

125 FERC ¶ 61,004
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.

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| Xcel Energy Services Inc. | Docket Nos. ER01-205-027 |
| Northern States Power Company and Northern States Power Company (Wisconsin) | ER98-2640-025 |
| Public Service Company of Colorado | ER98-4590-023 |
| Southwestern Public Service Company New Century Services, Inc. | ER99-1610-031 |

ORDER GRANTING CLARIFICATION AND DENYING REHEARING

(Issued October 2, 2008)

1. In this order, the Commission grants Xcel Energy Services Inc.'s¹ request for clarification and denies Xcel's request for rehearing of the Commission's June 9, 2008 order in this proceeding.²

¹ Xcel Energy Services Inc. (XES) submitted its request for rehearing and clarification on behalf of itself and the Xcel Energy Operating Companies - Northern States Power Company Minnesota (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.*, 123 FERC ¶ 61,253 (2008) (June 9 Order).

I. Background

2. In the June 9 Order, the Commission denied Xcel's request for rehearing of the Commission's November 9, 2006 order³ with regard to border sales, denied requests for rehearing by Occidental Permian, Ltd. and Occidental Power Marketing (collectively, Occidental) and Golden Spread Electric Cooperative, Inc. and Lyntegar Electric Cooperative, Inc. (collectively, Golden Spread) on the Western Systems Power Pool (WSPP) Agreement, and Golden Spread's request for rehearing regarding the SPP energy imbalance market. Further, the Commission concluded that the affiliate abuse concerns raised by Occidental and Golden Spread were fully addressed in the Commission's order issued in *Golden Spread Electric Cooperative, Inc. v. Southwestern Public Service Co.*,⁴ and therefore terminated the investigation under section 206 of the Federal Power Act⁵ in Docket No. EL05-115-000.

3. In addition, in the June 9 Order, the Commission accepted Xcel's December 11, 2006 filing,⁶ however it determined that Xcel's proposed tariff language regarding border sales was inconsistent with the Commission's directive in the November 9 Order, and therefore rejected that language. Accordingly, the Commission directed 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.⁷ The Commission also accepted XES's May 4, 2007, June 13, 2007, and December 14, 2007 change in status and compliance filings, accepted XES's October 30, 2007 change in status filing, and conditionally accepted its October 30, 2007 compliance filing. With regard to XES's October 30, 2007 compliance filing, the Commission determined that Xcel did not include the tariff provision required by Order No. 697,⁸ identifying any limitations and

³ *Xcel Energy Services Inc.*, 117 FERC ¶ 61,180 (2006) (November 9 Order).

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

⁵ 16 U.S.C. § 824e (2006).

⁶ Xcel December 11, 2006 Filing, Docket No. ER01-205-016, *et al.* (December 11 Compliance Filing).

⁷ June 9 Order at P 26.

⁸ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008), *clarified*, 124 FERC ¶ 61,055 (2008).

exemptions regarding its market-based rate authority, and therefore directed Xcel to revise its market-based rate tariffs to include the required tariff provision.⁹

4. On July 9, 2008 Xcel submitted a request for rehearing or clarification of certain aspects of the June 9 Order.¹⁰

II. Discussion

A. Request for Rehearing

5. In its request for rehearing, Xcel seeks that the Commission reverse its finding that Xcel was not permitted to make sales at market-based rates at the border of balancing authority areas in which Xcel is mitigated beginning on the refund effective date in this proceeding. Xcel argues that its proposed tariff provisions permitting such sales are consistent with Commission precedent before Order No. 697 and Commission policy after the issuance of that order.¹¹

6. Xcel contends that the Commission engaged in unreasoned decision making that is arbitrary and capricious and contrary to the Administrative Procedure Act (APA) insofar as the Commission did not accept Xcel's proposed language that would permit Xcel to make sales at market-based rates at the border between the PSCo and SPS balancing authority areas and any balancing authority area where Xcel has been granted market-based rate authority from the period beginning with the refund effective date in this proceeding, August 12, 2005.¹² Specifically, Xcel argues that its proposal in its December 11 Compliance Filing to make border sales was consistent with the

⁹ June 9 Order at P 78. The Commission has granted Xcel's requests for extensions of time to make the refunds directed in the June 9 Order on July 18, 2008 and July 31, 2008.

¹⁰ Xcel also submitted on July 9, 2008 a filing in compliance with the June 9 Order that includes proposed tariff revisions to the XES, NSP, PSCo, and SPS market-based rate tariffs. We will address the compliance filing in a separate order.

¹¹ Xcel Rehearing Request at 1-2.

¹² *Id.* at 8-9 (citing 5 U.S.C. § 706(2) (2006); *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 121 FERC ¶ 61,260, at P 7 (2007) (Order Clarifying Final Rule); *LG&E Energy Marketing*, 122 FERC ¶ 61,175, at P 35-36 (2008)).

Commission's decision to permit the LG&E Parties¹³ to make such border sales at market-based rates,¹⁴ and that holding otherwise was arbitrary and capricious and contrary to the APA.¹⁵ Xcel asserts that there is no difference between the proposal put forth by the LG&E Parties and accepted by the Commission, and the proposal submitted by Xcel in its December 11 Compliance Filing. Xcel also contends that the Commission did not explain why its determination in Order No. 697 that border sales do not raise market power concerns should not apply to those pending requests by entities such as Xcel to make such sales.¹⁶

7. Xcel asserts that Commission policy articulated in Order No. 697 permits the border sale language included in Xcel's December 11 Compliance Filing.¹⁷ Xcel argues that in the Commission's Order Clarifying Final Rule, the Commission explained that it would "continue to apply mitigation to *all* of a seller's sales in the balancing authority area in which a seller is found, or presumed, to have market power."¹⁸ Xcel argues that, because the proposal in its December 11 Compliance Filing is in all material respects the same as the Commission's border sale policy in Order No. 697 and does not propose limiting mitigation to sales that sink in the PSCo and SPS balancing authority areas, there was no reason for the Commission to reject Xcel's proposal to permit market-based rate sales at the borders of the PSCo and SPS balancing authority areas.

8. Further, Xcel asserts that the Commission "inexplicably states that its 'action not subjecting border sales to mitigation was in error and was not consistent with

¹³ The LG&E Parties include LG&E Energy Marketing, Inc. (LG&E Energy Marketing), Louisville Gas & Electric Company (LG&E), Kentucky Utilities Company (Kentucky Utilities), and Western Kentucky Energy Corporation (Western Kentucky Energy). *LG&E Energy Marketing*, 122 FERC ¶ 61,175, at n.1 (2008) (*LG&E*).

¹⁴ Xcel Rehearing Request at 9 (citing *LG&E Energy Marketing Inc.*, Docket No. ER06-1046-000, *et al.* (July 6, 2006) (unpublished letter order); *LG&E*, 122 FERC ¶ 61,175 at P 35-36).

¹⁵ *Id.* at 8 (citing 5 U.S.C. § 706(2) (2006)).

¹⁶ *Id.* at 11-12.

¹⁷ *Id.* at 12 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 819; *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary by Public Utilities*, Notice of Proposed Rulemaking, FERC Stats. Regs. ¶ 32,602, at P 820 (2006) (NOPR)).

¹⁸ *Id.* at 14 (quoting Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 7) (emphasis in original)).

Commission policy.’”¹⁹ Xcel argues that limiting mitigation to sales that sink in the mitigated balancing authority area is not the same as permitting sales at the border between a mitigated balancing authority area and a balancing authority area where market-based rate sales are permitted. It asserts that the Order Clarifying Final Rule and *South Carolina Electric & Gas Co.*²⁰ discuss mitigation proposals that limit the mitigation to sales that sink in the mitigated balancing authority area, and do not discuss the border sales that are at issue here.²¹ Finally, Xcel asserts that the Commission, in the June 9 Order, did not explain that it had “discussed with approval,” in *LG&E*, the Commission’s prior acceptance of the LG&E Companies’ border sales proposal.²² Thus, Xcel argues that *LG&E* demonstrates that the Commission has distinguished between limiting mitigation to sales that sink in a mitigated balancing authority area and permitting border sales at market-based rates. Xcel therefore asserts that the Commission erred in failing to make a distinction between border sales and sales that sink in a balancing authority area in which the seller is mitigated.

Commission Determination

9. We will deny Xcel’s request for rehearing of the June 9 Order. Xcel’s request for rehearing of the June 9 Order reiterates many of the same arguments it made in its request for rehearing of the November 9 Order. We find that we fully explained the basis for our determinations in those orders.²³ Therefore, to the extent Xcel is now challenging that determination, without raising any new arguments, we will not reiterate our position now.

10. Xcel also contends that the Commission offers no explanation as to why its determination in Order No. 697 that border sales are permitted under certain circumstances should not apply to entities such as Xcel, prior to the effective date of Order No. 697. Notwithstanding Xcel’s claim, in Order No. 697, the Commission determined that it would permit border sales only *under specific conditions*. It required

¹⁹ *Id.* at 16 (quoting June 9 Order at P 40 (citing Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 7; *Oklahoma Gas and Electric Co.*, 114 FERC ¶ 61,297 (2006); *Westar Energy, Inc.*, 116 FERC ¶ 61,219 (2006)).

²⁰ 121 FERC ¶ 61,263 (2007) (*South Carolina*).

²¹ Xcel Rehearing Request at 16 (citing Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 7; *South Carolina*, 121 FERC ¶ 61,263)).

²² *Id.* at 17 (citing *LG&E*, 122 FERC ¶ 61,175 at P 35-36).

²³ *See* June 9 Order at P 27 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 819) (mitigation must apply to *all* sales in the balancing authority area), P 39-40 (orders permitting sales at border were in error).

that sellers making border sales are required to commit and maintain sufficient documentation to demonstrate that: (1) legal title of the power sold transfers at the metered boundary of the balancing authority area where the seller has market-based rate authority; and (2) the seller and its affiliates do not sell the same power back into the balancing authority area where the seller is mitigated. Sellers must also retain, for a period of five years from the date of the sale, all data and information related to the sale that demonstrates compliance with items (1) and (2) above. Xcel's proposed tariff language did not contain these conditions prior to Order No. 697. Thus, the Commission appropriately determined that Xcel was not permitted to make market-based rate sales at the borders of the PSCo and SPS balancing authority areas prior to the effective date of Order No. 697.

11. We disagree with Xcel's argument that the Commission erred in rejecting Xcel's tariff language permitting border sales because the Commission had previously accepted the LG&E Companies' border sales proposal in a July 6, 2006 delegated letter order.²⁴ The July 6, 2006 delegated letter order does not constitute binding precedent.²⁵ Accordingly, we find Xcel's reliance on the July 6, 2006 delegated letter order is not persuasive. Further, Xcel's assertion that the Commission in *LG&E* "discussed with approval" its prior acceptance of the LG&E Companies' border sales proposal²⁶ is a mischaracterization. The paragraphs in *LG&E* that Xcel relies upon do not "discuss[] with approval" the Commission's prior acceptance of the LG&E Companies' border sales proposal, but rather summarize the Commission's prior actions in that proceeding, and accept the LG&E Companies' revisions to their market-based rate tariffs in their September 10, 2007 filing as in compliance with Order No. 697.

12. Accordingly, we will deny Xcel's request for rehearing of the June 9 Order.

B. Request for Clarification

13. Xcel argues that, to the extent the Commission does not find that Xcel was permitted to make sales at market-based rates at the border of balancing authority areas in which Xcel is mitigated, the Commission should clarify that any refund-effective period

²⁴ *LG&E Energy Marketing Inc.*, Docket No. ER06-1046-000, *et al.* (July 6, 2006) (unpublished letter order).

²⁵ See *Midwest Generation, LLC*, 95 FERC ¶ 61,231, at 61,799 (2001) ("actions taken by its staff pursuant to delegated authority 'do not constitute precedent binding the Commission in future cases . . .'" (quoting *Phoenix Hydro Corp.*, 26 FERC ¶ 61,389, at 61,870 (1984), *aff'd*, *Phoenix Hydro Corp. v. FERC*, 775 F.2d 1187, 1191 (D.C. Cir. 1985)).

²⁶ Xcel Rehearing Request at 17 (citing *LG&E*, 122 FERC ¶ 61,175 at P 35-36).

for the market-based rate sales at the metered boundary between the PSCo and SPS balancing authority areas and any other balancing authority area ended on September 17, 2007, the day before the effective date of Order No. 697. Xcel argues that, in the alternative, the Commission should grant rehearing on this issue given that a contrary ruling on this issue is inconsistent with the Commission's decision to make Order No. 697's provisions effective on September 18, 2007 and with the inclusion by Xcel of the specific tariff provisions in its market-based rate tariffs submitted on October 30, 2007.

14. In support of its request, Xcel states that the Commission has stated that the requirements of Order No. 697 would become effective on September 18, 2007, regardless of whether the tariff provisions were included in the sellers' market-based rate tariffs, and that the tariff provisions would be deemed to be part of the market-based rate tariffs as of that date.²⁷ Further, Xcel argues that its 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 submitted on October 30, 2007 (October 30 Compliance Filing), adequately include the Commission's metered boundary sales language from Order No. 697. Xcel states that the language submitted in its October 30 Compliance Filing satisfies the Commission's requirements and is in compliance with the requirement to include the specified tariff language.²⁸ Xcel claims that it is not clear whether the Commission rejected the language on border sales submitted by Xcel in its October 30 Compliance Filing. Therefore, Xcel asserts that, given the effectiveness of Order No. 697's tariff provisions, if the Commission finds that Xcel's proposed tariff provisions are inconsistent, it should issue an order directing conforming changes, and not reject Xcel's proposal outright.²⁹

Commission Determination

15. We clarify that Xcel's refund obligation for any border sales made at market-based rates was through September 17, 2007.

16. With regard to Xcel's claim that it is not clear whether the Commission rejected the language on border sales submitted by Xcel in its October 30 Compliance Filing, we clarify that we accepted for filing Xcel's October 30 Compliance Filing, but rejected Xcel's proposed tariff language on border sales submitted in its October 30 Compliance

²⁷ Xcel Rehearing Request at 18 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 924; Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 4-5).

²⁸ *Id.* at 20 (citing *Georgia Strait Crossing Pipeline LP*, 107 FERC ¶ 61,065, at P 14 n.21, *order on reh'g*, 108 FERC ¶ 61,053 (2004)).

²⁹ *Id.* at 24 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 924).

Filing.³⁰ While Xcel may have intended the language on border sales proposed in its October 30 Compliance Filing to satisfy Order No. 697's requirement on border sales, it did not, in fact, do so. Specifically, XES's market-based rate tariff states that its tariff applies to "sales of capacity and/or energy at the border/interface between the SPS control area in which [XES], PSCo, SPS, and the NSP Companies have been deemed to have market power...." The term "border/interface" is not consistent with the Commission's use of the term metered boundary when applied to a mitigated sales provision in a seller's market-based rate tariff. Therefore, using the term "border/interface" is inconsistent with Order No. 697. The tariff provision identifying any limitations and exemptions must be included in Xcel's tariff without variation³¹ unless such variation is expressly requested and permitted by the Commission.³² Therefore, we appropriately directed Xcel to revise its market-based rate tariffs to include the required tariff provision, consistent with Order No. 697.³³

The Commission orders:

(A) Xcel's request for rehearing is hereby denied, as discussed in the body of this order.

(B) Xcel's request for clarification is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁰ June 9 Order at P 78, Ordering Paragraphs (G), (H).

³¹ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 387; Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 916-917; *see* Appendix C for a listing of the standard ancillary services provisions. *See also* *Niagara Mohawk Power Corp.*, 121 FERC ¶ 61,275, at P 14 & n.22 (2007) (directing seller to conform with Appendix C).

³² *See Arizona Public Service Company*, Docket No. ER08-1104-000 (July 3, 2008) (unpublished letter order).

³³ June 9 Order at P 78, Ordering Paragraphs (G), (H). *See also* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914-915.