

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Xcel Energy Services Inc.

Docket Nos. ER06-301-000
ER06-301-001

ORDER ON TECHNICAL CONFERENCE AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued November 2, 2006)

1. On December 8, 2005, Xcel Energy Services Inc. (XES), on behalf of itself and the Xcel Energy Operating Companies,¹ filed two proposed service schedules as amendments to its Joint Operating Agreement (JOA), which the Commission accepted and suspended. On June 12, 2006, the Commission held a technical conference to explore the issues raised by XES's filing, including why the transfer price proposed in Service Schedule H is different from the transfer price proposed in Service Schedule I, and why XES needs both service schedules. In this order, the Commission addresses

¹ The Xcel Energy Operating Companies (Xcel Operating Companies or Xcel) are the four primary utility operating company subsidiaries of XES. Xcel states that it operates an "integrated public utility system" within the meaning of section 2(a)(29) of the Public Utility Holding Company Act of 1935. 15 U.S.C. § 79b(a)(29) (2000) (subsequently repealed). XES is the service company subsidiary of Xcel, which provide an array of administrative and general services in support of both XES and Xcel. The four subsidiaries at issue are Northern States Power Company (Minnesota) (NSP-M), 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). Xcel Energy Inc., is the registered holding company of Xcel and is headquartered in Minnesota. Xcel Energy Inc. has electric operations principally in Minnesota, Wisconsin, Texas, and Colorado.

comments originating from the technical conference proceeding,² and, as discussed below, establishes hearing and settlement judge procedures.

Background

2. XES's December 8, 2005 filing followed an audit by the Commission's Office of Enforcement (formerly known as the Office of Market Oversight and Investigations (OMOI)) of one of XES's operating companies.³ XES proposed Service Schedule H (Transfer of Non-System Sales and Purchases to Facilitate Non-System Marketing) and Service Schedule I (Transfer of Capacity and Energy Purchased from Third Parties), stating that the purpose of such transfers is to enable Xcel to maximize revenues. XES explained that Service Schedule H provides for the transfer of non-system sale and purchase positions held by one operating utility (Transferor) to another operating utility (Transferee) to enable the Transferee to undertake a non-system purchase or sale. Service Schedule I provide for the transfer of capacity and/or energy that one Operating Company (Transferor) may purchase from a third party (Seller) with the intention of reselling all or a portion of such capacity and/or energy to another Operating Company (Transferee).

3. In its May 5, 2006 Order, the Commission accepted and suspended the proposed Service Schedules H and I. The Commission found that the proposed service schedules would benefit from further exploration and, therefore, directed a technical conference be held to explore, *inter alia*, why the transfer price proposed in Service Schedule H is different from the transfer price proposed in Service Schedule I and why both service schedules are required. The technical conference was held on June 12, 2006.

Comments on Technical Conference

4. On July 26, 2006, Golden Spread Electric Cooperative, Inc. (Golden Spread), Occidental Permian Ltd. and Occidental Power Marketing, L.P. (collectively, Occidental), and XES filed initial comments on the technical conference.

5. In its initial comments, Golden Spread submits that Schedule H contravenes the stated purpose set out in the JOA and is contrary to the market-based rate authority given to XES and its affiliates, which prohibit affiliate sales. Golden Spread asserts that XES

² See *Xcel Energy Services, Inc.*, 115 FERC ¶ 61,148 (2006) (May 5, 2006 Order).

³ See OMOI Audit Report, Docket No. PA05-1-000 (Nov. 7, 2005); *see also* May 5, 2006 Order, 115 FERC ¶ 61,148 at P 2-3 (discussing audit).

seeks to bypass the commitment contained in its market-based rate tariff (MBR Tariff) not to make market-based transfers between affiliates; proposed Schedule H explicitly states that XES and its affiliates may do exactly what is prohibited in its MBR Tariff. Golden Spread explains that the definition of “Transfer Price” in proposed Section H3 defines the sale “at whatever the projected market price would be, and not at cost,” and thus, Golden Spread concludes, “is unequivocally an attempt to implement a market-based cost component in a cost based [sic] rate schedule” in contravention of Commission precedent.⁴ Further, Golden Spread claims that, in practice, XES is not using Schedule H as written, providing an example of affiliate sales to PSCo through the JOA by virtue of an exchange agreement with El Paso Electric Company (EPE). Golden Spread submits that such a transfer is nothing more than a market-based opportunity sale from SPS’s fleet of generators. With respect to Schedule I, Golden Spread states that it may have legitimate business purposes, but it is not clear as filed.

6. Occidental contends that further exploration associated with the proposed service under Schedules H and I through formal discovery and hearings is necessary. Occidental explains that, even with the one-week extension for initial comments, the information was provided too late in the process for the parties to be able to analyze meaningfully the data, to seek follow-up explanations and information from XES, and thus to comment on that information in their post-technical conference comments.

7. Occidental states that the information provided does not adequately explain prior inter-affiliate transactions that would be authorized under the proposed new service schedules, and, in fact, indicates that XES and its operating company affiliates engaged in improper transactions. Occidental contends that, at a minimum, XES should be required to provide an accounting of all transactions covered under Service Schedules H and I, as well as an explanation of the circumstances in which they were entered into. Occidental underscores a particular area of concern; namely, whether one Xcel operating company may have sold power to a third party that was in turn sold back to another Xcel operating company in a transaction of the sort addressed by the proposed Service Schedules. Occidental states that, specifically, the information provided by XES raises the question of whether XES’s operating company affiliate SPS is utilizing an exchange agreement with El Paso Electric Company to evade the requirements of the JOA as well as its own MBR Tariff to deliver power to its affiliate PSCo.

⁴ Request for Rehearing at 3 (citing *Northern States Power Co.*, 83 FERC ¶ 61,293 (1998); *accord Deseret Generation & Transmission Co-operative, Inc.*, 115 FERC ¶ 61,306, at P 13 & n.8 (2006)).

8. Occidental seeks confirmation that XES will modify the pricing proposed for Service Schedule H to conform to that of Service Schedule I as XES's representative committed. Additionally, Occidental requests that XES confirm that it can and will modify its Electric Quarterly Reports (EQRs) to include the following information for each transaction undertaken pursuant to Service Schedules H and I:

(1) the identity of the transferor's counterparty; (2) the delivery point, start and end date, price and quantity of the position being transferred; (3) the identity of the transferee's counterparty; and (4) the delivery point, start and end date, price and quantity of the transaction between the transferee and its counterparty.

9. Occidental also states that there is no reasonable basis on which to establish an effective date earlier than February 7, 2006, for neither the Commission nor the parties can identify all of the transactions that would be affected by such a retroactive authorization or what the impact of those transactions on the customers of Xcel was.

10. XES purports to explain the difference between the two proposed service schedules. XES states that Service Schedule H was intended to provide greater flexibility to the Xcel Operating Companies in engaging in off-system marketing activities. XES states that Service Schedule I was intended to cover the situation in which one Xcel operating company may be able to enter into an economy purchase in the marketplace that is not needed, or only partially needed, for its own system purchase, but which could be used advantageously for the system purposes of another Xcel operating company.

11. XES maintains that, although it believed that the identified transactions were properly entered under the existing JOA, XES proposed Service Schedule H when the Commission's OMOI "pointed out to PSCo that the ability to transfer off-system marketing transactions was not explicit in the JOA."⁵ XES states that it has met its commitment to file an appropriate amendment through the filing of Service Schedule H.

12. "It is important to emphasize," XES explains,

that Service Schedule H is intended to address transfers of marketing positions that no [Xcel operating company] intends to use for its own system purposes and therefore will be resold off-system, whereas Service Schedule I provides for the transfer of economy energy purchases intended to lower the operating costs of an [Xcel operating company].⁶

⁵ XES Initial Comments at 2-3.

⁶ *Id.* at 3-4.

XES clarifies that the two service schedules are necessary because they serve two different purposes under the JOA. XES states that Service Schedule H facilitates non-system marketing to enable the transferring operating company to undertake a non-system purchase or sale; Service Schedule I facilitates the transfer of capacity and energy purchased from third parties on an economy basis—*i.e.*, with the intention that the purchase lower an operating company's system costs.

13. XES addresses the transfer price for transactions under Service Schedule H, stating that it is the price at which the transferee operating company expects to be able to make a non-system sale or purchase using the transferred position. XES explains that, because all revenues are pooled and total revenues allocated among the operating companies, it does not matter in the ultimate allocation (pursuant to the methodology specified in Service Schedule C) whether Xcel charged the estimated or actual price or some other price for these transactions Service Schedule H, for, in the end, the total margin to be shared under Service Schedule C would be the same. And with respect to Service Schedule I, XES contends that every transaction under this service schedule will lower the economy energy costs to the second/transferee operating company.

14. XES states that the total number of transactions to date occurring under Service Schedule I is eighteen (18). XES further states that it can make modifications to its reporting on the EQRs in the future to show which transactions come under Service Schedule H and which come under Service Schedule I.

15. Finally, XES requests a January 1, 2001 effective date for Service Schedule H to ensure that any applicable transactions that occurred in the past under the JOA will be covered by Service Schedule H. XES requests an April 1, 2005 effective date for Service Schedule I to “apply retroactively to sales made during the spring of 2005,” though XES also states that all transactions under Service Schedule I “were made in the summer of 2005.”⁷

Reply Comments

16. On August 4, 2006, Golden Spread, Occidental, and XES filed reply comments. Golden Spread alleges that SPS's contract with EPE:

is very clear that capacity and energy exchanged by SPS with EPE is initially delivered by SPS at the east side of the interconnection between the

⁷ *Id.* at 7.

SPS and EPE systems near the Eddy County HVDC tie....[T]his location is the border of the SPS control area.^{8]}

Golden Spread concludes that “it is clear where the capacity and energy originates: the SPS system itself, *not* an off-system marketing position.”⁹

17. Golden Spread further argues that XES has produced no evidence that it has appropriately backed out the cost of such short-term marketing transactions from SPS total cost of fuel or other costs, from the cost-based wholesale fuel billings assessed to Golden Spread and others pursuant to SPS’ filed rate schedules and the Commission’s fuel clause regulations.

18. Golden Spread remarks that, while XES quantified the number of Service Schedule I transactions, XES did not quantify the Service Schedule H transactions. Therefore, the number of transactions may be significantly greater because (1) some trades are reported as a single transaction, even though they could be multiple days of short-term sales; (2) transactions from SPS to other XES affiliates, or from other XES affiliates to SPS are not substantiated; and (3) years other than 2004 have not been analyzed.

19. In its reply comments, Occidental maintains that Service Schedule H is unreasonable. First, Occidental states that the January 1, 2001 effective date is unjustified, since Xcel itself cannot determine precisely which past transactions Service Schedule H would retroactively authorize. Occidental alleges that Xcel has elected not to share all of the information concerning past transactions that it does possess.

20. Secondly, Occidental contends that proposed Service Schedule H would substitute one set of violations for another. Occidental argues that Service Schedule H would authorize sales by one Xcel operating company to another effectively at market-based rates, because the transfer price would be the price at which the transferee expects to make the non-system sale or purchase, *i.e.*, the market price. Occidental contends that, at least in practice, Service Schedule H would undermine the existing XES JOA requirement that sales between Xcel operating companies be made at incremental prices.

21. Thirdly, Occidental asserts that XES has not established that there would be no harm to cost-based wholesale and retail customers; XES’s example of how off-system sales revenue is pooled and allocated to the operating companies proves nothing.

⁸ Golden Spread Reply Comments at 1.

⁹ *Id.* at 2.

Occidental asserts that by facilitating market-based rate sales at system average fuel cost Service Schedule H can significantly harm cost-based wholesale and retail customers. Occidental avers that, for example, the EPE exchange agreement, which effectively allows SPS to make market-based rate sales indirectly to its affiliate PSCo, would force SPS's cost-based customers to bear a share of the incremental costs of those sales.¹⁰ Moreover, according to Occidental, any benefit from Service Schedule H transactions is unsubstantiated by XES.

22. XES responds that neither Golden Spread nor Occidental provides any evidence of harm to XES customers that results, or could result, in harm from Service Schedules H and I. XES maintains that transactions under Service Schedules H and I mathematically cannot produce harm to an operating company or its customers.

23. With respect to affiliate sales, XES explains that Golden Spread mischaracterized the JOA and that the affiliate sales precluded under the market-based rate tariff are entirely distinct from sales that occur among the regulated XES operating companies under the JOA. XES states that “[s]ales to affiliates precluded by the XES market-based tariff are sales to *unregulated* affiliates.”¹¹

24. With respect to the SPS-EPE transactions, XES notes that these transactions are being considered in another proceeding, in Docket No. EL05-19-000.

25. XES responds to Occidental, stating that XES has already answered Occidental's single question without any follow-up by Occidental and that there is no (relevant) issue that either Occidental or Golden Spread has presented that was not already fully explained and answered by XES.

Discussion

26. Our preliminary analysis in the May 5, 2006 Order indicated that XES's filing had not been shown to be just and reasonable and may have been unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, in the May 5, 2006 Order we accepted XES's proposed service schedules for filing, suspended them for a nominal period, made them effective February 7, 2006, subject to refund and subject to further orders that would follow the technical conference.

¹⁰ Occidental Reply Comments at 6 (citing *Golden Spread Elec. Coop., Inc. v. Southwestern Pub. Serv. Co.*, 115 FERC ¶ 63,043 (2006)).

¹¹ XES Reply Comments at 3 (emphasis in original).

27. After review of the comments following the technical conference that explore the issues raised by XES's filing, including why the transfer price proposed in Service Schedule H is different from the transfer price proposed in Service Schedule I, and why XES needs both service schedules, we find that the proposed service schedules raise issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below. In addition to these issues and the issues raised by intervenors, the hearing should also develop a record on what transmission arrangements would be used to support transactions under service schedule H and how, if at all, native load crediting for off-system sales would be impacted by transactions under that service schedule.

28. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹² If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹³ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the proposed amendments to the Entergy

¹² 18 C.F.R. § 385.603 (2006).

¹³ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

System Agreement. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(C) Within thirty (30) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in this proceeding in a hearing room of the Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.