

111 FERC ¶ 61,343
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Xcel Energy Services Inc.	Docket No. ER01-205-007 ER01-205-005 ER01-205-004
Northern States Power Company and Northern States Power Company (Wisconsin)	ER98-2640-005 ER98-2640-004
Public Service Company of Colorado	ER98-4590-003 ER98-4590-002
Southwestern Public Service Company New Century Services, Inc.	ER99-1610-010 ER99-1610-009 ER99-1610-008
Xcel Energy Services Inc., Northern States Power Company and Northern States Power Company (Wisconsin), Public Service Company of Colorado, Southwestern Public Service Company and New Century Services, Inc.	[EL05-115-000]

ORDER ON UPDATED MARKET POWER ANALYSIS AND CHANGE IN STATUS,
INSTITUTING SECTION 206 PROCEEDING AND ESTABLISHING
REFUND EFFECTIVE DATE

(Issued June 2, 2005)

1. On February 8, 2005, Xcel Energy Services Inc. (XES) 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) submitted for filing an updated market power analysis in compliance with the Commission's order issued on May 13,

2004.¹ The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004 and clarified on July 8, 2004.² The Commission has previously accepted Xcel's tariffs incorporating the Commission's market behavior rules.³

2. The filing indicates that Xcel fails the pivotal supplier and wholesale market share screens for the four seasons in the PSCo⁴ control area, passes the pivotal supplier screen but fails the market share screen for the four seasons in the SPS control area,⁵ and passes both screens in the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) market. Xcel also states that it passes both indicative screens in the first-tier markets to the PSCo and SPS control areas. However, as discussed below, the Commission is unable to conclude that Xcel satisfies the Commission's generation market power standard for market-based rate authority in the first-tier control areas to SPS and PSCo.

3. As the Commission stated in the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a proceeding under section 206 of the Federal Power Act (FPA)⁶ and establishes a rebuttable presumption of market power in the section 206 proceeding. Accordingly, as discussed below, in this order, the Commission institutes a proceeding pursuant to section 206 of the FPA to determine whether XES, SPS, and PSCo may

¹ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

² *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

³ XES' tariff incorporating the Commission's market behavior rules was previously accepted by the Commission. *See Acadia Power Partners, LLC*, Docket Nos. ER01-205-003 and ER01-2941-001 (March 29, 2004) (unpublished letter order). NSP's, PSCo's and SPS's tariffs incorporating the Commission's market behavior rules were previously accepted by the Commission. *See Northern States Power Companies*, Docket Nos. ER98-2640-003, *et al.* (April 26, 2004) (unpublished letter order).

⁴ Xcel's analysis of the PSCo control area shows market shares as high as 94 percent.

⁵ Xcel's analysis of the SPS control area shows market shares as high as 74 percent.

⁶ 16 U.S.C. § 824e (2000).

continue to charge market-based rates and establishes a refund effective date pursuant to the provisions of section 206. The instant section 206 proceeding, as well as any resulting mitigation or refunds, is limited to the SPS and PSCo control areas because the filing indicates that these are the geographic markets for which Xcel fails the wholesale market share screen. In this regard, we are not instituting a section 206 proceeding with respect to NSP's market-based rate authority because as noted they pass the indicative screens in the Midwest ISO market. However, we direct NSP to provide a compliance filing that identifies any current contract it has entered into for sales into the SPS or PSCo control areas and require that, pending the outcome of the investigation initiated herein, to the extent that NSP wishes to make sales into either the SPS or PSCo control area it must first receive Commission authorization of the transaction under section 205 of the Federal Power Act.

4. In addition, Xcel states that it passes the pivotal supplier screen and the wholesale market share screen in each of the directly interconnected first-tier control areas examined. However, the Commission is unable to conclude that Xcel satisfies the Commission's generation market power standard for market-based rate authority in the first-tier control areas to SPS and PSCo. Accordingly, in this order, the Commission directs Xcel to make a compliance filing within 30 days of the date of this order to revise the simultaneous import capability studies submitted for the SPS and PSCo control areas; submit the text-readable powerflow, contingency, monitored facility, super area and transaction files for the PSCo simultaneous import capability studies for the PSCo and SPS control areas; and submit working papers for historical long-term and short-term network/firm reservation controlled by Xcel and their affiliates.

5. In addition, the Commission finds that Xcel's filing fails to address the affiliate abuse and reciprocal dealing part of the Commission's test for granting market-based rate authority and, therefore, is incomplete. In light of this failure, as discussed below, the Commission institutes a proceeding pursuant to section 206 of the FPA⁷ to determine whether Xcel may continue to charge market-based rates and establishes a refund effective date pursuant to the provisions of section 206. Moreover, as discussed below, the Commission will address as part of the section 206 proceeding established by this order the allegations raised by intervenors, regarding whether Xcel satisfies the Commission's requirements regarding affiliate abuse and reciprocal dealing.

6. This order, including the refund effective date, will protect customers from excessive rates and charges that may result from the exercise of market power.

⁷ 16 U.S.C. § 824e (2000).

Background

7. On January 30, 2004, Xcel filed an updated market power analysis employing the then applicable Supply Margin Assessment (SMA) analysis.

8. On August 19, 2004, Xcel filed to notify the Commission of recent additions of generation which took effect on July 1, 2004 and of a new total requirements customer on the SPS system and stated that it would report any change in status that would reflect a departure from the characteristics that the Commission relied upon in approving the market-based rate authorizations for PSCo and SPS in their triennial updated market power analyses.

9. In the April 14 Order, as clarified by the July 8 Order, the Commission adopted two indicative screens for assessing generation market power: a pivotal supplier screen and a wholesale market share screen. The Commission stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess generation market power, while failure of either screen creates a rebuttable presumption that the applicant has generation market power. The Commission further stated that applicants and intervenors may, however, rebut the presumption established by the results of the initial screens by submitting a Delivered Price Test. Alternatively, an applicant may accept the presumption of market power or forego the generation market power analysis altogether and go directly to mitigation.⁸ The May 13 Order directed Xcel to file within 180 days of the issuance of that order revised generation market power analyses based on these two indicative screens.⁹

10. On February 8, 2005 (February 8 Filing), Xcel filed updated market power analyses, amending its earlier analyses, in compliance with the Commission's May 13 Order.

Description of the February 8 Filing

11. In its filing, Xcel submitted the results of the two generation market power screens. As required in the May 13 Order, Xcel also provided updated information on the transmission and barriers to entry parts, but failed to provide updated information on the affiliate abuse and reciprocal dealings part of the Commission's four-part market-based

⁸ In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether the applicant does or does not possess market power. *See* April 14 Order, 107 FERC ¶ 61,018 at P 37.

⁹ *See* May 13 Order at Ordering Paragraph (A).

rate analysis. Xcel states that it continues to be unable to exercise transmission market power and or erect barriers to entry.

12. Xcel states that it fails both indicative screens in the PSCo control area and fails the market share screen in the SPS control area. In addition, Xcel states that it passes both generation market power screens in the Midwest ISO market. Xcel states that the Commission should take no action with respect to Xcel's market-based rate authority at this time because it intends to file additional analysis which it believes will show that Xcel does not possess generation dominance.

13. Xcel states that it conducted the market power analyses as directed by the Commission's current guidelines which require evaluating control areas as the default geographic market. Xcel argues that in this instance there are valid reasons to assume that the geographic markets around each operating company are larger than the control area. For example, SPS and NSP both operate under regional transmission tariffs (Southwest Power Pool (SPP) and Mid-Continent Area Power Pool (MAPP), respectively) and the Midwest ISO, which was expected to be fully operational.

Notice of Filings and Responsive Pleadings

14. Notice of the January 30, 2004 filing of Xcel's updated market power analyses was published in the *Federal Register*, 69 Fed. Reg. 6,961 (2004), with interventions or protests due on or before February 20, 2004. This date was subsequently extended to March 11, 2004, April 9, 2004, and May 10, 2004. On February 20, 2004 and May 10, 2004, Golden Spread Electric Cooperative, Inc. (Golden Spread) filed motions to intervene, protest and comments. On March 11, 2004 as amended on April 9, 2004, West Texas Municipal Power Agency (WTMPA) filed to intervene and protest. WTMPA withdrew its pleadings on July 26, 2004. On March 26, 2004 Xcel filed an answer. On May 10, 2004, Wisconsin Public Service Corporation, Upper Peninsula Power Company, WPS Energy Services Inc., and WPS Power Development, LLC (collectively the WPS Companies) filed a motion to intervene. On May 25, 2004 Xcel filed a reply to Golden Spread's May 10, 2004 protest. Golden Spread's request for the Commission to direct Xcel to submit its market power analysis by June 1, 2004 is made moot, and superseded by the May 13 Order.

15. Notice of Xcel's August 19, 2004 change of status filing in compliance with SPS's and PSCo's market-based rate tariffs was published in the *Federal Register*, 69 Fed. Reg. 53,430 (2004), with interventions or protests due on or before September 9, 2004. None was filed.

16. Notice of the February 8 filing of Xcel's updated market power analyses was published in the *Federal Register*, 70 Fed. Reg. 9,064 (2005), with interventions or protests due on or before March 1, 2005.

17. On February 22, 2005, Golden Spread and Lyntegar Electric Cooperative, Inc. (Lyntegar) (collectively Golden Spread/Lyntegar) filed a motion to intervene, motion to establish a section 206 proceeding and motion for order directing immediate disclosure of market-based rate agreements. Golden Spread/Lyntegar state that their ability to present record evidence is impaired by the refusal of Xcel and its affiliates to provide full copies of its market-based rate agreements that contain the substantive provisions of deals with counterparties with those contracts as required by sections 35.1(a) and (g) of the Commission's Regulations and Order No. 2001.

18. On March 1, 2005, Occidental Permian Ltd. (OPL) and Occidental Power Marketing, L.P. (OPM) (collectively, Occidental) filed a protest requesting that the Commission initiate a section 206 investigation, set a refund effective date, and require all of the Xcel entities to address all four parts of the market power test. On March 1, 2005, Golden Spread/Lyntegar submitted a second protest stating that continued market-based rate authority should be denied on the ground that Xcel has failed to demonstrate that it and its affiliates lack market power in the transmission-constrained SPS control area in which SPS has a dominant generation position. On March 1, 2005, Dairyland Power Cooperative (Dairyland) and Southern Minnesota Municipal Power Agency (SMMPA) intervened to reserve the right to introduce evidence as to actual operation of the Midwest ISO Day 2 market if the changes in market share anticipated by Xcel do not materialize when the market is in operation. Midwest Municipal Transmission Group (MMTG) on behalf of itself and its members also moved to intervene, reserving the right to protest in the event that Xcel and MMTG are unable to reach settlement with regard to mitigation of Xcel's market power.

19. Timely motions to intervene, protest and comment were also filed by Municipal Energy Agency of Nebraska (MEAN). MEAN requests that the Commission institute a section 206 investigation, and establish the earliest possible refund effective date, with respect to Xcel's authority to make market-based rate sales, at least in the PSCo control area.

20. The WPS Companies and El Paso Electric Company (El Paso) filed timely motions to intervene and become parties in this proceeding with no substantive comments. Tri-State Generation and Transmission Association, Inc. (Tri-State) and WTMPA filed late motions to intervene.

21. On March 9, 2005, Xcel filed an answer (March 9 Answer) to the protests raised by Golden Spread and Lyntegar. Xcel states that the Commission should permit Golden Spread's and Lyntegar's motion to intervene and should deny their motion for disclosure of market-based transaction agreements. On March 16, 2005 (March 16 Answer), Xcel filed a response to the various interventions and requested leave to answer and answered the substantive protests filed by Golden Spread/Lyntegar, MEAN and Occidental. Xcel's

March 16 Answer states that the focus of the investigation should be on the Delivered Price Test or on the mitigation that Xcel may propose.

22. On March 16, 2005, WTMPA filed an answer to clarify certain statements in Occidental's March 1, 2005 protest regarding WTMPA's purchases of Total Requirements Power Service from SPS under SPS's market-based rate tariff.

23. On March 29, 2005, MMTG filed a protest. On March 29, 2005, Occidental filed an answer requesting that Xcel's and WTMP's answers be rejected on the basis that they are largely argumentative and contribute little, if anything, useful to the record. Occidental requests that if the Commission does not reject the Xcel and WTMPA pleadings, it then consider Occidental's answer.

24. On April 13, 2005, Xcel filed an answer to the protest of the MMTG, stating that the Commission should not consider in this proceeding complaints regarding nodal pricing in the Midwest ISO Day 2 markets, regional transmission planning processes and the demise of TRANSLink Transmission Company, LLC (TRANSLink) since the issue is not legitimately related to the scope of this proceeding.

Discussion

Procedural Matters

25. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

26. Given Tri-State's and WTMPA's interest in this proceeding, the early stage of this proceeding, and the absence of undue delay or prejudice, the Commission finds good cause to grant the untimely motions to intervene of Tri-State and WTMPA.

27. Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. The Commission will accept Xcel's and Occidental's responses and WTMPA's clarification because these have assisted our decision making.

Market-Based Rate Authorization

28. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and

transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse and reciprocal dealing.¹⁰

Generation Market Power

29. Xcel states that its share of uncommitted capacity in the SPS and PSCo control areas exceeds 20 percent for each of the four seasons during the relevant time period. Consequently, Xcel fails the wholesale market share screen in those control areas. Xcel has prepared both the pivotal supplier and the wholesale market share screen analyses for the Midwest ISO market and states that it passes both screens in the Midwest ISO market. As the Commission noted in the April 14 Order, once Midwest ISO becomes a single market and performs functions such as central commitment and dispatch with Commission-approved market monitoring and mitigation, Midwest ISO would be considered to have single geographic market for the purposes of our generation dominance screens.¹¹ The Commission has reviewed Xcel's generation market power standard for the Midwest ISO market and has determined that Xcel satisfies the Commission's generation market power standard for the grant of market-based rate authority in the Midwest ISO market.

30. Xcel included simultaneous transmission import capability studies pursuant to the methodology laid out in the April 14 Order. The filing included the simultaneous import capability studies into the PSCo control area as well its first-tier markets. For SPS and its first-tier markets Xcel relied upon the SPP's own study for SPP members (i.e., Sunflower Electric Power Corporation and West Plains Energy Colorado) and on publicly available information for the Western Electricity Coordinating Council (WECC) entities (i.e., Public Service Company of New Mexico and El Paso).

31. Xcel states that it is a member of SPP and service on its transmission system is provided under the SPP tariff. We note that we have required that SPP provide a market monitoring plan which includes appropriate market power mitigation measures to address market power problems and a clear set of rules governing market participation conduct

¹⁰ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

¹¹ Because the Midwest ISO became a single market and began performing the central commitment and dispatch functions with the Commission-approved market monitoring and mitigation on April 1, 2005 we have used the Midwest ISO market as the geographic market for the purposes of analyzing NSP's generation market power screens.

with the consequences for violations spelled out.¹² In addition, SPP's market monitoring plan must include the process that the Independent Market Monitor (IMM) would use if the IMM thinks the markets are not resulting in just and reasonable prices or providing appropriate incentives for investment in needed infrastructure. SPP's market monitoring plan would include periodic reports prepared by the IMM. These reports will incorporate market metrics to provide a basis for measuring the performance of these markets across RTOs and ISOs, and compare the performance of the market in each RTO or ISO over time. Metrics will also be developed to provide standard performance information on a monthly basis. Accordingly, once the Commission approves SPP's market monitoring and mitigation plan, Applicants could point to such mitigation rules as evidence that any market power has been adequately mitigated. The Commission will consider such arguments on a case-by-case basis.

32. As outlined in the April 14 Order, Xcel's failure of the wholesale market share screen in the SPS and PSCo control areas provides the basis for the Commission to institute the instant section 206 proceeding, which is limited to the SPS and PSCo control areas, to determine whether XES, SPS, and PSCo may continue to charge market-based rates and establishes a rebuttable presumption of market power. This order establishes a refund effective date in order to put in place the necessary procedural framework to promptly impose an effective remedy, in case the Commission determines that such a remedy is required. Our decision to establish a refund effective date does not constitute a determination that refunds will be ordered. In this regard, we are not instituting a section 206 proceeding with respect to NSP's market-based rate authority because as noted they pass the indicative screens in the Midwest ISO market. However, we will direct NSP to provide a compliance filing that identifies any current contract it has entered into for sales into the SPS or PSCo control areas and require that, pending the outcome of the investigation initiated herein, to the extent that NSP wishes to make sales into either the SPS or PSCo control areas, it must first receive Commission authorization of the transaction under section 205 of the FPA.

33. The Commission's decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that XES, SPS, and PSCo have market power in the SPS and PSCo control areas. As discussed in the April 14 and July 8 Orders, the screens are conservatively designed to identify the subset of applicants who require closer scrutiny. Accordingly, Xcel will have 60 days from the date of issuance of this order finding a screen failure to: (1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the

¹² *Southwest Power Pool, Inc.*, 106 FERC 61,110, *order on reh'g, Southwest Power Pool, Inc.*, 109 FERC 61,010 (2004).

ability to exercise market power; or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.¹³ In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether Xcel does or does not possess market power.¹⁴

34. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the initiation of the Commission's proceeding in the *Federal Register*, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with Commission precedent,¹⁵ the Commission will establish a refund effective date at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the proceeding in Docket No. EL05-115-000 is published in the *Federal Register*. In addition, section 206 requires that, if no final decision has been rendered by that date, the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by October 31, 2005.

35. The Commission intends to examine the issue of market power in generation in the control areas of SPS and PSCo in the instant 206 proceeding discussed above. The filing indicates that Xcel passes the pivotal supplier screen and the wholesale market share screen in each of the directly interconnected first-tier control areas to PSCo and SPS examined. However, the Commission is unable to find here that Xcel satisfies the Commission's generation market power standard for market-based rate authority in the first-tier control areas to SPS and PSCo without a compliance filing, as discussed below.

36. Regarding import capability, as noted above, Xcel did not provide the text-readable powerflow, contingency, monitored facility, super area and transaction files for the PSCo control area simultaneous import capability study, or for the SPS control area simultaneous import capability study, nor did it provide working papers for historical long-term and short-term network/firm reservation controlled by SPS and its affiliates.

¹³ See April 14 Order, 107 FERC ¶ 61,018 at P 201, 207-209.

¹⁴ *Id.* at P 37.

¹⁵ See, e.g., *Canal Electric Company*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

Xcel is directed to file this data to support its transmission import proxy within 30 days of the date of this order.

37. Dairyland and SMMPA initially filed to reserve the right to file comments on Xcel's market power analysis based upon actual conditions in the Midwest ISO Day 2 Market. Because they have not subsequently filed comments, the Commission concludes that the commencement of Day 2 markets for Midwest ISO has mitigated SMMPA's and Dairyland's concerns.

38. Other intervenors ask the Commission to institute a section 206 proceeding for at least the SPS and PSCo control areas and to establish the earliest possible refund effective date. The section 206 proceeding we institute herein addresses this request. MEAN also cautions the Commission regarding several arguments made by Xcel to undermine its market share. MEAN notes, for example, that Xcel mentions the addition of 210 MW of transmission capacity resulting from the completion of the new DC tie at Lamar, which according to Xcel will enhance competition in its control area. MEAN explains that Xcel fails to note that the entire capacity of the facility has been reserved, in both directions, by Xcel itself through at least 2010. MEAN submits Transmission Request Details from PSCo's OASIS in support of its protest. The Commission will further examine those claims within the context of the 206 proceeding instituted herein.

Transmission Market Power

39. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an open access transmission tariff (OATT) on file before granting such authorization. Xcel states that NSP, SPS, and PSCo provide transmission service in accordance with a joint OATT on file with the Commission.¹⁶ NSP is a Midwest Reliability Organization (MRO) and Midwest ISO member. SPS is a member of the SPP and for some time has had its transmission available for service under the SPP regional tariff. Xcel states that PSCo provides transmission service under an OATT and is actively involved in establishing an RTO for its facilities in the WECC.

40. In its March 29, 2005 protest, MMTG argues that in order to support electric utility needs and competitive markets, transmission construction will be needed in the region, citing the "Interim Report: Identifying Minnesota's Electric Transmission Infrastructure Needs," CAPX 2020 (December, 2004). MMTG also highlights market

¹⁶ The joint OATT was accepted by the Commission in Northern States Power Company (Minnesota) and New Century Energies, Inc., 90 FERC ¶ 61,020 (2000) (*Merger Order*).

power concerns in the Upper Midwest,¹⁷ stating that unless there is adequate internal transmission and generation within the Midwest ISO, Xcel will have market power within its transmission area in the short and long-term. MMTG requests that the Commission adopt both procedures and solutions that will resolve or at least ameliorate these problems. MMTG and its members request that a hearing or a Commission-sponsored conference be held to consider Xcel market power issues. MMTG suggests some solutions, including the full use of the Commission's conditioning authority, that should be considered: (A) providing MMTG and others similarly-situated rights to participate in the transmission grid; (B) providing MMTG and others similarly-situated rights to participate in CAPX 2020; (C) reconstituting TRANSLink or a similar transmission company; (D) adopting cost-based or capped wholesale power rates; and (E) allowing MMTG and other similarly-situated entities to participate in nodal locational marginal pricing (LMP) averaging within the Xcel transmission system.

41. On April 13, 2005 Xcel filed an answer to the protest of MMTG stating that the Commission should not consider in this proceeding complaints regarding nodal pricing in the Midwest ISO Day 2 markets, regional transmission planning processes and the demise of TRANSLink since these issues are not legitimately related to the scope of this proceeding.

42. The Commission agrees that the issues raised by MMTG do appear to be criticisms of the Midwest ISO regional planning structure and the Midwest ISO Day 2 markets and not directed specifically at NSP and or Xcel. The Commission finds that MMTG's protest regarding lack of transmission availability within the Midwest ISO is outside the scope of this proceeding. The Commission has previously identified transmission constraints in Wisconsin and the Upper Michigan area and has addressed those issues in orders approving the commencement of Day 2 energy markets in the Midwest ISO market.¹⁸

43. Further, intervenors argue that the presence of transmission constraints in the SPS and PSCo control areas have a direct impact on transmission market power, and also affect the other parts of the Commission's test for market-based rate authority. Golden Spread also submits actual data from the two-week period of January 19, 2003 through

¹⁷ See MMTG's protest at 3 and Attachment A (citing the Written Statements by Anne Kimber on behalf of MMTG and TAPS for a December 7 technical conference, *Market-Based Rates for Public Utilities*, Docket No. RM04-7-000).

¹⁸ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC 61,163 (2004) (TEMT II Order), *order on reh'g*, 109 FERC ¶ 61,157 (2004), *order on reh'g*, 111 FERC ¶ 61,043 (2005).

February 2, 2003 concerning refused daily firm transmission reservations to show SPS's ability to exercise market power due to the existence of limited transfer capability. Golden Spread states that (as the only other market participant with more than 25 MW in the control area) it is denied access to transact at market-based rates where SPS and its affiliates can transact at market-based rates across vital ties with the remainder of the SPP. Occidental and Golden Spread/Lyntegar state in their protest that there is documented evidence that Xcel has failed to demonstrate that it and its affiliates lack market power in the transmission constrained control area in which SPS has a dominant generation position. Protestors reference the 2001 Texas Legislature's determination to delay retail competition for SPS until 2007 or later¹⁹ as evidence of recognized market power.

44. Protesters have not raised specific allegations that Xcel has violated its OATT, but rather make the case for the greater need for available transmission capacity in the markets, which is beyond the scope of the instant proceeding. We note, however, that many of the concerns raised relate to lack of transmission capacity and impediments to independent competitors obtaining access to transmission to bring their supplies to market. This is the type of evidence that the April 14 and July 8 Orders anticipated could be considered as part of the Commission's examination of generation market power.²⁰ Therefore, the Commission may consider these issues in the context of the generation market power section 206 investigation instituted herein.

45. The Commission finds that Xcel satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

Other Barriers to Entry

46. Xcel states that it does not have dominant control over sites for generation. Xcel notes that it does not have the ability to frustrate entry due to their control over fuels or fuel delivery systems. Further, Xcel states that its pipeline interests are minor and that since the Commission last found those facilities did not raise market power concerns,²¹ the only change is that Viking Gas Transmission Company was sold to an unaffiliated

¹⁹ Occidental's protest at 2 (citing House Bill No. 1692, now codified at Texas Utilities Code §§ 39.401 *et seq.*).

²⁰ April 14 Order, 107 FERC ¶ 61,108 at P 102, 119 and July 8 Order, 108 FERC ¶ 61,026 at n.84 (explaining that the type of evidence to be considered is historical sales and/or access to transmission to move supplies within, out of, and into a control area).

²¹ *Merger Order*, p. 21.

third party. No intervenors have raised concerns regarding barriers to entry. Based on Xcel's representations, the Commission finds that Xcel cannot erect barriers to entry. However, should Xcel or any of its affiliates deny, delay or require unreasonable terms, conditions or rates for natural gas service to a potential electric competitor in bulk power markets, that electric competitor may file a complaint with the Commission that could result in the suspension of Xcel's authority to sell power at market-based rates.²²

Affiliate Abuse

47. Although Xcel provides a description of its affiliates, Xcel does not address the affiliate abuse and reciprocal dealings part of the Commission's four part market-based rate analysis. In addition, protestors explain that SPS is currently using its market power and affiliate relationships to force its captive customers to subsidize its market-based rate wholesale sales through different fuel pricing structures. Golden Spread/Lyntegar argues that SPS is obtaining a competitive advantage over other sellers in the marketplace due to its ability to shift costs to its native load customers. This protest is being addressed under Docket No. EL05-19-000, *Golden Spread Electric Cooperative, Inc v. Southwestern Public Service Company*, 109 FERC ¶ 61,321 (2004).²³ Golden Spread/Lyntegar filed a motion for an order directing immediate disclosure of market-based rate agreements. Golden Spread/Lyntegar states that their ability to present record evidence is impaired by the refusal of Xcel to provide full copies of its market-based rate agreements that contain the substantive provisions of deals with counterparties to those contracts as required by sections 35.1(a) and (g) of the Commission's Regulations and Order No. 2001.

48. In its March 9 response to the protests raised by Golden Spread/Lyntegar, Xcel states that the Commission should deny their motion for disclosure of market-based rate transaction agreements. Xcel contends that Golden Spread/Lyntegar's protest that their review of the market power analysis for Xcel is "significantly frustrated" by SPS's past refusal to provide them with access to specific transaction confirmation agreements with counterparties is out of context. Xcel explains that those concerns are related to the justness and reasonableness of their present cost-based rates but do not have anything to do with whether it is appropriate to grant SPS or any other Xcel company market-based rate authority in the future and notes that Golden Spread/Lyntegar have already filed a complaint against SPS with respect to its existing cost-based rates, which has been set for hearing. *See Golden Spread Electric Cooperative, Inc., et al. v. Southwestern Public*

²² *See, e.g., Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

²³ On April 26, 2005, an *Order of Chief Judge Terminating Settlement Judge Procedures and Designating Presiding Administrative Law Judge* was issued under Docket No. EL05-19-000, *et al.*

Service Company, 109 FERC ¶ 61,321 (2004) (*Golden Spread v. SPS*). Xcel states that the Electric Quarterly Reports provide all the relevant information to analyze the cost-of-service (issue in Docket No. EL05-19-000 complaint proceeding) and that the relevance of certain agreements with respect to analyzing market power is unclear.

49. Occidental and Golden Spread/Lyntegar further state that in the past SPS has engaged in certain three-way transactions that allowed it to sell power below cost to third parties which in turn sold the power to SPS affiliates at the same price, in violation of the Xcel Joint Operating Agreement (JOA) approved by the Commission.²⁴ They note that some of these complaints were filed with the Commission, docketed as EL05-19-000, and subsequently set for hearing by the Commission. Occidental and Golden Spread/Lyntegar further state that this aspect of SPS's business practices should be addressed in this section 206 proceeding.

50. Occidental overall clarifies that Xcel mischaracterizes Occidental's arguments concerning affiliate abuse and reciprocal dealing engaged in by SPS and its affiliates. Occidental argues that considering that Xcel has been involved in proceedings with the Texas and Colorado Commissions regarding transactions that indicate that SPS and its affiliates have engaged in abusive affiliate behavior the Commission should further investigate Xcel's affiliate behavior.

51. Xcel's failure to address the affiliate abuse and reciprocal dealing part of the Commission's market power analysis provides the basis for the Commission to institute the section 206 proceeding to determine whether Xcel may continue to charge market-based rates. Our decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that Xcel has market power. Accordingly, Xcel is directed, within 30 days of the date of issuance of this order, to make a compliance filing to address the affiliate abuse and reciprocal dealing part of the Commission's market power analysis.

52. In addition, the 206 proceeding we institute herein will also consider concerns raised by intervenors regarding whether Xcel satisfies the Commission's requirements regarding affiliate abuse and reciprocal dealing. However, to the extent the ongoing consolidated hearing ordered by the Commission on December 21, 2004, in Docket No. EL05-19-000 (109 FERC ¶ 61,321), and on December 29, 2004, in Docket No. ER05-168-000 (109 FERC ¶ 61,373), will examine allegations similar to some of those raised by protestors in this proceeding, we will hold the investigation of those issues in this

²⁴ *Energy Services, Inc.*, Docket Nos. ER01-205-000 and ER01-205-001 (January 30, 2001) (unpublished letter order).

proceeding in abeyance pending the outcome of the ongoing consolidated proceedings in Docket Nos. EL05-19-000 and ER05-168-000.

Reporting Requirements

53. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.²⁵ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.²⁶

54. Xcel filed to notify the Commission of recent additions of generation which took effect on July 1, 2004 and of a new total requirements customer on the SPS system and stated that it would report any change in status that would reflect a departure from the characteristics that the Commission relied upon in approving the market-based rate authorizations for PSCo and SPS in their triennial updated market power analyses. Xcel's notification of changes in status from the characteristic that the Commission relied upon in approving the market-based rate authorizations for PSCo and SPS is hereby accepted for filing.

55. Xcel must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.²⁷ Order No. 652 requires that the change in status reporting requirement

²⁵ *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

²⁶ The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

²⁷ *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097 (2005) (Order No. 652).

be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, Xcel is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariffs to incorporate the following provision:

[insert market-based rate seller name] must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

The Commission orders:

(A) Xcel is directed to submit the text-readable powerflow, contingency, monitored facility, super area and transaction files for the PSCo control area simultaneous import capability study, and for the SPS control area simultaneous import capability study submit working papers for historical long-term and short-term network/firm reservation controlled by SPS and its affiliates.

(B) Xcel's updated market power analysis for all relevant markets not subject to the section 206 proceeding instituted herein is hereby conditionally accepted for filing, pending Commission acceptance of the compliance filing directed in Ordering Paragraph (A), as discussed in the body of this order.

(C) Xcel is directed, within 30 days of the date of issuance of this order, to address the affiliate abuse and reciprocal dealing part of the Commission's market power analysis and those concerns of the intervenors raised in this proceeding that are not being addressed in the ongoing consolidated proceedings in Docket Nos. EL05-19-000 and ER05-168-000.

(D) NSP is directed to provide a compliance filing that identifies any current contract it and any of its affiliates have entered into for sales into the SPS or PSCo control areas and requires that, pending the outcome of the investigation initiated herein, to the extent that NSP wishes to make sales into either the SPS or PSCo control areas, it must first receive Commission authorization of the transaction under section 205 of the Federal Power Act.

(E) Xcel's notification of changes in status from the characteristic that the Commission relied upon in approving the market-based rate authorizations for PSCo and SPS is hereby accepted for filing, as discussed in the body of this order.

(F) Xcel is directed, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to incorporate the change in status reporting requirement adopted in Order No. 652.

(G) 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 by the Federal Power Act, particularly section 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), the Commission hereby institutes a proceeding in Docket No. EL05-115-000 to determine the justness and reasonableness of XES's, SPS's, and PSCo's market-based rates in the SPS and PSCo control areas and whether Xcel satisfies the Commission's concerns with regard to affiliate abuse, as discussed in the body of this order. (H) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL05-115-000.

(I) The refund effective date established pursuant to section 206(b) of the FPA will be 60 days following publication in the *Federal Register* of the notice discussed in Ordering Paragraph (F) above.

(J) For the SPS and PSCo control areas, Xcel is directed, within 60 days from the date of issuance of this order, to: (1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates, as discussed in the body of this order.

By the Commission. Commissioner Kelliher dissenting in part with a separate statement attached.

(S E A L)

Linda Mitry,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Xcel Energy Services Inc.	Docket No. ER01-205-007 ER01-205-005 ER01-205-204
Northern States Power Company and Northern States Power Company (Wisconsin)	ER98-2640-005 ER98-2640-004
Public Service Company of Colorado	ER98-4590-003 ER98-4590-002
Southwestern Public Service Company	ER99-1610-010 ER99-1610-009 ER99-1610-008
Xcel Energy Services Inc., Northern States Power Company and Northern States Power Company (Wisconsin), Public Service Company of Colorado, Southwestern Public Service Company and New Century Services, Inc.	EL05-115-000

(June 2, 2005)

Joseph T. KELLIHER, Commissioner *dissenting in part*:

This order institutes a section 206 proceeding to investigate whether Xcel satisfies the Commission's requirements regarding affiliate abuse and reciprocal dealing for purposes of determining whether Xcel may continue to charge market-based rates. I agree with the decision to initiate a 206 proceeding based on Xcel's failure to address the affiliate abuse and reciprocal dealing prong in its updated market power analysis. In my view, failure to address one of the four prongs of the Commission's market power test is essentially the same as failing to make a filing on that prong.

However, I do not agree with the Commission's decision to further address in the section 206 proceeding the allegations raised by intervenors regarding whether Xcel satisfies the Commission's affiliate abuse and reciprocal dealing standards. As I previously explained, in my view, this prong has not been well-defined by the

Commission.¹ However, to the extent the Commission has precedent in this area, expanding the section 206 investigation to examine intervenors' affiliate abuse and reciprocal dealing allegations marks an unexplained departure from past practice.

Our precedent indicates that the Commission has only set affiliate abuse issues for hearing in cases where an intervenor has challenged a proposed sales agreement between affiliates.² But that is not the case here. Instead, the Commission's investigation is based on complaints relating to various three-way transactions that are already the subject of ongoing complaint proceedings, not on allegations of a power sales agreement between Xcel and an affiliate. I believe the parties' complaints should be addressed in the ongoing complaint proceedings, rather than through an expanded investigation of Xcel's market-based rate authority.

It is not my position that the current market power test adequately measures market power. In fact, the Commission has initiated a rulemaking to review the entire market power test, including the affiliate abuse prong.³ In my view, significant changes to our market power test, including redefining or expanding the affiliate abuse prong should be made in the rulemaking where the Commission can have the benefit of notice and comment procedures, rather than in proceedings such as this.⁴ I would continue to apply the same test in this instance, and reserve changes for the rulemaking. For that reason, I dissent in part from this order.

Joseph T. Kelliher

¹ *Southern Companies Energy Marketing, Inc.*, 111 FERC ¶ 61,144 (2005) (Kelliher dissenting in part).

² *E.g., Wisconsin Public Service Corp.*, 109 FERC ¶ 61,319 at 62,523 (2004).

³ *Market-Based Rates For Public Utilities*, RM04-7-000, 107 FERC ¶ 61,019 (2004).

⁴ *Association of Businesses Advocating Tariff Equity v. Hanzlik*, 779 F.2d 697, 701 (D.C. Cir. 1985)(agency is empowered to “order [its] own proceedings and control [its] own docket[]”).