

123 FERC ¶ 61,253
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Xcel Energy Services Inc.	Docket Nos.	ER01-205-015 ER01-205-016 ER01-205-018 ER01-205-020 ER01-205-021 ER01-205-023 ER01-205-024
Northern States Power Company and Northern States Power Company (Wisconsin)		ER98-2640-013 ER98-2640-014 ER98-2640-016 ER98-2640-018 ER98-2640-019 ER98-2640-021 ER98-2640-022
Public Service Company of Colorado		ER98-4590-011 ER98-4590-012 ER98-4590-014 ER98-4590-016 ER98-4590-017 ER98-4590-019 ER98-4590-020
Southwestern Public Service Company New Century Services, Inc.		ER99-1610-019 ER99-1610-020 ER99-1610-022 ER99-1610-025 ER99-1610-027 ER99-1610-028
Xcel Energy Services Inc., Northern States Power Company (Wisconsin), Public Service Company of Colorado, Southwestern Public Service Company and New Century Services, Inc.		EL05-115-000 EL05-115-001

ORDER ON REHEARING, COMPLIANCE FILINGS, AND CHANGE IN STATUS
AND TERMINATING SECTION 206 PROCEEDING

(Issued June 9, 2008)

1. In this order, the Commission accepts Xcel Energy Services Inc.'s December 11, 2006 filing (December 11 Compliance Filing),¹ submitted in compliance with the Commission's November 9, 2006 order.² The November 9 Order directed Xcel to submit a compliance filing with respect to its proposal to mitigate the presumption of horizontal market power in the Public Service Company of Colorado (PSCo) and Southwestern Public Service Company (SPS) balancing authority areas and to allow SPS to participate in the Southwest Power Pool (SPP) energy imbalance market.³
2. This order also denies, with regard to the November 9 Order, Xcel's request for rehearing on border sales, Occidental Permian, Ltd. and Occidental Power Marketing (Occidental) and Golden Spread Electric Cooperative, Inc. and Lyntegar Electric Cooperative, Inc.'s (Golden Spread) requests for rehearing on the Western Systems Power Pool (WSPP) Agreement, and Golden Spread's request for rehearing regarding the SPP energy imbalance market, and finds that the Commission has fully addressed Occidental and Golden Spread's requests for rehearing on affiliate abuse issues. Furthermore, this order accepts XES's May 4, 2007, June 13, 2007, and December 14, 2007 change in status and compliance filings and accepts XES's October 30, 2007 change in status filing and conditionally accepts the October 30, 2007 compliance filing.
3. This order also finds that the affiliate abuse concerns raised by Occidental and Golden Spread have been considered and addressed in the Commission's order issued on

¹ Xcel Energy Services Inc. (XES) submitted this filing as well as other filings on behalf of itself and the Xcel Energy Operating Companies - Northern States Power Company (NSP-M) and Northern States Power Company (Wisconsin) (NSP-W) (NSP-M and NSP-W, collectively, NSP), Public Service Company of Colorado (PSCo), and Southwestern Public Service Company (SPS) - (collectively, Xcel).

² *Xcel Energy Services Inc.*, 117 FERC ¶ 61,180 (2006) (November 9 Order).

³ We note that the Commission adopted the use of "balancing authority area" instead of "control area" in *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, at P 250 (2007), *clarified*, 121 FERC ¶ 61,260 (2007) (Order Clarifying Final Rule), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008).

April 21, 2008 in *Golden Spread Electric Cooperative, Inc. v. Southwestern Public Service Co.*⁴ Accordingly, this order terminates the section 206 proceeding in Docket No. EL05-115-000.

I. Background

4. In the November 9 Order, the Commission conditionally accepted revisions to the market-based rate tariffs of XES, SPS, and PSCo, to provide that service under the tariffs applies only to sales outside the PSCo and SPS balancing authority areas. The Commission also directed NSP and any other entities affiliated with Xcel to submit compliance filings to revise their market-based rate tariffs limiting sales of energy and capacity at market-based rates to areas outside of the SPS and PSCo balancing authority areas.

5. Further, the Commission found that, because some provisions of the proposed market-based rate tariffs identify services that are provided, while other provisions identify services not provided, as proposed, XES's, SPS's, and PSCo's market-based rate tariffs were confusing. Thus, the Commission directed Xcel to revise its market-based rate tariffs to identify only the services that are provided thereunder. The Commission also noted that Xcel's cost-based mitigation proposal should not be referenced in the market-based rate tariffs.

6. The Commission conditionally accepted Xcel's proposal providing for cost-based rates applicable to wholesale sales of electric power to mitigate the presumption of horizontal market power for transactions in the PSCo and the SPS balancing authority areas. The Commission also stated that acceptance of Xcel's use of the WSPP Agreement⁵ for mitigation purposes was conditioned upon that proposal applying to sales of "less than one year." The Commission accepted Xcel's commitment to seek prior authorization for long-term sales to the extent that such commitment applies to sales of one year or more. Furthermore, the Commission interpreted Xcel's proposal to be that sales of one year or longer will be made on an embedded cost-of-service basis, and accepted this proposal on the condition that any such sales be cost-justified. The Commission then directed Xcel to state whether it accepts these modifications to its mitigation proposal.

⁴ Opinion No. 501, 123 FERC ¶ 61,047 (2008) (*Golden Spread*).

⁵ Western System Power Pool Rate Schedule, FERC No. 6, Schedules A and C. *See Western Sys. Power Pool*, 55 FERC ¶ 61,099, *order on reh'g*, 55 FERC ¶ 61,495 (1991), *aff'd in relevant part and remanded in part sub nom. Environmental Action and Consumer Federation of America v. FERC*, 996 F.2d 401 (D.C. Cir. 1992) (*Environmental Action*), *order on remand*, 66 FERC ¶ 61,201 (1994).

7. The Commission found that Xcel's mitigation proposal does not preclude Xcel from participation in the SPP energy imbalance market. However, to alleviate confusion and to add clarity to SPS's proposed tariff revision, the Commission directed SPS to file revised tariff sheets to provide for sales in the SPP imbalance market as provided for in *SPP*,⁶ under SPS's market-based rate tariff, subject to the rules and mitigation specific to SPP's energy imbalance market.

8. The Commission stated that it would continue to hold the investigation of affiliate abuse issues in this proceeding in abeyance pending the outcome of the Consolidated Proceeding in Docket Nos. EL05-19-000 and ER05-168-000.⁷

9. Finally, the Commission directed Xcel to make refunds for sales made under its market-based rate tariffs that were above the cost-based rates accepted as part of Xcel's mitigation proposal for the SPS and PSCo balancing authority areas.⁸

Description of Filings

10. On December 11, 2006, XES submitted a compliance filing in response to the November 9 Order. Also on December 11, 2006, several parties requested rehearing of the November 9 Order on the issues of border sales, the WSPP Agreement, affiliate abuse, and sales in the SPP Energy Imbalance Market. On February 22, 2007, XES filed a refund report as required by the November 9 Order. We will address the compliance filing and these rehearing issues more fully below.

11. On May 4, 2007, and June 13, 2007, XES submitted notices of changes in status to notify the Commission of changes to existing and new power purchase commitments.

12. On October 30, 2007, XES submitted a notice of change in status on behalf of PSCo and NSP to notify the Commission of changes to existing and new purchase power commitments. The October 30 filing also includes proposed tariff revisions to the market-based rate tariffs of XES, PSCo, SPS, and NSP, to bring them into compliance with the requirements of Order No. 697. On December 14, 2007, XES filed a notice of

⁶ *Southwest Power Pool, Inc.*, 114 FERC ¶ 61,289 (2006), *order on reh'g* 116 FERC ¶ 61,289 (2006) (*SPP Rehearing Order*) (collectively, *SPP*).

⁷ November 9 Order, 117 FERC ¶ 61,180 at P 74. The Commission instituted a proceeding pursuant to section 206 of the Federal Power Act (16 U.S.C. § 824e (2000)) because Xcel failed to address the affiliate abuse issue and reciprocal dealing part of the Commission's test for granting market-based rate authority. *See Xcel Energy Services Inc.*, 111 FERC ¶ 61,343, at P 5 (2005) (June 2 Order).

⁸ The refund effective date in this proceeding is August 12, 2005.

change in status on behalf of NSP to notify the Commission of changes to new purchase power commitments. The December 14 filing also includes an Asset Appendix, which was submitted to comply with the requirements of Order No. 697.

II. Notice of Filings and Responsive Pleadings

13. Notice of XES's December 11, 2006 compliance filing was published in the *Federal Register*, 71 Fed. Reg. 78,177 (2006), with interventions and protests due on or before January 2, 2007. Golden Spread and Occidental filed timely protests.

14. Notice of XES's May 4, 2007 change in status filing was published in the *Federal Register*, 72 Fed. Reg. 27,112 (2007), with interventions and protests due on or before May 25, 2007. None was filed.

15. Notice of XES's June 13, 2007 change in status filing was published in the *Federal Register*, 72 Fed. Reg. 45,032 (2007), with interventions and protests due on or before August 17, 2007. None was filed.

16. Notice of XES's October 30, 2007 filing was published in the *Federal Register*, 72 Fed. Reg. 65,322 (2007), with interventions and protests due on or before November 20, 2007. Golden Spread filed a timely protest. On December 5, 2007, XES filed an answer to Golden Spread's protest.

17. Notice of XES's December 14, 2007 filing was published in the *Federal Register*, 72 Fed. Reg. 74,278 (2007), with interventions and protests due on or before January 4, 2008. None was filed.

III. Discussion

A. Compliance Filing

18. In its December 11 Compliance Filing, XES submitted revised market-based rate tariffs on behalf of itself, PSCo, SPS, and NSP, limiting sales of energy and/or capacity to areas outside of the PSCo and SPS balancing authority areas, where XES, NSP, PSCo, and SPS have been authorized by the Commission to sell at market-based rates. XES also submitted NSP's revised market-based rate tariff to reflect that NSP will not make market-based rate sales in the PSCo and SPS balancing authority areas without first making a filing under section 205 of the Federal Power Act (FPA)⁹ and receiving prior approval from the Commission.

19. However, XES also revised the market-based rate tariffs for itself, PSCo, SPS, and NSP to allow for sales at the border/interface between PSCo and SPS, (the balancing

⁹ 16 U.S.C. § 824d (2000 & Supp. V 2005).

authority areas where Xcel has market power), and any neighboring balancing authority area where Xcel is authorized to sell at market-based rates. Xcel requests clarification, or in the alternative, requests rehearing, with respect to the Commission's treatment of border sales.

20. As directed by the Commission in the November 9 Order, Xcel revised SPS's market-based rate tariff to state that SPS may make market-based rate sales in the energy imbalance market implemented by SPP. Xcel also revised its market-based rate tariffs to include only services provided under those tariffs and removed references to the WSPP Agreement in the market-based rate tariffs of XES, SPS, and PSCo. In addition, Xcel affirms that sales under the WSPP Agreement shall be for "less than one year," and that sales of "one year or greater" will only be made subject to prior Commission approval, pursuant to a filing made under section 205 of the FPA. For sales of one year or greater, Xcel agrees with the Commission's interpretation that such sales will be made on an embedded cost-of-service basis and will be cost-justified.

21. On February 22, 2007, XES submitted a refund report that summarizes its payment of refunds with interest during the refund effective period in this proceeding for sales made in the PSCo and SPS balancing authority areas that were above the cost-based rate caps in its mitigation proposal.

1. Protests to the Compliance Filing

22. Occidental and Golden Spread protest Xcel's December 11 Compliance Filing with respect to border sales. Additionally, Golden Spread protests Xcel's filing with respect to the SPP imbalance market.

23. Occidental and Golden Spread argue that Xcel's December 11 Compliance Filing ignored the directive in the November 9 Order to revise Xcel's market-based rate tariffs so that they apply only to sales outside of the SPS and PSCo balancing authority areas. Occidental states that Xcel finds ambiguity where none exists, and then interprets the November 9 Order to allow market-based rate sales at border locations. Similarly, Golden Spread argues that the November 9 Order is not ambiguous, and it does not leave room for interpretation. Golden Spread states that the Commission in the November 9 Order, by referring to sales "outside of the SPS and PSCo [balancing authority] areas" means exactly that: market-based rate transactions are restricted to sales beyond the borders of these balancing authority areas.

24. Golden Spread points to a separate proceeding (Docket No. ER06-301-000), in which the Commission is specifically pursuing concerns about sales by SPS to third parties at the border of the SPS system, coupled with resales of exchanged energy back to

an SPS affiliate at trading hubs distant from the SPS system.¹⁰ Golden Spread's argument in this regard does not relate to Xcel's December 11 Compliance Filing. We therefore address this argument in the section below on affiliate abuse.

25. Next, Golden Spread asserts that the language Xcel proposes does not contain the required clarification that sales in the SPP imbalance market are subject to SPP's market and mitigation rules. Rather, it suggests that more appropriate language would be: "Markets in which Company has authority to engage in the sale of capacity and/or energy at market-based rates include the Energy Imbalance Market implemented by the Southwest Power Pool, Inc. as approved by FERC in Docket Nos. ER06-4512-000, *et al.* subject to the rules and mitigation specific to SPP's energy imbalance market."

2. Commission Determination

26. We will accept Xcel's tariff revisions in part, effective August 12, 2005. Specifically, we find that Xcel's proposed language stating that the tariffs apply to sales of capacity and/or energy outside of the balancing authority areas where Xcel has been authorized by the Commission to make sales at market-based rates¹¹ complies with the Commission's directives in the November 9 Order. However, we find that the tariff language regarding border sales is inconsistent with the Commission's directive in the November 9 Order, and will therefore reject it.¹² Xcel's tariff language, which allows for sales at market-based rates at the border, could be interpreted as allowing for sales within the balancing authority area in which the seller is found, or presumed, to have market power as long as the sale is at the border. Accordingly, we will direct Xcel to revise its market-based rate tariffs to provide that service under the tariffs applies only to sales outside of SPS's and PSCo's balancing authority areas, effective as of the refund effective date in this proceeding, August 12, 2005.¹³

¹⁰ *Xcel Energy Services Inc.*, 117 FERC ¶ 61,153 (2006).

¹¹ Although the Commission used the term "mitigated market" in Order No. 697, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 817, we believe that "balancing authority area in which a seller is found, or presumed, to have market power" is a more accurate way to describe the area in which a seller is mitigated. Accordingly, we use that phrase herein.

¹² November 9 Order, 117 FERC ¶ 61,180 at P 54.

¹³ We will address below Xcel's October 30, 2007 notice of change in status filing, which includes language concerning border sales that does not meet the requirements of Order No. 697.

27. In Order No. 697, the Commission concluded that adequately protecting customers from the potential exercise of market power required that it continue to apply mitigation to *all* sales in the balancing authority area in which a seller is found, or presumed, to have market power. The Commission noted that allowing a seller that has been found to have market power, or has so conceded, to make market-based rate sales in the very market in which market power is a concern is inconsistent with the Commission's responsibility under the FPA to ensure that rates are just and reasonable and not unduly discriminatory or preferential.¹⁴ The Commission further stated that, while it generally agrees that it is desirable to allow market-based rate sales into markets where the seller has not been found to have market power, it does not agree that it is reasonable to allow a mitigated seller to make market-based rate sales *anywhere* within a balancing authority area in which the seller has been found to have market power, or has so conceded, as it is unrealistic to believe that such sales could be effectively monitored to ensure against improper sales.¹⁵ However, the Commission stated that it would allow mitigated sellers to make market-based rate sales at the metered boundary with a balancing authority area in which the seller has market-based rate authority under certain circumstances.¹⁶ Therefore, if Xcel wishes to make market-based rate sales at the metered boundary, consistent with Order No. 697, it may adopt the relevant tariff provision.¹⁷

28. Because the Commission has never accepted Xcel's filings regarding border sales, Xcel was not authorized to make border sales under its market-based rate tariffs prior to the effective date of Order No. 697. Therefore, to the extent that Xcel made any border sales at market-based rates since the refund effective date in this proceeding¹⁸ at rates that were above the rates under the mitigation proposal accepted in the November 9 Order, we will direct Xcel, within 30 days of the date of issuance of this order, to make refunds, with interest. In addition, we will direct Xcel to file a refund report within 15 days after making refunds. If no refunds were due, Xcel must file with the Commission within 30 days of the date of issuance of this order so stating.

29. We will accept Xcel's tariff language limiting Xcel's sales of energy and/or capacity to areas outside of the PSCo and SPS balancing authority areas, where Xcel, NSP, PSCo, and SPS have been authorized by the Commission to sell at market-based

¹⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 819.

¹⁵ *Id.* P 818-19.

¹⁶ *Id.* P 830.

¹⁷ Prior to September 18, 2007, the effective date of Order No. 697, border sales were subject to the mitigation measures.

¹⁸ The refund effective date in this proceeding is August 12, 2005.

rates. We will also accept NSP's market-based rate tariff revision to reflect the Commission's requirement that NSP will not make market-based rate sales into the PSCo and SPS balancing authority areas without first making a filing under section 205 of the FPA and receiving prior approval from the Commission.

30. The transmittal letter accompanying XES's December 11 Compliance Filing describes short-term transactions as transactions of "less than one year" and long-term transactions as transactions of "one-year or greater." However, Xcel's proposed market-based rate tariffs describe short-term transactions as having "a duration of a year or less" and long-term transactions as having a duration of "greater than a year." These definitions are not consistent with the Commission's definitions of short-term and long-term transactions. Accordingly, we will direct Xcel to revise its market-based rate tariffs, within 30 days of the date of this order, to reflect that short-term transactions are for transactions of "less than one year" (and not "a year or less") and long-term transactions are sales of "one year or more" (and not "greater than a year").

31. We will accept Xcel's removal of references to the WSPP Agreement in the XES, PSCo, and SPS market-based rate tariffs and its clarification of the scope of services provided. Also, the Commission will accept Xcel's tariff revisions regarding the WSPP Agreement because Xcel clarified that its use of the WSPP Agreement for mitigation purposes will apply to sales of "less than one year," that it will seek prior authorization pursuant to a filing made under section 205 of the FPA for long-term sales being sales of one year or more, and that these sales of one year or more will be made on an embedded cost-of-service basis and be cost-justified.

32. We will also accept Xcel's tariff revisions that specifically state that SPS may make market-based rate sales in the energy imbalance market implemented by SPP, as approved by the Commission in Docket No. ER06-451-000.¹⁹ We find that Xcel's tariff revisions are consistent with the directive in the November 9 Order that Xcel revise its tariff sheets to provide for sales in the SPP imbalance market, subject to the rules and mitigation specific to SPP's energy imbalance market.²⁰ Accordingly, we reject Golden Spread's argument that Xcel's December 11 Compliance Filing does not contain the required clarification.

33. Lastly, we will also accept XES's February 22, 2007 refund report.

¹⁹ *SPP*, 114 FERC ¶ 61,289.

²⁰ November 9 Order, 117 FERC ¶ 61,180 at P 57.

B. Requests for Rehearing**1. Border Sales****a. Request for Clarification**

34. In its request for rehearing of the November 9 Order, Xcel requests that the Commission clarify that “border sales” are not subject to the mitigation measures that the Commission has accepted in this proceeding, because Xcel has revised its market-based rate tariffs to provide assurances that power transferred in such transactions will not be resold in the PSCo and SPS balancing authority areas at market-based rates. In the alternative, Xcel seeks rehearing of the November 9 Order to the extent that the Commission intended border sales to be subject to mitigation.

35. Xcel states that, in its order accepting the LG&E Companies’ revised market-based rate tariffs, the Commission accepted a commitment that power transferred in border sales would not be resold at market-based rates in balancing authority areas where it failed the Commission’s market screen.²¹ Xcel states that the Commission has distinguished between sales that occur in a mitigated balancing authority area and sales at such balancing authority areas’ borders, and decided that the latter should not be subject to mitigation. Xcel argues that border sales are unique because they involve transactions sinking into destination markets where no mitigation is required. Xcel notes that it is proposing border language in its compliance filing with the understanding that its filing is subject to any final determinations on the Commission’s treatment of border sales in Order No. 697.

b. Commission Determination

36. We will deny rehearing on this issue. As discussed above, prior to September 18, 2007, the effective date of Order No. 697, border sales were subject to the mitigation measures.

37. As an initial matter, in the November 9 Order the Commission fully explained the basis for rejecting Xcel’s proposed tariff language regarding border sales. Specifically, the Commission stated that its role is to assure customers that sellers who are authorized to sell at market-based rates do not have market power or have adequately mitigated it.²² The November 9 Order stated that “the Commission’s recent orders accepting mitigation

²¹ *LG&E Energy Marketing Inc.*, Docket No. ER06-1046-000 (July 6, 2006) (unpublished letter order) (July 2006 Order).

²² November 9 Order, 117 FERC ¶ 61,180 at P 53 (citing *AEP Power Marketing*, 108 FERC ¶ 61,026, at P 146 (2004) (July 8 Order)).

proposals are clear that the mitigation is to apply to sales in the geographic market where a seller is found (or presumed) to have market power, not only to sales that sink (i.e., sales to end users) in the control area.”²³ In addition, the Commission stated that in order to put in place adequate mitigation that eliminates the ability to exercise market power and ensure that rates are just and reasonable, all market-based rate sales in a balancing authority area where an applicant is found or presumed to have the ability to exercise market power must be subject to mitigation approved by the Commission.²⁴

38. Thus, the Commission concluded that “Xcel’s proposed tariff language is unclear and may provide for market-based rate sales within the SPS and PSCo control areas if Xcel were to sell at points at the border location or interface between the mitigated control area and a non-mitigated control area.”²⁵ Accordingly, the Commission directed Xcel to make revisions to its market-based rate tariffs to provide that service under the tariffs applies only to sales outside of SPS’s and PSCo’s balancing authority areas. The Commission stated that its action in this regard was subject to the outcome of the rulemaking proceeding that resulted in Order No. 697.²⁶ Therefore, the Commission fully explained in the November 9 Order the basis for its rejection of Xcel’s tariff language regarding border sales, and how its action in that regard was consistent with Commission policy and precedent at the time.

39. Additionally, as discussed above,²⁷ since the issuance of the November 9 Order, the Commission has further addressed mitigation issues in Order No. 697. After careful consideration of the arguments raised by commenters on the scope of mitigation, the Commission concluded that adequately protecting customers from the potential exercise of market power required that it continue to apply mitigation to *all* sales in the balancing authority area in which a seller is found, or presumed, to have market power. However, as explained above, in Order No. 697, the Commission stated that it would allow

²³ *Id.* (citing *Oklahoma Gas and Electric Co.*, 114 FERC ¶ 61,297 (2006); *Carolina Power and Light Co.*, 114 FERC ¶ 61,294 (2006); *Duke Energy Trading and Marketing, LLC*, 114 FERC ¶ 61,056 (2006); *MidAmerican Energy Co.*, 114 FERC ¶ 61,280 (2006)).

²⁴ *Id.* (citing *AEP Power Marketing*, 107 FERC ¶ 61,018, at P 144 (April 14 Order), *order on reh’g*, 108 FERC ¶ 61,026 (2004) (July 8 Order)).

²⁵ *Id.* P 54.

²⁶ *Id.*

²⁷ *See supra* P 27.

mitigated sellers to make market-based rate sales at the metered boundary with a balancing authority area in which the seller has market-based rate authority under certain circumstances. Order No. 697 included the relevant tariff provision in this regard.²⁸

40. Xcel is correct that the Commission has distinguished between sales that occur in a mitigated balancing authority area and sales at such balancing authority areas' borders, and decided that the border sales should not be subject to mitigation. However, as the Commission has since explained,²⁹ the Commission's action not subjecting border sales to mitigation was in error and was not consistent with Commission policy.³⁰ Prior to September 18, 2007, the effective date of Order No. 697, border sales were subject to the mitigation measures.

41. For the foregoing reasons, we believe that we have fully explained the basis of our rejection of Xcel's proposed tariff language regarding border sales, including how such a rejection is consistent with Commission policy. Accordingly, we will deny Xcel's request for rehearing.

2. WSPP Agreement

a. Request for Rehearing

42. Occidental and Golden Spread request rehearing of the November 9 Order. Occidental argues that the Commission did not respond to arguments that cost-based rates must be based on the costs of the SPS and PSCo systems, nor did it address evidence that the WSPP rate caps were established for a different purpose than the proposed use here. Occidental also argues that the November 9 Order did not respond to arguments that there is no logical nexus between the WSPP rate caps and mitigation of market power in the SPS and PSCo balancing authority areas. Golden Spread argues that the WSPP Agreement price caps were predicated on costs of certain Western utilities in the 1990s,

²⁸ As discussed below, if Xcel wishes to make sales at the metered boundary, consistent with Order No. 697, Xcel may adopted the required tariff provision regarding sales at the metered boundary.

²⁹ Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 7; *South Carolina Electric & Gas Co.*, 121 FERC ¶ 61,263, at P 12 (2007); *LG&E Energy Marketing, Inc.*, 122 FERC ¶ 61,175, at P 32 (2008).

³⁰ Indeed, the Commission otherwise has consistently rejected proposals to limit mitigation to sales that sink in the mitigated balancing authority area. *See, e.g., Oklahoma Gas and Electric Co.*, 114 FERC ¶ 61,297 (2006) and *Westar Energy, Inc.*, 116 FERC ¶ 61,219 (2006).

and Xcel was not even a WSPP member when cost determinations were made. Golden Spread emphasizes that, for current market-based rate sales, SPS does not charge rates as high as the WSPP price cap.

43. Golden Spread argues that the use of the WSPP Agreement rate caps as mitigation itself is not a specific issue in the rulemaking and, while the rulemaking is pending, Xcel has the ability to transact in a manner that could be harmful to meaningful development of the markets.

44. Occidental argues that, although the November 9 Order states that parties can file a complaint if they believe that a utility's rates are not just and reasonable, that does not relieve the Commission of its obligation to ensure that rates are just and reasonable. Occidental states that Xcel, as the proponent of the use of the WSPP Agreement, has the burden of establishing that the proposed rates are just and reasonable in the context for which they are proposed and the complainant should not have the burden of establishing that the rates are unreasonable. Golden Spread shares Occidental's concerns with respect to who bears the burden of proof.

b. Commission Determination

45. We will deny Occidental's and Golden Spread's requests for rehearing regarding the rate cap in the WSPP Agreement. At the time we accepted Xcel's use of the WSPP Agreement for mitigation purposes, the WSPP Agreement demand charge rate was a cost-based rate on file with the Commission, and was presumed to be just and reasonable for any seller that is a member of WSPP. Thus, Xcel's proposal to use the WSPP Agreement rate cap in the mitigated balancing authority areas was appropriate, and any challenges to that rate would need to be made in a separate section 206 proceeding.

46. Since then, however, the Commission initiated an investigation under FPA section 206 into the WSPP Agreement demand charge rate as it pertains to mitigated sellers. On February 21, 2008, in *Western Systems Power Pool*,³¹ the Commission determined that a public utility that lacks market-based rate authority may no longer rely on the system-wide ceiling rate demand charge in the WSPP Agreement, but rather must justify that rate based on its actual costs. The Commission directed such sellers to make a compliance filing within 60 days of the date of the WSPP Order providing cost justification for that

³¹ 122 FERC ¶ 61,139 (2008) (WSPP Order).

ceiling rate or cost support for an alternative rate. However, in the WSPP Order, the Commission exercised its discretion and did not direct the payment of refunds which might have accrued prior to the date of the compliance filing.³²

3. Affiliate Abuse

47. On June 2, 2005, the Commission found that Xcel had failed to address the affiliate abuse and reciprocal dealing part of the Commission's test for granting market-based rate authority, and instituted a proceeding, pursuant to section 206 of the Federal FPA,³³ in Docket No. EL05-115-000.³⁴ Additionally, recognizing that the ongoing consolidated hearing ordered by the Commission in Docket Nos. EL05-19-000 and ER05-168-000 would examine allegations similar to some of those raised by protestors in this proceeding regarding affiliate abuse, the Commission determined that it would hold the investigation of those issues in this proceeding in abeyance, pending the outcome of the ongoing consolidated proceedings in those dockets.³⁵

a. Compliance Filing

48. On July 5, 2005, in compliance with the June 2 Order, Xcel submitted a filing that addresses the affiliate abuse and reciprocal dealing part of the Commission's market-based rate analysis (July 5 Compliance Filing).³⁶ Xcel states that they and their parent holding company, Xcel Energy, Inc., do not presently own any non-utility power marketers. Further, Xcel states that their market-based rate tariffs do not permit sales to any affiliates. Xcel states that they can only transact with affiliates, including each other, pursuant to schedules or agreements that have been approved by the Commission. In this regard, Xcel states that they are parties to a Commission-approved joint operating

³² We note that XES has filed on behalf of SPS a separate stand-alone cost-based rate schedule in Docket No. ER08-857-000, in accordance with the WSPP Order. We also note that, in addition to the WSPP rate, PSCo and XES have another Commission approved cost-based tariff on file providing for capped "up-to" rates. *See Public Service Company of Colorado*, Docket No. ER95-1207-000 (October 26, 1995) (unpublished letter order). The Commission approved PSCo's and XES' use of this tariff for mitigation in the PSCo balancing authority area in the November 9 Order.

³³ 16 U.S.C. § 825e (2000 & Supp. V 2005).

³⁴ June 2 Order, 111 FERC ¶ 61,343 (2005).

³⁵ *Id.* P 52.

³⁶ *See* Xcel July 5, 2005 Compliance Filing, Attachment B, Aff. of David T. Hudson.

agreement (JOA)³⁷ that provides the framework for coordinated operations, including capacity and energy transactions between Xcel at rates based on cost or a share-the-savings rate (sometimes referred to as a split-the-savings rate). Under the JOA, XES acts as an agent and provides support services on behalf of Xcel.

49. Xcel states that XES does not directly make sales of energy as an electric utility, but rather acts as an agent on behalf of the individual Xcel Energy Operating Companies. Xcel clarifies that XES cannot profit from any of the transactions it may enter into on behalf of any of these operating companies. Xcel states that, to date, XES has not transacted under its market-based rate tariff and that all transactions have been conducted under each utility's individual market-based rate authority. Finally, Xcel states that they are aware that they can only transact among or between themselves pursuant to the JOA or another Commission-accepted agreement or rate schedule because their market-based rate tariffs do not permit sales to any affiliate.

50. Occidental protested Xcel's July 5 Compliance Filing. Occidental argues that SPS's practice of allocating system average fuel cost instead of incremental fuel cost to its market-based rate sales requires SPS's captive retail ratepayers to subsidize its unregulated activities and results in a direct transfer of benefits from SPS's captive customers to Xcel and its shareholders.³⁸ Occidental contends that, as a result, the sales at market-based rates make no contribution to the fixed costs of the system to offset the increased fuel cost the captive customers are forced to bear. In addition, Occidental argues that, because "SPS conducts its unregulated marketing activities using XES as its agent, rather than using a separate affiliated power marketing entity," XES's actions on behalf of SPS are subject to the same standards of conduct requirements as an energy affiliate under Order No. 2004.³⁹ Occidental states that, to the extent that SPS has

³⁷ *Xcel Energy Services, Inc.*, Docket No. ER05-293-000 (January 10, 2005) (unpublished letter order).

³⁸ Occidental July 26, 2005 Protest at 10.

³⁹ *Id.* at 12 (citing *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs. ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161, *order on reh'g*, Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166, *order on reh'g*, Order No. 2004-C, FERC Stats. & Regs. ¶ 31,172 (2004), *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *vacated and remanded as it applies to natural gas pipelines sub nom. National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006); see *Standards of Conduct for Transmission Providers*, Order No. 690, 72 Fed. Reg. 2,427 (Jan. 19, 2007), FERC Stats. & Regs. ¶ 31,237, *order on reh'g*, Order No. 690-A, 72 Fed. Reg. 14,235 (Mar. 27, 2007), FERC Stats. & Regs. ¶ 31,243 (2007); see also *Standards of Conduct for Transmission Providers*, Notice of Proposed Rulemaking, 72 Fed. Reg. 3,958 (Jan. 29, 2007), FERC Stats. & Regs. ¶ 32,611 (2007).

engaged in anti-competitive market manipulation, it has violated the Commission's market-behavior rules and its market-based tariff.⁴⁰ Occidental concludes that, if the Commission permits SPS to make market-based rate sales, in order to prevent further affiliate abuse, the Commission must require SPS to allocate incremental fuel costs to each market-based sale that SPS makes.⁴¹

51. Golden Spread also protested Xcel's July 5 Compliance Filing, arguing that "the FCA [fuel charge adjustment clause] provision speaks directly to the ability of SPS to use its internal marketing affiliate to derive benefits (i.e., profits) from the customers of SPS's regulated function. Thus, it also raises significant affiliate abuse and reciprocal dealing issues...."⁴² Golden Spread contends that the coal swap transaction at issue in Docket No. EL05-19 involves the possible transfer of benefits by a regulated utility to either a marketer affiliate or another affiliate regulated utility, and further argues that, in the instant proceeding, Golden Spread seeks to protect itself prospectively by limiting the prospective behavior of SPS and its affiliates, which "requires the revocation of its and to some extent its affiliates' ability to sell at market-based rates in a manner that harms captive customers."⁴³ In addition, Golden Spread contends that Xcel's description of the JOA in its July 5 Compliance filing requires further explanation.⁴⁴

52. On August 10, 2005, XES submitted an answer, on behalf of itself and Xcel. Xcel states that the market power and affiliate abuse issues raised by Golden Spread and Occidental focus on low cost wholesale power available in the SPS control area, and the suggestion that they, as existing wholesale customers, should reap the benefit of all low cost energy on the SPS system to the detriment of other wholesale customers "seeks to

⁴⁰ Occidental July 26, 2005 Protest at 16.

⁴¹ *Id.* at 22.

⁴² Golden Spread July 26, 2005 Protest at 10.

⁴³ *Id.* at 11.

⁴⁴ *Id.* at 11-12. Occidental reiterated its arguments concerning affiliate abuse in its August 16, 2005 answer submitted in the instant proceeding. Golden Spread also reiterated its arguments concerning affiliate abuse in its August 16, 2005 answer and its September 1, 2005 supplemental protest in the instant proceeding. The August 16, 2005 answers submitted by Occidental and Golden Spread, and the September 1, 2005 supplemental protest submitted by Golden Spread were accepted in the November 9 Order, wherein the Commission determined that in order to allow full review of the affiliate abuse issues raised, the Commission would hold the investigation of all the affiliate abuse issues in abeyance pending the outcome of the Consolidated Proceeding. November 9 Order, 117 FERC ¶ 61,180 at P 73-74.

hoard the lower cost capacity on the SPS system and raise prices to others,” which is preferential and discriminatory.⁴⁵ Additionally, Xcel argues that the ability to sell power at competitive prices in a wholesale market does not constitute market power, nor does it create a scenario in which affiliate abuse is possible. Xcel also reiterates that the arguments raised by Golden Spread or Occidental are not evidence of affiliate abuse, stating that affiliate abuse does not exist without sales to affiliates. Xcel states that the Commission focuses on the transfer of benefits from a public utility to an affiliated power marketer, that XES has no affiliated power marketer, and that its system has only operating utilities with market-based rate authority.⁴⁶

53. Further, Xcel states that, in the past, SPS has made wholesale sales with individual counterparties under its market-based rate tariff, and that these wholesale sales are not, and are not alleged to be, with any of the Xcel’s operating companies, or with any other affiliated companies. Xcel also explains that any such transactions are entered into under the Commission-approved JOA, not the market-based rate tariff. Xcel states that, even under a cost-based rate, SPS’s wholesale sales would include an average fuel cost component, and that this pricing methodology is not an issue of market power and not an issue of affiliate abuse, and therefore irrelevant to the instant proceeding. Xcel points out that Golden Spread, by its own admission, is pursuing claims related to the treatment of fuel costs in SPS’s wholesale sale in Docket No. EL05-19-000.⁴⁷ With regard to Occidental’s argument that XES is subject to the standards of conduct under Order No. 2004, Xcel states that there are no issues in the instant proceeding regarding XES’s compliance with the standards of conduct, and that Occidental’s attempt to raise this issue is irrelevant and should therefore be rejected as beyond the scope of the instant proceeding.⁴⁸

⁴⁵ XES August 10, 2005 Answer at 5, 12.

⁴⁶ *Id.* (citing *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 61,060 (1994) (*Heartland*)).

⁴⁷ *Id.* at 11 (citing Golden Spread July 26, 2005 Protest at 10).

⁴⁸ *Id.* at 16.

b. Commission Determination

54. As noted above, in the November 9 Order, the Commission accepted for filing Xcel's July 5, 2005 compliance filing, but continued to hold the investigation of the affiliate abuse issues in the instant proceeding in abeyance pending the outcome of the Consolidated Proceeding in Docket Nos. EL05-19-000 and ER05-168-000.⁴⁹

55. The arguments of Occidental and Golden Spread concerning SPS's practice of allocating system average fuel cost instead of incremental fuel cost to its market-based rate sales, and Golden Spread's arguments concerning the coal swap transaction and the JOA are addressed below. We reject as beyond the scope of this proceeding Occidental's suggestion in its July 26 protest to Xcel's July 5 Compliance Filing that XES's actions on behalf of SPS are not in compliance with the standards of conduct under Order No. 2004. With regard to Occidental's argument that SPS's practice of allocating system average fuel cost to its market-based rate sales resulted in a violation of the Commission's market behavior rules, we address below SPS's practice of allocating system average fuel cost instead of incremental fuel cost to its market-based rate sales.

c. Requests for Rehearing

56. In its request for rehearing of the November 9 Order, Occidental argues that market-based rate sales by SPS outside of its balancing authority area would violate the prong of the Commission's market power standard that addresses the potential for affiliate abuse or reciprocal dealing. It argues that the presiding judge in the *Golden Spread* Initial Decision⁵⁰ found that SPS had engaged in market power abuses that resulted in SPS forcing its cost-based customers, both wholesale and retail, to subsidize Xcel. Occidental concludes that the Commission erred in the November 9 Order by "continu[ing] to hold the investigation of the affiliate abuse issues in this proceeding in abeyance pending the outcome of the Consolidated Proceeding in Docket Nos. EL05-19-000 and ER05-168-000" despite the findings of improper conduct in the *Golden Spread* Initial Decision. Occidental also states that the Commission cannot permit continued market-based rate sales by SPS outside of its balancing authority area absent a finding, based on substantial evidence, that the affiliate abuse and reciprocal dealing standard has been met.

⁴⁹ November 9 Order, 117 FERC ¶ 61,180 at P 35. The November 9 Order accepted Occidental's July 26, 2005 Protest, Golden Spread's July 26, 2005 Protest, and XES's August 10, 2005 Answer. *Id.* P 28-29. The November 9 Order also accepted the July 26, 2005 motion to intervene submitted by Holy Cross Electric Association, Inc. *Id.*

⁵⁰ *Golden Spread Electric Cooperative, Inc. v. Southwestern Public Service Co.*, 115 FERC ¶ 63,043 (2006) (*Golden Spread* Initial Decision).

57. On rehearing, Golden Spread argues that the Commission ignored other cases now pending before the Commission that reflect on SPS's ability to exert market power or unduly influence or affect the development of a proper market that encompasses the SPS balancing authority area. Golden Spread points to *Xcel Energy Services, Inc.*,⁵¹ in which the Commission set for hearing a section 205 application filed by XES, on behalf of its affiliates, in which it proposed transfers of energy among the affiliates. Golden Spread states that the Commission overlooked this matter when it delayed determination of all issues in the Docket No. EL05-115-000 investigation until the Consolidated Proceeding was resolved.

d. Commission Determination

58. We find that the affiliate abuse and reciprocal dealing concerns raised by Occidental and Golden Spread relating to SPS's practice of allocating system average fuel cost instead of incremental fuel cost to its market-based rate sales, which they argue results in a transfer of benefits from SPS's captive customers to Xcel and its shareholders, have been fully considered and addressed in the order issued in the Consolidated Proceeding.⁵² We also reject Golden Spread's argument that we need more explanation of the JOA and its argument that the Commission overlooked the proceeding in Docket No. ER06-301-000⁵³ in determining (in the November 9 Order) that it would hold affiliate abuse issues in abeyance pending the outcome of the Consolidated Proceeding.

59. In *Golden Spread*, the Commission addressed the issue of how to treat fuel costs under market-based rate contracts when determining the fuel cost adjustment clause (FCAC) for wholesale requirements customers. Specifically, the Commission addressed the argument that SPS's allocation of average fuel cost for market-based rate sales impermissibly subsidizes intersystem sales⁵⁴ at the expense of native load.⁵⁵

⁵¹ 117 FERC ¶ 61,153 (2006).

⁵² *Golden Spread Electric Cooperative, Inc. v. Southwestern Public Service Co.*, Opinion No. 501, 123 FERC ¶ 61,047 (2008) (*Golden Spread*).

⁵³ *Xcel Energy Services Inc.*, 117 FERC ¶ 61,153 (2006).

⁵⁴ “[A] utility may have available excess generation not already committed to native load customers, providing the utility with an opportunity to sell this capacity to buyers outside its home area. These sales are called opportunity sales or intersystem sales.” *Golden Spread*, 123 FERC ¶ 61,047 at P 39.

⁵⁵ *Id.* P 12. The Commission explained that it was not disputed that SPS's market-based sales contracts provide that SPS recovers the average cost of fuel, not the incremental costs as the complainants preferred. *Id.*

60. The Commission explained that it has clearly sought to prevent the subsidization of shareholders at the expense of captive customers,⁵⁶ and concluded that it would be unreasonable for SPS's intersystem customers to be subsidized by wholesale requirements customers through a FCAC mechanism based on average fuel cost.⁵⁷ The Commission found that, because the market-based intersystem transactions do not necessarily have a basis in actual cost, and to avoid the possibility of subsidization of these transactions by the wholesale requirements customers, the Commission must impute an appropriate fuel rate to the fuel cost calculation, in order to avoid native load customers overpaying as a result of intersystem transactions under market-based rate contracts.⁵⁸ Thus, the Commission directed that, in order to avoid subsidization, the incremental cost of fuel for market-based intersystem sales must be flowed through the FCAC.⁵⁹

61. Specifically, the Commission in *Golden Spread* required that SPS attribute incremental costs for the purposes of the FCAC, and make refunds for the amount of money recovered for fuel for its market-based rate sales based on the average cost, beginning on January 1, 2005, the refund effective date established in that proceeding.⁶⁰ Accordingly, we find that the Commission has fully addressed the arguments of Occidental and Golden Spread regarding affiliate abuse and reciprocal dealing, and directed appropriate remedies. Therefore, subject to SPS making the modifications directed in *Golden Spread*, we find that Xcel satisfies the Commission's standard for affiliate abuse for the grant of market-based rate authority.

62. We will reject Golden Spread's argument that we need more information about the JOA. The JOA was approved by the Commission in a separate proceeding,⁶¹ and is not the subject of the current FPA section 206 investigation. In addition, we reject Golden Spread's argument that the coal swap transaction at issue in Docket No. EL05-19

⁵⁶ See, e.g., *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,062-63 (1994) (*Heartland*) (prohibiting transfer of benefits from captive customers of a franchised public utility to affiliates and shareholders).

⁵⁷ *Golden Spread*, 123 FERC ¶ 61,047 at P 41.

⁵⁸ *Id.* P 43-47 (citing *Entergy Services Inc.*, 58 FERC ¶ 61,234, at 61,772 (1992); *Consumers Energy Co.*, 94 FERC ¶ 61,180 (2001)).

⁵⁹ *Id.* P 47.

⁶⁰ *Id.* P 49, 53.

⁶¹ *Xcel Energy Services, Inc.*, Docket No. ER05-293-000 (January 10, 2005) (unpublished letter order).

involved the transfer of benefits by a regulated utility to either a marketer affiliate or another affiliate regulated utility. In *Golden Spread*, the Commission upheld the Administrative Law Judge's finding that the coal swap transaction involving SPS, its coal supplier, TUCO, its affiliate NSP, and fuel supplier Peabody CoalSales was just and reasonable.⁶²

63. We also disagree with Golden Spread's argument that the Commission overlooked the proceeding in Docket No. ER06-301-000⁶³ when it decided to hold affiliate abuse issues in abeyance pending the outcome of the consolidated proceeding in Docket Nos. EL05-19-000 and ER05-168-000. The proceeding in Docket No. ER06-301-000 concerned proposed service schedules as amendments to the JOA.⁶⁴ As we explain above, the JOA is not the subject of the current FPA section 206 investigation.

64. We also reject Occidental's argument that the Commission erred in the November 9 Order by continuing to hold the investigation of the affiliate abuse issues in this proceeding in abeyance pending the outcome of the Consolidated Proceeding. Holding the affiliate abuse issues in abeyance promoted the efficient use of the resources of the Commission and the parties. In addition, with regard to Occidental's argument that the presiding judge in the *Golden Spread* Initial Decision found that SPS had engaged in market power abuses, we find that this argument was addressed in *Golden Spread*.

Docket No. EL05-115-000

65. In light of our determinations herein, we will terminate the section 206 proceeding established in Docket No. EL05-115-000. That proceeding was established to investigate horizontal market power issues and affiliate abuse issues in the SPS and PSCo balancing authority areas. Based on the above findings, the Commission finds that there is no need for further investigation in this docket.

4. Sales in the SPP Energy Imbalance Market

a. Request for Rehearing

66. Golden Spread argues that the Commission erred in accepting revisions to SPS's tariff to enable SPS to sell at market-based rates in the energy imbalance service market

⁶² *Golden Spread*, 123 FERC ¶ 61,047 at P 157; *Golden Spread* Initial Decision, 115 FERC ¶ 63,043 at P 178.

⁶³ *Xcel Energy Services Inc.*, 117 FERC ¶ 61,153 (2006).

⁶⁴ On August 13, 2007, the Commission approved an uncontested settlement agreement, to which both Golden Spread and Occidental were parties. *Xcel Energy Services Inc.*, 120 FERC ¶ 61,154 (2007).

to be administered by SPP. Golden Spread takes issue with the Commission's finding in *SPP* that, absent transmission constraints, the SPP imbalance market is competitive, and that SPP has mitigation measures to ensure just and reasonable imbalance prices in the event of transmission constraints binding the imbalance market. Golden Spread states that the SPS balancing authority area is highly constrained and the lack of transmission access exposes Golden Spread to unique risks when it experiences the loss of resource due to a forced outage. Golden Spread states that it and others have sought judicial review of the Commission's order approving SPP's energy imbalance service market and that these pending appeals directly affect whether SPS should be allowed to sell at market-based rates into the SPP energy imbalance services market.

b. Commission Determination

67. Golden Spread's argument on rehearing is a collateral attack on *SPP*. In the *SPP Rehearing Order*, the Commission determined that "the SPP imbalance market is competitive in the absence of transmission constraints" and that "SPP's mitigation measures and monitoring plan are sufficient to protect customers from the exercise of market power that might occur in the energy imbalance market when transmission constraints bind."⁶⁵ We decline to reverse our decision, and note that the petition for review of the *SPP Rehearing Order* is no longer pending.⁶⁶ Further, as a policy matter, not accepting the tariff revisions due to pending judicial review would frustrate the implementation of Commission orders and create regulatory uncertainty. The Commission may rely on contested orders even though they are pending on appeal because the Commission's decisions are final and effective unless they have been stayed.⁶⁷ Therefore, while judicial review was pending, it was appropriate for the Commission in the November 9 Order to accept revisions to SPS's tariff to enable SPS to sell at market-based rates in the energy imbalance service market to be administered by SPP.

⁶⁵ *SPP Rehearing Order*, 116 FERC ¶ 61,289 at P 30.

⁶⁶ *Southwest Indus. Customer Coalition v. FERC*, No. 06-1390, *et al.*, appeal dismissed, 2008 U.S. App. LEXIS 2890 (D.C. Cir. Feb. 5, 2008).

⁶⁷ See, e.g., *ExxonMobil Corp. v. Entergy Services, Inc.*, 118 FERC ¶ 61,032, at P 13 (2007); see also section 313(c) of the FPA, 16 U.S.C. § 8251 (c) (2000 & Supp. V 2005) ("The filing of an application for rehearing [or] the commencement of [review] proceedings shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order").

C. Change in Status and Order No. 697 Compliance Filings

68. On May 4, 2007, and June 13, 2007, XES submitted notices of changes in status. XES filed the May 4 notice on behalf of PSCo, to notify the Commission of changes to existing and new power purchase commitments that increase PSCo's generation capacity in the PSCo balancing authority area by 340.89 MW in the summer, and 329.75 MW in the winter. XES filed the June 13 notice on behalf of NSP, to notify the Commission of changes to existing and new purchase power commitments that result in an increase in capacity for NSP of 141.65 MW in the summer and 28.35 MW in the winter.

69. On October 30, 2007 XES submitted a notice of change in status on behalf of PSCo and NSP, to notify the Commission of changes to existing and new purchase power commitments that, with respect to PSCo, result in an increase in summer capacity of 508 MW and in winter capacity of 481 MW, and, with respect to NSP, result in an increase in summer capacity of 440.95 MW and in winter capacity of 324 MW. XES also included proposed tariff revisions to the market-based rate tariffs of XES, PSCo, SPS, and NSP, to bring them into compliance with the requirements of Order No. 697.

70. XES also submitted a notice of change in status on December 14, 2007 on behalf of NSP, to notify the Commission of changes to new purchase power commitments that result in an increase in summer capacity of 150 MW and in winter capacity of 150 MW. XES also included an Asset Appendix identifying generation, transmission, and/or natural gas intrastate pipelines and/or gas storage facilities owned or controlled by Xcel and its affiliates. The Asset Appendix was submitted to comply with the requirements of Order No. 697.

1. Protests

71. Golden Spread protested XES's October 30 filing, arguing that, because the October 30 filing contains substantive provisions that modify Xcel's market-based rate tariffs, the Commission cannot act on the October 30 filing without first resolving the requests for rehearing of the November 9 Order, and the protests to Xcel's December 11 Compliance Filing. Further, Golden Spread argues that the Commission should not allow Xcel to change its market-based rate tariffs to nullify the outstanding compliance matters. Golden Spread does not specifically protest the change in status notification contained in XES's October 30 filing. On December 5, 2007, XES filed an answer Golden Spread's protest.

2. Commission Determination

72. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept XES's answer and will, therefore, reject it.

73. We will dismiss as moot Golden Spread's argument that the Commission cannot act on XES's October 30 filing without first resolving the requests for rehearing of the November 9 Order, and the protests to Xcel's December 11 Compliance Filing. The Commission has addressed herein the requests for rehearing of the November 9 Order and the protests to Xcel's December 11 Compliance Filing.

a. Change in Status Filings

74. XES filed the above mentioned change in status filings to notify the Commission of changes to existing and new purchase power commitments that increase PSCo's and NSP's generation capacity. XES states that the power purchases in its change in status filings do not change the overall result (that Xcel satisfies the Commission's horizontal market power standard for market-based rate authority in the first-tier balancing authority areas to SPS and PSCo) that allows Xcel to make sales at market-based rates into markets outside of the SPS and PSCo balancing authority areas, including the first-tier markets. And, as noted above, Golden Spread does not specifically protest the change in status filings. Based on XES's representations, we will accept XES's May 4, 2007, June 13, 2007, October 30, 2007, and December 14, 2007 change in status filings in this regard.

b. Compliance with Order No. 697

75. XES' October 30 filing also included proposed tariff revisions to the market-based rate tariffs of XES, PSCo, SPS, and NSP, to bring them into compliance with the requirements of Order No. 697. The tariffs include the provision requiring compliance with Commission regulations, including certain affiliate restrictions set forth in section 35.39 of the Commission's regulations.

76. In Order No. 697, the Commission required that all market-based rate sellers revise their respective tariffs to contain two standard required provisions:⁶⁸ (1) a provision requiring compliance with Commission regulations; and (2) a provision identifying all limitations and exemptions regarding the seller's market-based rate authority.⁶⁹ In addition to the required tariff provisions, the Commission adopted a set of standard provisions that must be included in a seller's market-based rate tariff to the

⁶⁸ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 912-913.

⁶⁹ *Id.* P 914-915.

extent that they are applicable.⁷⁰ The Commission required that all market-based rate sellers make a compliance filing⁷¹ to modify their existing tariffs to include these standard required provisions as well as the standard applicable provisions.⁷²

77. Consistent with Order No. 697, we find that Xcel has revised the market-based rate tariffs of XES, PSCo, SPS, and NSP to include the provision requiring compliance with Commission regulations, including certain affiliate restrictions set forth in section 35.39 of the Commission's regulations. We will therefore accept this revision to their market-based rate tariffs.

78. However, Xcel does not include the other required tariff provision. In particular, Order No. 697 also requires sellers to include a provision identifying any limitations and exemptions regarding their market-based rate authority. Specifically, a seller must identify all limitations on its market-based rate authority (including markets where the seller does not have market-based rate authority) and any exemptions from, waivers of, or blanket authorizations under the Commission's regulations that the seller has been granted (such as an exemption from affiliate sales restrictions, waiver of the accounting regulations, blanket authority under Part 34 for the issuances of securities and liabilities, etc.), including citations to the relevant Commission orders.⁷³ Accordingly, we will direct Xcel, within 30 days of the date of this order, to revise its market-based rate tariffs to include the required provision identifying all limitations and exemptions regarding the seller's market-based rate authority, consistent with Order No. 697.

79. Additionally, in Order No. 697, the Commission adopted a set of standard provisions that must be included in a seller's market-based rate tariff, to the extent that they are applicable, based on the services that are offered by the seller.⁷⁴ For example, if a seller makes sales of ancillary services, the seller must include the standard ancillary

⁷⁰ *Id.* P 917.

⁷¹ These compliance filings are to be made the next time a seller proposes a tariff change, makes a change in status filing, or submits an updated market power analysis (or demonstration that Category 1 status is appropriate) in accordance with the schedule in Appendix D, whichever occurs first.

⁷² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 923. The standard applicable provisions must be included in a seller's market-based rate tariff to the extent that they are applicable based on the services provided by the seller. A complete description of these standard applicable provisions is available in Appendix C of Order No. 697.

⁷³ *Id.* P 916.

⁷⁴ *Id.* P 917.

services provision.⁷⁵ XES previously obtained authority to make sales of ancillary services as a third-party provider.⁷⁶ Therefore, XES must include, within 30 days of the date of this order, the required standard ancillary services provision in its market-based rate tariffs, consistent with Order No. 697.

80. In addition, if a mitigated seller wishes to make sales at the metered boundary with a balancing authority area in which the seller has market-based rate authority, consistent with Order No. 697, the seller's market-based rate tariff must include the applicable provision as required by Appendix C of Order No. 697. Therefore, to the extent that Xcel wishes to make sales at the metered boundary, we will direct Xcel, within 30 days of the date of this order, to include the required standard provision, consistent with Order No. 697.

81. Further, in Order No. 697, the Commission also determined that provisions concerning the reassignment or sale of transmission capacity or firm transmission rights (FTRs) should be removed from a seller's market-based rate tariff⁷⁷ because sellers who seek to reassign transmission capacity should adhere to the provisions of Order No. 890.⁷⁸

82. Because Xcel's market-based rate tariffs include provisions concerning the reassignment or sale of transmission capacity or firm transmission rights, we find that Xcel has failed to comply with the directives set forth in Order No. 697. Accordingly, we will direct Xcel, within 30 days of the date of this order, to remove all provisions governing the reassignment of transmission capacity from its respective market-based rate tariffs.

83. Xcel also includes affiliate sales restrictions in its revised market-based rate tariffs. However, in Order No. 697, the Commission adopted certain affiliate restrictions that are codified in section 35.39 of the Commission's regulations. These restrictions govern the relationship between franchised public utilities with captive customers and their "market-

⁷⁵ *Id.* P 916-917; *see* Appendix C for a listing of the standard ancillary services provisions.

⁷⁶ *See Xcel Energy Services Inc.*, Docket Nos. ER01-205-000 and ER01-205-001 (January 30, 2001) (unpublished letter order).

⁷⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 920.

⁷⁸ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, at P 814-816 and n.496 (2007), *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats & Regs. ¶ 31,261 (2007).

regulated” affiliates, i.e., affiliates whose power sales are regulated in whole or in part on a market-based rate basis. Because the affiliate restrictions are codified in the Commission’s regulations, it is unnecessary to include affiliate restrictions as part of Xcel’s market-based rate tariffs. Accordingly, we will direct Xcel, within 30 days of the date of this order, to remove affiliate sales restrictions from its market-based rate tariffs.

The Commission orders:

(A) Xcel is hereby directed, within 30 days of the date of this order, to revise its market-based rate tariffs submitted in its December 11 Compliance Filing, as discussed in the body of this order.

(B) Xcel’s December 11 Compliance Filing, as modified in accordance with Ordering Paragraph (A) above, is hereby accepted for filing, as discussed in the body of this order.

(C) Xcel is hereby directed to make refunds, within 30 days of the date of issuance of this order, with interest, calculated pursuant to 18 C.F.R. § 35.19a(a)(2), and to file a refund report within 15 days of date refunds are made, as discussed in the body of this order. If no refunds are due, Xcel is hereby directed to file with the Commission within 30 days of the date of issuance of this order so stating.

(D) Xcel’s February 22, 2007 refund report is hereby accepted, as discussed in the body of this order.

(E) The requests for rehearing are hereby denied, as discussed in the body of this order.

(F) XES’s change in status filings are hereby accepted, as discussed in the body of this order.

(G) Xcel is hereby directed, within 30 days of the date of this order, to revise its market-based rate tariffs filed on October 30, 2007, to comply with the requirements of Order No. 697, as discussed in the body of this order.

(H) XES’s October 30, 2007 filing revising Xcel’s market-based rate tariffs to comply with the requirements of Order No. 697, as modified in accordance with Ordering Paragraph (G) above, is hereby accepted for filing, as discussed in the body of this order.

(I) The section 206 proceeding established in Docket No. EL05-115-000 is hereby terminated, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.