

111 FERC ¶ 61,206
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Xcel Energy Services Inc.

Docket No. ER05-699-000

ORDER ACCEPTING FOR FILING AND SUSPENDING PROPOSED
AMENDMENTS TO GRANDFATHERED AGREEMENTS AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued May 9, 2005)

1. On March 11, 2005, Xcel Energy Services Inc. (Xcel), on behalf of Northern States Power Company-Minnesota (NSP-Minnesota) and Northern States Power Company-Wisconsin (NSP-Wisconsin) (jointly, NSP Companies), filed to amend 11 grandfathered transmission service agreements (GFAs) in order to pass through certain costs associated with the transmission service Xcel obtains from the Midwest Independent System Transmission Operator, Inc. (Midwest ISO) to serve the customers under those GFAs. In this order, we, subject to refund, accept and suspend for a nominal period, the proposed amendments and establish hearing and settlement judge procedures. This order benefits customers because it will result in the proper allocation of costs to GFA customers.

I. Background

2. On April 1, 2005, the Midwest ISO implemented its new Transmission and Energy Markets Tariff (TEMT). Under the TEMT, the Midwest ISO has started "Day 2" operations in its 15-state region, including day-ahead and real-time energy markets and a Financial Transmission Rights (FTR) market.¹

¹ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 107 FERC ¶ 51,191 (2004). Under Day 2 operations, the Midwest ISO will centrally operate competitive bid-based wholesale electricity markets, including a day-head energy market and a real-time energy market, both with locational marginal pricing, and FTRs for hedging congestion

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3. In order to integrate the GFAs with the Midwest ISO's TEMT, the Commission started a three-step investigation of the GFAs under section 206 of the Federal Power Act (FPA)² “to decide whether GFA operations can be coordinated with energy market operations, whether and to what extent the [transmission owners] should bear the costs of taking service to fulfill the existing contracts and whether and to what extent the GFAs should be modified.”³

4. The Commission then issued an order addressing how different categories of GFAs would be treated in the Midwest ISO energy and FTR markets.⁴ The GFAs at issue here fall into two categories: (1) GFAs governed by the just and reasonable standard of review⁵ for which the parties could not reach a settlement as to how the GFAs should be treated in the Midwest ISO’s markets; and (2) GFAs that the parties agreed to integrate under one of three options proposed by the Midwest ISO.⁶

II. Xcel’s Filing

5. Xcel now proposes its plan to pass through the TEMT costs it pays to the Midwest ISO to the customers under the eleven GFAs at issue here. Specifically, Xcel filed: (1) proposed revisions to certain GFAs with transmission service subject to NSP-Minnesota’s Rate Schedule Transmission Service TM-1 (TM-1),⁷ and (2) a new

costs.

² 18 U.S.C. § 824e (2000).

³ See *Midwest Independent Transmission System Operator, Inc.*, 107 FERC ¶ 61,191 (2004), *order on reh’g*, 111 FERC ¶ 61,042 (Procedural Order).

⁴ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,236 (2004), *order on reh’g*, 111 FERC ¶ 61,042 (GFA Order).

⁵ The Commission found that it was just and reasonable to integrate these GFAs into the energy markets. The Commission also noted that this treatment “may affect the bargain between parties to individual GFAs” and that if costs shift between the parties, they may propose modifications to the GFAs to reflect the new costs. *Id.* at P 137 - 138.

⁶ *Id.* at P 264.

⁷ Xcel’s proposal to amend GFAs subject to the TM-1 affects the following NSP-Minnesota contracts: GFA No. 352 with the City of Ada, Minnesota; GFA No. 354 with the City of Fairfax, Minnesota; GFA No. 355 with the City of Hillsboro, North Dakota; GFA No. 357 with the City of Melrose, Minnesota; GFA No. 358 with the City of Sauk Centre, Minnesota; GFA No. 359 with the City of St. James, Minnesota; GFA No. 361 with the City of Sleepy Eye, Minnesota; and GFA No. 362 with Minnesota

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Schedule 12 applicable to NSP Companies' pricing zone under Xcel Operating Companies'⁸ Joint Open Access Transmission Tariff (Joint OATT).⁹

6. Xcel explains that this filing is consistent with the Commission's statement in the GFA Order that proposals may be submitted to recover new costs associated with GFAs subject to a just and reasonable standard of review.¹⁰ Xcel also states that the revisions to TM-1 and the proposed new Schedule 12 will recover costs incurred under the TEMT to meet its GFA obligations, including the Cost Recovery Adder (Schedule 10),¹¹ the Financial Transmission Rights Administrative Service Cost Recovery Adder (Schedule 16),¹² the Energy Market Support Administrative Service Cost Recovery Adder (Schedule 17),¹³ and market-related congestion and uplift charges associated with load that will be charged to NSP Companies by the Midwest ISO.

7. Xcel states that the Commission allows the pass-through of new administrative costs associated with regional transmission organizations (RTOs) (such as Schedules 10, 16 and 17) as well as market-related charges based on load (such as uplift and congestion charges). Xcel explains that it is not seeking to recover certain TEMT costs (*e.g.*, losses) where the individual existing transmission service agreements already recover such costs.

Municipal Power Agency.

⁸ The Xcel Operating Companies include Northern States Power Company-Minnesota, Northern States Power Company-Wisconsin, Public Service Company of Colorado and Southwestern Public Service Company.

⁹ Xcel's proposed new Schedule 12 to the Joint OATT affects the following joint NSP-Minnesota/NSP-Wisconsin contracts: GFA No. 377 with Dairyland Power Cooperative; GFA No. 378 with Southern Minnesota Municipal Power Agency; and GFA No. 379 with Central Minnesota Municipal Power Agency.

¹⁰ GFA Order at P 138.

¹¹ Under Schedule 10, the Midwest ISO recovers its non-market related costs of administering transmission service under the TEMT, including costs of planning and operating the transmission facilities under its control and costs associated with its functioning as North American Electric Reliability Council security coordinator for its region.

¹² Under Schedule 16, the Midwest ISO recovers its costs of implementing and administering FTRs.

¹³ Under Schedule 17, the Midwest ISO recovers its costs of developing, implementing, and operating its energy markets.

It states that, to ensure that customers are not billed twice for the same services, it has taken existing contract provisions into account when determining which new schedule should be applied to which existing transmission service agreement.

8. Xcel requests that the Commission waive the 60-day notice requirement and accept the proposal for filing effective April 1, 2005, subject to refund and the resolution of any procedures ordered by the Commission. It states that good cause exists to grant the waiver since the changes to the GFAs need to take effect April 1, 2005 to coincide with the beginning of the Midwest ISO's Day 2 market and the implementation of the TEMT. Xcel states that its personnel have been focused on implementation issues related to the start-up of the Midwest ISO's markets. In addition, it says that it waited for the Commission to act on its request for rehearing of the GFA Order in order to avoid filing rate changes unnecessarily in case the Commission granted rehearing and determined that the NSP Companies should not be responsible for TEMT costs associated with the GFAs. Finally, Xcel argues that the filing merely passes through market-related costs that were already envisioned by the GFA Order. Accordingly, as the Commission has already approved the costs at issue and each GFA at issue in this filing has already been determined to be subject to the just and reasonable standard of review, good cause exists to waive the Commission's 60-day prior notice requirement. Moreover, Xcel argues, allowing the filing to be accepted effective on April 1, 2005 would be consistent with the GFA Order because it would enable the NSP Companies to avoid trapped costs. Xcel also requests limited waiver of Order No. 614's filing requirements in order to process the large number of revisions before April 1, 2005.¹⁴

III. Notice, Interventions and Protests

9. Notice of Xcel's filing was published in the *Federal Register*, 70 Fed. Reg. 15,079 (2005), with interventions and protests due on or before April 1, 2005. Timely motions to intervene were filed by Missouri River Energy Services and Southern Minnesota Municipal Power Agency. Timely motions to intervene and protests were filed by: (1) jointly, Hillsboro Municipal Utilities, Sauk Centre Public Utilities and St. James Public Utility (collectively, Cities); (2) Central Minnesota Municipal Power Agency (Central Minnesota); and (3) Dairyland Power Cooperative (Dairyland).

¹⁴ See *Designation of Electric Rate Schedule Sheets*, Order No. 614, 65 Fed. Reg. 18,221, FERC Stats. & Regs. ¶ 31,096 (2000).

10. Cities state that Xcel's filing is inconsistent with a June 24, 2004 joint agreement filed by Xcel and the Cities that resolved the TEMT cost responsibility for their GFAs. They assert that under the terms of the joint agreement, they are only responsible for Schedule 16 and 17 charges and, therefore, Xcel is not permitted to recover from them Schedule 10, uplift, and congestion charges. Moreover, Cities state that, because they settled on Option B under the TEMT for treatment of their GFAs,¹⁵ they are not subject to any congestion costs when the scheduling entity submits its bilateral transaction schedule a day ahead.

11. Cities assert that Schedule 10 predates their GFAs and that the proposed pass-through of Schedule 10, uplift and congestion charges as new services should not be permitted because they are not new. They argue that the Commission found in Opinion Nos. 459 and 459-A¹⁶ that uplift and congestion are essentially redispatch costs

¹⁵ The Midwest ISO proposed to require GFA parties to schedule and settle their GFA transactions under the Midwest ISO's Energy and FTR Markets through one of three options. Option A of the TEMT requires the GFA Responsible Entity (the entity responsible for financially settling the GFA transactions under the TEMT) to nominate and hold FTRs in order to transact under GFAs. The Midwest ISO assesses congestion charges and the cost of losses for all transactions under the GFA. Option B provides that the GFA Responsible Entity will not nominate or receive FTRs. The Midwest ISO will charge the GFA Responsible Entity the cost of congestion for all transactions pursuant to the GFA, but if the GFA Scheduling Entity (the entity responsible for scheduling the GFA transaction under the TEMT) submits the bilateral transaction schedule a day ahead, the Midwest ISO will credit back to the GFA Responsible Entity the costs of congestion resulting from day-ahead schedules that the GFA Responsible Entity clears in the day-ahead market. The Midwest ISO will also charge the GFA Responsible Entity the cost of losses for all transactions under the GFA; then, if the GFA Scheduling Entity has timely submitted a conforming schedule for the GFA, the Midwest ISO will credit back to the GFA Responsible Entity the difference between marginal losses and system losses at the GFA source and sink points. Option C requires the GFA Responsible Entity to pay the costs of congestion for all GFA transactions. In the GFA Order, the Commission approved all three options for those GFAs for which the parties filed settlements by the deadline established in the Procedural Order, and approved Options A and C for all other GFAs that are subject to the TEMT, either voluntarily or through the requirements of the GFA Order.

¹⁶ *Pacific Gas & Electric Company*, Opinion No. 459, 100 FERC ¶ 61,160, *reh'g denied*, Opinion No. 459-A, 101 FERC ¶ 61,139 (2002).

and are not permitted to be passed through to customers as new services under grandfathered firm transmission service contracts. In addition, they state that Xcel failed to clarify how Schedule 10, uplift and congestion charges will be allocated to each GFA customer or how such charges will be calculated. Thus, Cities request that Xcel's proposal to recover Schedule 10 and market-related congestion and uplift charges be rejected; if not rejected, Cities ask that the proposal be set for hearing.

12. Central Minnesota also requests that Xcel's filing be set for hearing. The hearing should examine the language and contractual intent of each GFA as well as the justness and reasonableness of assessing potentially volatile congestion costs on GFA customers. In addition, Central Minnesota states that the hearing should address the manner in which Xcel will handle offsets to congestion charges. It also argues that mechanisms need to be established for GFA customers to examine the charges assessed to them in addition to a dispute resolution process through which they can address potential erroneous charges. Finally, Central Minnesota states that Xcel has not demonstrated good cause for waiver of the 60-day notice requirement.

13. Dairyland states that the filing should be rejected because Xcel did not file cost support for the proposed rate increase. In the alternative, the Commission should investigate the justness and reasonableness of the NSP Companies' rates and revenue requirements. Dairyland argues that the fact that the Commission has accepted rates as part of the Midwest ISO OATT and TEMT does not mean that the pass-through of those charges under the Joint OATT is just and reasonable. Dairyland also states that Xcel has not shown that its proposal to pass through Midwest ISO charges is necessary to avoid inappropriate cost shifting, and that Xcel has not shown that these charges are related to new services not already provided for in GFA No. 377. Dairyland asserts that the pass-through of the Midwest ISO charges would be contrary to the voluntary approach to RTO formation outlined in Order No. 2000,¹⁷ stating that any additional Midwest ISO-related costs are the result of NSP Companies' voluntary decision to participate in the Midwest ISO, a decision Dairyland could not influence.

14. Dairyland also argues that the settlement agreements that affect GFA No. 377 contemplate RTO-provided services and address the cost responsibility of existing transmission customers for such services. Further, Xcel has not acted consistently in

¹⁷ *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 at 31,028 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), FERC Stats. & Regs. ¶31,092 (2000), *aff'd sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

choosing which costs to pass through. For example, Xcel proposes to pass through costs associated with congestion management, but it does not propose to pass through energy imbalance and loss charges. Dairyland says that this is because the provisions for imbalances and losses in the existing agreements favor Xcel more than they would if they were modified to pass through Midwest ISO's costs. It is not just and reasonable, according to Dairyland, to allow Xcel to preserve those portions of the agreement that benefit Xcel, and modify only those portions that do not.

15. Furthermore, Dairyland asserts that it is not clear how Xcel proposes to recover Schedule 16 charges, or how Schedule 16 charges and congestion charges relate to each other. Dairyland argues that, since Xcel is the only party that can acquire FTRs in connection with its GFAs, it would not be just and reasonable to allow Xcel to pass through congestion charges related to its contract. If Xcel can pass through to Dairyland Schedule 16 charges and congestion charges, Dairyland asserts that Xcel will not have any incentive to prudently manage the risk of congestion, and would have an incentive to maximize the exposure of Dairyland (an Xcel competitor) to congestion charges.

16. Dairyland states that Xcel's failure to file cost support is sufficient reason for a five-month suspension. Moreover, it argues, Xcel's newly proposed rates may be "substantially excessive." Dairyland also states that Xcel has not demonstrated good cause for waiver of the 60-day notice requirement.

17. On April 18, 2005, Xcel filed an answer to the various protests. On April 29, 2005, Dairyland filed an answer to Xcel's answer.

IV. Discussion

A. Procedural Matters

18. 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. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the answer filed by Xcel or the answer filed by Dairyland and will, therefore, reject them.

B. Commission Decision

19. Our preliminary analysis of Xcel's filing indicates that it has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, we will accept Xcel's filing, suspend it for a nominal period, to become effective May 10, 2005, sixty days after the date of filing, subject to refund, and set it for hearing and settlement judge procedures.

20. Absent a strong showing of good cause, the Commission's policy is to deny requests for waiver of prior notice for rate increases when the rate change and the effective date are not prescribed by contract.¹⁸ Xcel has not made such a showing. It states that its personnel have been focused on implementation issues related to the start up of the Midwest ISO's markets. However, the Commission has found that justifications such as the press of other company business simply will not be accepted as sufficient demonstration of good cause for waiver.¹⁹ In addition, Xcel states that it waited for the Commission to act on its request for rehearing of the GFA Order in order to avoid filing for rate changes unnecessarily if the Commission granted rehearing and determined that the NSP Companies should not be responsible for TEMT costs associated with the GFAs in the first instance. However, Xcel does not explain why it could not have timely filed an application to take effect April 1, 2005 in the event that rehearing was denied. Indeed, Xcel participated in such a timely filing made jointly by the Midwest ISO transmission-owning members to pass through TEMT costs to customers under another group of GFAs.²⁰ Accordingly, the Commission will deny the request to waive the 60-day prior notice requirement for failure to show good cause, but will grant Xcel's request for limited waiver of Order No. 614's filing requirements.

21. The hearing and settlement judge procedures ordered below must address, among other things, what modifications to the rate proposal (if any) are necessary to better define what charges are properly passed through to GFA customers. Specifically, the proceedings must: (1) evaluate whether the existing rates in the grandfathered agreements already provide Xcel an opportunity to recover the costs it proposes to pass

¹⁸ See, e.g., *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106 at 61,339, order on reh'g, 61 FERC ¶ 61,089 (1992).

¹⁹ *Id.* at ¶ 61,337.

²⁰ *Transmission Owners of the Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,339 (2005).

through that are not associated with new services; (2) address what adjustments are necessary to ensure that the GFA customers will not be double-charged for services already included in their contracts; and (3) address what other adjustments to the proposed pass-through are necessary to ensure that the rates are just and reasonable.²¹

22. While we are setting the filing for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes 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, under Rule 603 of the Commission's Rules of Practice and Procedure.²² If the parties desire, they may request a specific judge as a settlement judge in the proceeding; otherwise the Chief Judge will select a judge for this purpose.²³ 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 the commencement of a trial-type evidentiary hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Xcel's proposed amendments to GFAs with transmission service subject to NSP-Minnesota's Rate Schedule Transmission Service TM-1, and new Schedule 12 applicable to NSP Companies' pricing zone under Xcel Operating Companies' Joint OATT, are hereby accepted for filing and suspended for a nominal period, to become effective on May 10, 2005, subject to refund, as discussed in the body of this order.

²¹ The Commission found that Midwest ISO Schedules 10 and 17 are new services for a group of GFAs at issue in *Transmission Owners of the Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,339 at P 38 (2005). The Commission, as a result, requested a compliance filing to identify all credits that the transmission owners receive under the Midwest ISO tariff-based Schedule 10 and 17 charges and provide for an offset of charges by the amount of such credits. *Id.* at P 55.

²² 18 C.F.R. § 385.603 (2004).

²³ If the parties decide to request a specific judge, they must make their request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience, available at: <http://www.ferc.gov/about/offices/oalj/oalj-dj.asp>.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory 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), a public hearing shall be held concerning the proposed amendments, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (C) and (D) below.

(C) 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 these proceedings 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 by telephone within five (5) days of the date of this order.

(D) Within sixty (60) 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 every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) 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 Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 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. Commissioner Kelliher dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Xcel Energy Services, Inc.

Docket No. ER05-699-000

(Issued May 9, 2005)

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

I agree with the Commission's decision to set for hearing Xcel's proposal to amend eleven GFAs to pass through costs it incurs under the Midwest ISO's TEMT to its customers under those GFAs. However, in setting the proposal for hearing, the order observes that the Commission previously determined that Midwest ISO's schedules 10 and 17 constitute "new services."²⁴ I disagree with the order to the extent it relies on the Commission's prior new services ruling. As I previously explained, I believe that the question of whether the customers are in fact receiving new services should be included among the issues set for hearing.²⁵ That is the approach the Commission has taken in other cases involving "new services" claims,²⁶ and I dissent from this order to the extent that the Commission departs from that practice and instead relies on its earlier determination that Midwest ISO's schedules 10 and 17 are new services.

Joseph T. Kelliher

²⁴ Order at n.21, citing *Transmission Owners of the Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,339 at P 38 (2005) (March 24 Order).

²⁵ March 24 Order (Kelliher dissenting); *See also, Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,337 at 62,313 (2004) (Kelliher concurring).

²⁶ *See Otter Tail Power Company*, 110 FERC ¶ 61,220 (2005); *California Independent System Operator Corp.*, 93 FERC ¶ 61,337 (2000); *Pacific Gas & Electric Company*, 90 FERC ¶ 61,020 (2000).