

105 FERC ¶61,187  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

NRG Marketing Services LLC

Docket Nos. ER03-955-000  
and ER03-955-001

ORDER ACCEPTING MARKET-BASED RATE TARIFF AS MODIFIED

(Issued November 10, 2003)

1. In this order, the Commission accepts a proposed market-based rate wholesale power sales tariff<sup>1</sup> submitted by NRG Marketing Services LLC (NMS), subject to the compliance filing directed below. As discussed below, the code of conduct submitted by NMS is consistent with the Commission's requirements and also is accepted for filing, subject to modification. We also grant certain blanket waivers and authorizations under the Commission's regulations consistent with those granted to other entities with market-based rate authorization. This order benefits customers by authorizing a new market entrant in the electricity marketplace.

**Background**

2. On June 16, 2003, NMS filed, under Section 205 of the Federal Power Act (FPA),<sup>2</sup> an application requesting that the Commission: (1) accept for filing its proposed market-based Rate Schedule FERC No. 1, including a Statement of Policy and Code of Conduct; (2) grant blanket authority to make wholesale sales of capacity, energy, and ancillary services at market-based rates; and (3) grant such waivers and blanket authorizations as the Commission has granted in the past to other non-franchised entities with market-based rate authority. NMS requests an effective date of August 15, 2003, 60 days from the date of its original filing.

3. NMS, a wholly-owned subsidiary of NRG Energy, Inc. (NRG), which is in turn a wholly-owned subsidiary of Xcel Energy Inc. (Xcel Energy), states that it does not own any electric generation, distribution or transmission facilities.

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<sup>1</sup> Rate Schedule FERC No. 1, Original Sheet Nos. 1-5.

<sup>2</sup> 16 U.S.C. § 824d (2000).

4. On May 14, 2003, NRG and certain of NRG's subsidiaries, including NRG Power Marketing, Inc. (PMI), filed voluntary petitions for reorganization under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York.<sup>3</sup>

5. In its filing, NMS notes that NRG is a wholly-owned subsidiary of Xcel Energy, but upon the implementation of the plan of reorganization, the ownership interests, direct and indirect, of Xcel Energy in NRG and its subsidiaries will terminate. The SMA analysis submitted with NMS' application for market-based rates excludes the control areas of the Xcel Energy Utility Operating Companies (Xcel Energy control areas),<sup>4</sup> because NMS commits that it will not make any power sales into any Xcel Energy control areas until the control areas are part of an approved and operating regional transmission organization (RTO) or independent system operator (ISO) with a Commission-approved market monitoring plan and mitigation measures, or upon further application to the Commission once NMS and Xcel Energy are no longer affiliated.<sup>5</sup>

6. On August 8, 2003, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a deficiency letter requesting that NMS provide an SMA analysis for Xcel Energy consistent with AEP.<sup>6</sup> The deficiency letter noted that NMS is currently a wholly-owned indirect subsidiary of Xcel Energy and that NMS requests an effective date prior to the termination of its affiliation with Xcel Energy and prior to Xcel Energy joining an RTO with Commission-approved market monitoring and mitigation.

7. On September 12, 2003, NMS submitted a response to Commission Staff's deficiency letter, arguing that there was no need to perform an SMA analysis and requesting that the deficiency letter be withdrawn because, among other things, NRG expects to obtain approval to sever its affiliation with Xcel Energy by December 15, 2003, and NRG proposes to prohibit sales into the Xcel Energy control areas. NRG maintains that its commitment is the best remedy to address market power concerns

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<sup>3</sup> In re NRG Energy, Inc., et al., Case No. 03-13024 (Bankr. S.D.N.Y. 2003).

<sup>4</sup> The Xcel Operating Companies are the public utility subsidiaries of Xcel Energy, namely, Northern States Power Company (NSP), Northern States Power Company (Wisconsin) (NSP-W), Public Service Company of Colorado (PSCo), Southwestern Public Service Company (SPS) and Cheyenne Light, Fuel and Power Company (Cheyenne).

<sup>5</sup> NMS June 16 Filing at 10.

<sup>6</sup> AEP Power Marketing, Inc., et al., 97 FERC ¶ 61,219 at 61,970 (2001) (AEP), reh'g pending.

regarding the Xcel Energy control areas, without depriving the other markets of a market entrant.

8. Notwithstanding its objection to the deficiency letter, NMS submitted an SMA analysis as set forth in AEP. NMS states that it fails the SMA screen in the Xcel Energy control areas. NMS argues that one of the shortcomings of the SMA screen is that it is likely to produce false positive indicators of market power which evaluate control areas of incumbent utilities.

### **Notices, Interventions, Protests and Answers**

9. Notice of NMS' June 16, 2003 filing was published in the Federal Register, 68 Fed. Reg. 37,806 (2003), with comments, protests and interventions due on or before July 7, 2003. Timely motions to intervene and protests were filed by Richard Blumenthal, Attorney General for the State of Connecticut (Connecticut Attorney General), and Northeast Utilities Service Company (NUSCO), on behalf of itself and the Connecticut Light and Power Company (CL&P).

10. Notice of NMS' September 12, 2003 response to Commission Staff's deficiency letter was published in the Federal Register, 68 Fed. Reg. 56,282 (2003), with comments, protests and interventions due on or before October 3, 2003. A timely motion to intervene for a limited purpose and comment was filed by Xcel Energy Services Inc. (XES), on behalf of Xcel Energy Operating Companies.<sup>7</sup>

11. The Connecticut Attorney General and NUSCO urge the Commission to reject NMS' June 16 filing. According to the protestors, among other things, NMS' market-based rate application is inadequate and incomplete, and raises a concern of whether granting of such authority will enable and/or encourage another NRG affiliate, PMI, now in bankruptcy, to walk away from its electric supply obligations in New England. NUSCO asks the Commission to establish an evidentiary hearing to investigate the potential for the exercise of market power in Connecticut and consider remedies that will protect Connecticut retail customers from paying excessive prices for their electric power.

12. XES believes that Commission Staff erred in its determination that NMS and Xcel Operating Companies are affiliates, as that term is defined by the Commission's regulations.<sup>8</sup> XES states that NMS, a wholly-owned subsidiary of NRG, is no longer under the control of Xcel Energy as a result of the NRG bankruptcy proceeding. XES

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<sup>7</sup> XES is the service company subsidiary of Xcel Energy, and as such appears in proceedings before the Commission on behalf of Xcel Energy Operating Companies.

<sup>8</sup> See 18 C.F.R. § 161.2 (2003).

asserts that control over NRG has been assumed by a board independent of Xcel Energy, and thus Xcel Energy has no “authority to direct or cause the direction of the management or policies of”<sup>9</sup> NMS. According to XES, the Xcel Energy Operating Companies should not be deemed to be affiliates of NRG or any other NRG company for purposes of analyzing market power, because Xcel Energy no longer has control over the activities of NRG.<sup>10</sup>

## **Discussion**

### **A. Procedural Matters**

13. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure,<sup>11</sup> the timely, unopposed motions to intervene serve to make the filing entities parties to this proceeding.

### **B. Commission Decision**

#### **Overview**

14. 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. For an affiliate of a transmission-owning public utility to demonstrate the absence or mitigation of market power, the public utility must have on file with the Commission an open access transmission tariff for the provision of comparable services. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.<sup>12</sup>

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<sup>9</sup> Id.

<sup>10</sup> Given our acceptance in this proceeding of NMS’ commitment to prohibit sales into the Xcel control areas, we need not address XES’ arguments in this regard.

<sup>11</sup> 18 C.F.R. § 385.214 (2003).

<sup>12</sup> E.g., Progress Power Marketing, Inc., 76 FERC ¶ 61,155 at 61,919 (1996), Letter Order Approving Settlement, 79 FERC ¶ 61,149 (1997); Northwest Power Marketing Co., L.L.C., 75 FERC ¶ 61,281 at 61,899 (1996); accord, Heartland Energy Services, Inc., et al., 68 FERC ¶ 61,223 at 62,062-63 (1994).

## Generation Market Power

### Sales Into an RTO or ISO with Commission-Approved Market Monitoring and Mitigation

15. In AEP, the Commission announced a new market power screen for measuring generation dominance, the SMA, to be applied to market-based rate applications on an interim basis pending a generic review of new methods for analyzing market power.<sup>13</sup> The Commission found that all sales, including bilateral sales, into an RTO or ISO with Commission-approved market monitoring and mitigation will be exempt from the SMA and, instead, will be governed by the specific thresholds and mitigation provisions approved for particular markets.<sup>14</sup>

16. NMS states that it intends to sell into the California Independent System Operator (CAISO), PJM Interconnection, L.L.C. (PJM), ISO-New England, Inc. (ISO-NE) and New York Independent System Operator, Inc. (NYISO) markets, which have Commission-approved market monitoring and mitigation in place. NMS argues that it “is exempt from the SMA and instead is governed by the specific thresholds and mitigation approved for sales”<sup>15</sup> into the ISO markets.

17. The Connecticut Attorney General and NUSCO dispute NMS’ contention that it should be exempt from the SMA screen for market-based rate sales into New England. They argue that, in contrast to the circumstances envisioned in AEP, NRG (NMS’ affiliate) would control substantial generation in well-defined load pockets in New England where crucial market mitigation rules either are untried and untested or have yet to be developed or implemented.<sup>16</sup> The Connecticut Attorney General and NUSCO argue that the Commission authorized the adoption of Standard Market Design, or Market Rule 1, in New England, which established new standards for evaluating and mitigating

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<sup>13</sup> 97 FERC at 61,969.

<sup>14</sup> Id.

<sup>15</sup> NMS June 16 Filing at 8.

<sup>16</sup> According to the Connecticut Attorney General, NMS’ affiliates have 2,000 MW of installed capacity in Connecticut, translating into market shares of nearly 50 percent and over 85 percent in the load pockets of southwest Connecticut and the Norwalk-Stamford sub-area, respectively.

market power in New England.<sup>17</sup> Moreover, the Connecticut Attorney General and NUSCO argue that the Commission has authorized the adoption of a Peaking Unit Safe Harbor (PUSH) bid mechanism which reduced the rigor of the market power mitigation rules in ISO-NE. NUSCO requests that the Commission reject NMS' application for market-based rate authority in New England and hold a hearing to investigate the potential for the exercise of market power in Connecticut.

18. As indicated, NMS proposes to sell electric power into the California, PJM, New England and New York ISO markets. On this basis, NMS is exempt from the SMA and, instead, is governed by the specific thresholds and mitigation provisions the Commission has approved for sales in the CAISO,<sup>18</sup> PJM,<sup>19</sup> ISO-NE,<sup>20</sup> and NYISO<sup>21</sup> markets. However, we recognize that there are market power concerns in ISO-NE and, in particular, in southwest Connecticut. As the Connecticut Attorney General and NUSCO point out, we have, on an ongoing basis, approved modifications and changes to ISO-NE's market monitoring and mitigation program. This approach is consistent with our precedent. While ISO-NE's market monitoring and mitigation is sufficient to exempt sellers from the SMA, the Commission has the obligation under the FPA to ensure that rates in the ISO-NE market remain just and reasonable and, in order to meet this statutory responsibility, it may modify or adjust the market monitoring and mitigation in Section 205 and 206 proceedings involving ISO-NE (or its successor RTO).<sup>22</sup> Thus, to the extent that interveners have concerns regarding the ISO-NE market monitoring and mitigation program, those concerns are more appropriately addressed in other proceedings.

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<sup>17</sup> See Connecticut Attorney General Protest at 5-6, citing New England Power Pool and ISO New England, Inc., 101 FERC ¶ 61,344 (2002), order on reh'g, 103 FERC ¶ 61,304 (2003); New England Power Pool and ISO New England, Inc., et al., 100 FERC ¶ 61,287 (2002).

<sup>18</sup> See, e.g., California Comprehensive Market Redesign Proposal, 100 FERC ¶ 61,060 (2002) (Market Redesign Proposal), order on reh'g, 101 FERC ¶ 61,061 (2002).

<sup>19</sup> See, e.g., PJM Interconnection, L.L.C., 86 FERC ¶ 61,247 (1999); and Atlantic City Electric Company, et al., 86 FERC ¶ 61,248, clarified, 86 FERC ¶ 61,310 (1999).

<sup>20</sup> See, e.g., New England Power Pool, 85 FERC ¶ 61,379 (1998), reh'g denied, 95 FERC ¶ 61,074 (2001).

<sup>21</sup> See, e.g., New York Independent System Operator, Inc., et al., 89 FERC ¶ 61,196 (1999); and New York Independent System Operator, Inc., et al., 90 FERC ¶ 61,317 (2000).

<sup>22</sup> See GNE, LLC, 97 FERC ¶ 61,286 at 62,293 & n.5 (2001).

### **Sales Into Non-RTO/Non-ISO Markets**

19. NMS submits SMA analyses for the Ameren, Commonwealth Edison Company, Entergy, Nevada Power Company, Louisiana Generating LLC (LA Gen), Oklahoma Gas and Electric, Tennessee Valley Authority and Virginia Power control areas to determine whether NMS' affiliated capacity is pivotal in each of these control areas. The SMA analyses submitted by NMS conclude that NMS and its affiliates are not pivotal suppliers in these markets.

20. NMS explains that its SMA analysis excludes the control areas of the Xcel Energy Operating Companies because NMS commits not to make any power sales into any Xcel Energy control areas under this market-based rate authorization until the control areas are part of an approved and operating RTO or ISO with Commission-approved market monitoring plan and mitigation measures, or upon further application to the Commission once NRG and Xcel Energy are no longer affiliated.<sup>23</sup>

21. We note that the supplemental SMA analysis submitted by NMS concludes that NMS fails the SMA screen in the Xcel Energy control areas.

22. We have reviewed NMS' commitment to prohibit sales into the Xcel Energy control areas<sup>24</sup> and the supplemental SMA analysis. We will accept NMS' commitment, and, on this basis, we find that NMS complies with the Commission's requirements pertaining to generation market power for approval of market-based rates and NMS's market-based rate tariff is accepted for filing, subject to the compliance filing directed herein.

### **Transmission Market Power**

23. NMS states that it does not own, operate, or control any jurisdictional transmission facilities. NMS states that all of its transmission-owning affiliates except LA Gen have OATTs on file with the Commission, and further, that none of NMS' transmission-owning affiliates own transmission facilities in California, PJM, New England or New York.<sup>25</sup> NMS argues that the LA Gen transmission facilities are used exclusively for the delivery of power from a particular generating facility or to an individual wholesale customer and are not part of a franchised service territory. NMS states that the Commission has previously found that such facilities are "limited, discrete and do not

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<sup>23</sup> See NMS June 16 Filing at 10.

<sup>24</sup> See NMS September 12 Response at 2.

<sup>25</sup> Specifically, NSP, NSP-W, PSCo, SPS and Cheyenne all have on file OATTs with the Commission.

comprise an integrated transmission system,” and granted LA Gen’s request for waiver of compliance with Order Nos. 888 and 889.<sup>26</sup>

24. We find that NMS satisfies the Commission’s transmission market power standard for approval of market-based rates.

### **Other Barriers to Entry**

25. NMS states that NRG owns no pipeline interests and that Xcel Energy’s pipeline interests are very minor and remote from NRG’s generation. NMS claims that neither it nor any of its affiliates own or control fuel supplies, unique land sites, or other inputs to electric power generation that could be used to prevent competitors from entering the market, and neither NMS nor any of its affiliates own or control a construction or engineering firm that could engage in the construction of generation or transmission facilities.

26. Based on these representations, we are satisfied that NMS and its affiliates cannot erect barriers to entry.

### **Affiliate Abuse Concerns**

27. NMS provides a proposed Statement of Policy and Code of Conduct which prescribes the manner in which NMS will interact with its franchised public utility affiliates. NMS includes a reference to “NRG New Jersey Energy Sales LLC” which appears to be incorrect. NMS is directed to correctly state the entities to which the Code of Conduct applies.

28. In addition, NMS’ proposed rate schedule prohibits sales to or purchases from its affiliates absent approval from the Commission under Section 205 of the FPA. However, the proposed rate schedule language does not state “without first receiving” such approval.<sup>27</sup> Accordingly, NMS is required to amend its rate schedule to include such language. With the modifications discussed above, the NMS code of conduct meets the Commission’s requirements.

### **Sale of Ancillary Services**

29. NMS requests authority to engage in the sale of certain ancillary services (listed in the proposed tariff) at market-based rates into the markets administered by the ISO-NE, PJM, NYISO, and CAISO. Consistent with Commission precedent granting blanket

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<sup>26</sup> AmerGen Vermont, LLC, et al., 90 FERC ¶ 61,307 at 61,994 (2000).

<sup>27</sup> See Aquila, Inc., 101 FERC ¶ 61,331 at P 7-9, 12 (2002).



authority to sellers to engage in such transactions in those markets, the Commission will grant NMS' request.<sup>28</sup> NMS also requests authority to sell other ancillary services in additional markets that the Commission may authorize in the future. We will grant this request; however, this grant does not relieve NMS of the requirement to have current and complete tariffs on file with the Commission, pursuant to 18 C.F.R. § 35.1 (2003).<sup>29</sup>

30. NMW also includes in its proposed market-based rate tariff a provision to make sales of ancillary services consistent with the Commission's requirements set forth in Avista.<sup>30</sup> As these provisions are consistent with Avista, the Commission will grant the request.

### **Reassignment of Transmission Capacity**

31. NMS seeks Commission authorization for the reassignment of transmission capacity. We will grant NMS' request because it is consistent with the Commission's requirements.<sup>31</sup>

### **Creation of a Replacement Power Marketer**

32. The Connecticut Attorney General and NUSCO have raised a concern that NRG may intend to create another affiliate, *i.e.* NMS, with market-based rate authority in New England to effectively replace PMI, and allow NRG to continue to benefit through full participation in the market, leaving PMI as a corporate shell with its contract counterparties, such as CL&P, lacking any recourse to enforce PMI's obligations. NRG and certain of its affiliates, including PMI, are in bankruptcy. Under a Standard Offer Service Agreement (SOS) with CL&P, PMI is obligated to supply approximately one-third of all Connecticut load through December 31, 2003. In its bankruptcy proceeding, PMI sought

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<sup>28</sup> See, e.g., New England Power Pool, 85 FERC ¶ 61,379 (1998), reh'g denied, 95 FERC ¶ 61,074 (2001); Atlantic City Electric Company, et al., 86 FERC ¶ 61,248, clarified, 86 FERC ¶ 61,310 (1999); Central Hudson Gas & Electric Corporation, et al., 86 FERC ¶ 61,062, order on reh'g, 88 FERC ¶ 61,138 (1999); AES Redondo Beach, L.L.C., et al., 85 FERC ¶ 61,123 (1998), order on reh'g, 87 FERC ¶ 61,208 (1999), order on reh'g and clarification, 90 FERC ¶ 61,036 (2000).

<sup>29</sup> See Calhoun Power Company, LLC, 96 FERC ¶ 61,056 at 61,166 (2001).

<sup>30</sup> See Avista Corp., 87 FERC ¶ 61,223, order on reh'g, 89 FERC ¶ 61,136 (1999) (Avista).

<sup>31</sup> See Reliant Energy, Inc., et al., 91 FERC ¶ 61073 at 61,258 (2000); Select Energy, Inc., 85 FERC ¶ 61,290 at 62,182 (1998); Enron Power Marketing, Inc., 81 FERC ¶ 61,277 (1997).

to reject the SOS Agreement.<sup>32</sup> The Connecticut Attorney General argues that under Commission precedent, the grant and continued exercise of market-based rate authority requires that, in addition to showing a lack of undue market power, grantees adhere to proper business conduct and practices.<sup>33</sup> Thus, the Connecticut Attorney General asserts that the Commission should not allow NRG to seek to replace PMI, the affiliate in financial trouble, with NMS, but instead should require the established affiliates to carry out their obligations to customers and the market. NUSCO asks that the Commission require NMS to comply with PMI's obligations under the SOS Agreement, if NMS is granted market-based rate authority in Connecticut.

33. The Connecticut Attorney General's and NUSCO's concern that PMI will be able to walk away from its obligations under the SOS Agreement is beyond the scope of this proceeding.

### **Waivers, Authorizations and Reporting Requirements**

34. NMS requests the following waivers and authorizations: (1) waiver of 18 C.F.R. § 35.3 to the extent necessary for its rate schedule to take effect on or before August 15, 2003; (2) waiver of Subparts B and C Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except as to Sections 35.12(a), 35.13(b), 35.15 and 35.16; (3) waiver of Parts 41, 101 and 141 of the Commission's accounting and periodic reporting requirements; (4) waiver of Part 45 of the Commission's regulations pertaining to interlocking directors, except to the extent that filing of abbreviated statements by an officer or director of the Applicant's holding (or proposing to hold) interlocking positions may be required; (5) blanket pre-approval under FPA Section 204 and Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability, if there are no objections within 30 days of the Commission's order; and (6) such other further relief as the Commission may deem appropriate.

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<sup>32</sup> In re NRG Energy, Inc., et al., Case No. 03-13024 (Bankr. S.D.N.Y. 2003).

<sup>33</sup> Connecticut Attorney General Protest at 8, citing Enron Power Marketing, Inc., et al., 103 FERC ¶ 61,343 (2003).

35. We will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.<sup>34</sup> Notwithstanding the waiver of the accounting and reporting requirements here, we expect NMS to keep its accounting records in accordance with generally accepted accounting principles.

36. 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.<sup>35</sup> Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.<sup>36</sup> Accordingly, NMS must file its first Electronic Quarterly Report no later than 30 days after the first quarter NMS' rate schedule is in effect.

37. Additionally, we will direct NMS to inform the Commission promptly of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing. These characteristics include, but are not limited to: (1) ownership of generating or transmission facilities or inputs to electric power production other than fuel supplies; or (2) affiliation with any entity not disclosed in the filing that owns generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area.<sup>37</sup>

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<sup>34</sup> It should be noted that the Commission is examining the issue of continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101 and 141) as well as continued applicability of the blanket authorization for the issuance of securities and the assumption of obligations and liabilities, (18 C.F.R. Part 34). See Accounting and Reporting of Financial Instruments, Comprehensive Income, Derivatives and Hedging Activities, Order No. 627, 67 Fed. Reg. 67,691 at P 23 and P 24 (October 10, 2002), FERC Stats. & Regs. ¶ 32,558 (2002).

<sup>35</sup> Revised Public Utility Filing Requirements, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Regs. & Stats. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001.

<sup>36</sup> The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b.

<sup>37</sup> See, e.g., Morgan Stanley Capital Group, Inc., 69 FERC ¶ 61,175, 61,695 (1994), order on reh'g, 72 FERC ¶ 61,082 (1995); InterCoast Power Marketing Co., 68 FERC ¶ 61,248 at 62,134 (1994), order clarified, 68 FERC ¶ 61,324 (1994).

Alternatively, NMS may elect to report such changes in the updated market analysis it will be required to file every three years.<sup>38</sup>

### **Other Matters**

38. Acceptance of NMS' market-based rate tariff is subject to any tariff condition adopted by the Commission in Docket No. EL01-118. Within 15 days of the date of issuance of an order adopting a tariff condition in Docket No. EL01-118, NMS is directed to make a compliance filing in the instant proceeding to amend its tariff accordingly.

### **Effective Date**

39. We will allow an effective date of August 15, 2003, as requested by NMS.

#### The Commission orders:

(A) NMS' market-based rate schedule is hereby accepted for filing, as discussed in the body of this order, subject to the compliance filing directed herein, effective August 15, 2003.

(B) Within 15 days of the date of this order, NMS shall file a revised rate schedule to include its commitment not to make any power sales into any Xcel Energy control areas, to include a prohibition on sales to or purchases from affiliates "without first receiving" approval from the Commission under Section 205 of the FPA, and to correctly state the entities to whom the code of conduct applies.

(C) NMS' request for waiver of Parts 41, 101 and 141 of the Commission's regulations is hereby granted, with the exception of 18 C.F.R. §§ 141.14, 141.15 (2003) (providing for the filing both of the Form No. 80 and of the Annual Conveyance Report).

(D) Within 30 days of the date of issuance of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by NMS should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214 (2003).

(E) Absent a request to be heard within the period set forth in Ordering Paragraph (D) above, NMS is hereby authorized to issue securities and assume obligations or liabilities as guarantor, indorser, surety, or otherwise in respect of any

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<sup>38</sup> The Commission reserves the right to require such an analysis at any time.

security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of NMS, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(F) Until further order of this Commission, the requirements of Part 45 of the Commission's regulations, except as noted below, are hereby waived with respect to any person now holding or who may hold an otherwise proscribed interlocking directorate involving NMS. Any such person, instead, shall file a sworn application providing the following information: (1) his or her full name and business address; and (2) all jurisdictional interlocks, identifying the affected companies and the positions held by that person.

(G) The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of NMS' issuances of securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

(H) NMS' request for waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of Sections 35.12(a), 35.13(b), 35.15, and 35.16, is hereby granted.

(I) Consistent with the procedures the Commission adopted in Order No. 2001, NMS must file electronically with the Commission Electric Quarterly Reports no later than 30 days after the end of the reporting quarter. NMS must file its first Electronic Quarterly Report no later than 30 days after the end of the fourth quarter of calendar year 2003 and it should include all data back to the effective date of NMS' market-based rate tariff.

(J) NMS is hereby directed to file an updated market analysis within three years of the date of this order and every three years thereafter.

(K) NMS is hereby directed to inform the Commission of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.