

125 FERC ¶ 61,175  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Aquila Merchant Services, Inc. (f/k/a Aquila, Inc.)	Docket Nos.	EL03-138-005 EL03-181-006
Portland General Electric Company		EL03-165-004
Powerex Corporation (f/k/a British Columbia Power Exchange Corp.)		EL03-166-004
Powerex Corporation (f/k/a British Columbia Power Exchange Corp.)		EL03-199-004
Morgan Stanley Capital Group Inc. <sup>1</sup>		EL03-160-003 EL03-195-004

ORDER DENYING REHEARING

(Issued November 14, 2008)

1. In this order, the Commission denies requests for rehearing of three orders (March Settlement Orders) that approved settlement agreements in the captioned proceedings for

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<sup>1</sup> The Commission's order approving a settlement in these dockets was issued on March 8, 2004. *Morgan Stanley Capital Group Inc.*, 106 FERC ¶ 61,237 (2004). On May 24, 2004, Port of Seattle filed a notice to withdraw its request for rehearing of the order approving the Morgan Stanley settlement agreement. Because Port of Seattle was the only entity seeking rehearing of that order, its withdrawal eliminates any need for the Commission to issue an order on rehearing with respect to the Morgan Stanley settlement agreement. The Commission includes these dockets in the caption of this order to eliminate any confusion that might arise as a result of their being listed in several requests for rehearing that focused on other settlements. Accordingly, Docket Nos. EL03-160-003 and EL03-195-004 are terminated. *See* 18 C.F.R. § 385.216 (2008).

Aquila Merchant Services, Inc. (Aquila);<sup>2</sup> Portland General Electric Company (Portland General);<sup>3</sup> and Powerex Corporation (Powerex).<sup>4</sup> These settlement agreements (whose named settling parties are collectively referred to as Settling Parties) resolve disputes that arose as a result of events in the California Independent System Operator Corporation (CAISO) and California Power Exchange (CalPX) energy and ancillary services markets during the period from January 1, 2000, through June 1, 2001, as they relate to Aquila, Portland General, and Powerex. Although each settlement agreement is slightly different, the basic elements are nearly the same. Thus, for the sake of administrative efficiency, the Commission will address this group of requests for rehearing together in the instant order. The Commission will deny the requests for rehearing for the reasons discussed below.

## **I. Background**

2. Following alleged market abuses in the Western energy markets in 2000 and 2001, the Commission issued two show cause orders directing certain entities to explain why they should not be found to have engaged in gaming and/or anomalous market behavior in violation of the CAISO and CalPX tariffs.<sup>5</sup> Commission Trial Staff subsequently entered into settlement agreements with several of the entities named in those Show Cause Orders.

3. All three of the settlement agreements at issue in these proceedings involve common settling parties, *viz.*, Commission Trial Staff and Aquila, Portland General, and Powerex, respectively. Moreover, just as these settlement agreements involve common parties, comments on the settlement agreements and, ultimately, on rehearing raise similar concerns and objections.

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<sup>2</sup> *Aquila Merchant Services, Inc.*, 106 FERC ¶ 61,234 (2004).

<sup>3</sup> *Portland General Elec. Co.*, 106 FERC ¶ 61,236 (2004). On December 18, 2007, the Port of Seattle, Washington (Port of Seattle) filed a notice to withdraw its request for rehearing of the order approving the Portland General settlement agreement, thereby eliminating any need for the Commission to address Port of Seattle's rehearing request. However, the Commission will address California Parties' request for rehearing.

<sup>4</sup> *Powerex Corp.*, 106 FERC ¶ 61,304 (2004).

<sup>5</sup> *American Electric Power Service Corporation, et al.*, 103 FERC ¶ 61,345 (2003) (Gaming Order); *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003) (Partnership Order) (collectively, Show Cause Orders).

## II. Requests for Rehearing

4. California Parties<sup>6</sup> filed a single request for rehearing of the Commission's orders involving Aquila, Idaho Power Company (Idaho Power),<sup>7</sup> PacifiCorp,<sup>8</sup> Portland General, and Reliant Resources, Inc., Reliant Energy Power Generation, Inc., and Reliant Energy Services, Inc.<sup>9</sup> Certain Pacific Northwest Parties (Certain Parties)<sup>10</sup> filed a single request for rehearing of the Commission's orders involving Idaho Power, Powerex, and Reliant. In addition to participating in Certain Parties' filing, Port of Seattle filed separate requests for rehearing of the Aquila, Idaho Power, PacifiCorp, Portland General, Powerex, Reliant, and Morgan Stanley settlement agreements.<sup>11</sup>

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<sup>6</sup> California Parties include the following entities: People of the State of California, *ex rel.* Bill Lockyer, Attorney General, the California Electricity Oversight Board, the California Public Utilities Commission, Pacific Gas and Electric Company and Southern California Edison Company.

<sup>7</sup> *Idaho Power Co.*, 106 FERC ¶ 61,208 (2004). Requests for rehearing of this order were addressed in *Duke Energy Trading and Mktg. Co.*, 117 FERC ¶ 61,039 (2006).

<sup>8</sup> *PacifiCorp*, 106 FERC ¶ 61,235 (2004). Requests for rehearing of this order were addressed in *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 122 FERC ¶ 61,009 (2008).

<sup>9</sup> *Reliant Res., Inc.*, 106 FERC ¶ 61,207 (2004). The following Reliant entities were parties in the Reliant settlement: Reliant Resources, Inc.; Reliant Energy Power Generation, Inc.; Reliant Energy Services, Inc.; Reliant Energy Coolwater, Inc.; Reliant Energy Ellwood, Inc.; Reliant Energy Etiwanda, Inc.; Reliant Energy Mandalay, Inc.; and Reliant Energy Ormond Beach, Inc. (collectively, Reliant). Requests for rehearing of this order were addressed in *Duke Energy Trading and Mktg. Co.*, 117 FERC ¶ 61,039 (2006).

<sup>10</sup> Certain Parties include the following entities: Public Utility District No. 1 of Snohomish County, Washington; the City of Tacoma, Washington; and the Port of Seattle, Washington.

<sup>11</sup> As stated above, the Commission issued orders on rehearing with respect to the settlements involving Reliant, Idaho Power, and PacifiCorp, and the only request for rehearing with respect to the Morgan Stanley settlement was withdrawn. Accordingly, this order addresses only the requests for rehearing that remain pending in the Aquila, Portland General, and Powerex proceedings.

5. Colorado River Commission of Nevada (Colorado River) submitted an answer to California Parties' request for rehearing. Colorado River takes no position on the merits of the California Parties' request for rehearing.<sup>12</sup>

**A. California Parties**

6. California Parties first state that the Commission failed to address and correct the documented tariff violations in the March Settlement Orders. Second, they state that the March Settlement Orders impermissibly deviate from the Commission's policy for approving contested settlement agreements, which is governed by the four-pronged approach that was articulated in *Trailblazer Pipeline Company*.<sup>13</sup> California Parties contend that the Commission did not address their arguments that approval was not warranted under the *Trailblazer* principles, and they reiterate that the Commission could not approve the settlement agreements at issue here under *Trailblazer*.<sup>14</sup> Next, California Parties contend that the Commission ignored the genuine issues of material fact raised by the California Parties' comments opposing the respective settlement agreements, which issues do not, as the Commission stated, go to the scope of the proceedings addressed by the Gaming and/or Partnership Orders (and therefore are not beyond the scope of this proceeding, as the Commission determined in approving the settlements).

7. California Parties also allege that the Commission impermissibly precluded the development of an evidentiary record—the commencement of discovery and evidentiary procedures—prior to approving the settlement agreements in the March Settlement Orders.<sup>15</sup> Furthermore, California Parties posit that any fair evaluation of whether the Aquila settlement agreement should be approved must take into account the fact that Aquila never provided the “Paragraph 47” materials relating to its partnerships, alliances, or other arrangements, which include correspondence, e-mails, memoranda, tapes, phone logs, transaction data, billing statements, and agreements.<sup>16</sup> California Parties aver that it is entirely possible that, if these sellers were required to submit all of the Paragraph 47

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<sup>12</sup> Colorado River Answer at 2 n.3.

<sup>13</sup> 85 FERC ¶ 61,345 (1998), *reh'g denied*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

<sup>14</sup> California Parties Request for Rehearing at 9-13.

<sup>15</sup> *Id.* at 15-16 (citing their filed comments in the individual proceedings prior to the March Settlement Orders).

<sup>16</sup> At paragraph 47 of the Partnership Order, the Commission required that such materials be provided. Partnership Order, 103 FERC ¶ 61,346 at P 47.

materials, Trial Staff would have reached different determinations concerning whether, and for what amount, the charges against these sellers should be settled.

8. California Parties next challenge the Commission's choice of remedies in the approved settlement agreements (i.e., profit disgorgement) as being inadequate, providing only "cents on the dollar" relief. According to California Parties, the alleged profit calculations in these settlement agreements amount to only a tiny fraction of the actual profits earned by these sellers: the monetary remedies do not match the actual profits earned from the tariff violations. Moreover, California Parties contend that the Commission ignored their comments as well as the Gaming and Partnership Orders with respect to the Commission's failure to consider non-monetary remedies.

9. Finally, they contend that to the extent that any of the settlement agreements at issue contain *Mobile-Sierra*<sup>17</sup> language the Commission erred by approving that settlement agreement(s).

#### **B. Port of Seattle**

10. Port of Seattle filed individual requests for rehearing of the orders approving the Aquila, Portland General, and Powerex settlement agreements. In each request, Port of Seattle argues that the Commission erred by approving the contested settlement agreements in contravention of Rule 602 of the Commission's Rules of Practice and Procedure,<sup>18</sup> which requires that contested settlement agreements cannot be certified and approved if there are material issues of fact in dispute and if there is an inadequate record upon which to resolve such disputes. Port of Seattle maintains that the record demonstrates that genuine issues of material fact are in dispute, and these issues cannot be resolved without an evidentiary hearing. It argues that the settlement agreements are a culmination of a proceeding intended to elicit the full extent to which Aquila, Portland General, and Powerex profited by their gaming practices. Port of Seattle contends that the settlement agreements were entered into prior to any opportunity for discovery by any intervenor. Further, it contends that the Gaming Order and Partnership Order are themselves predicated upon no record at all. Finally, Port of Seattle asserts that the Commission did not take into account positions of the non-implicated intervenor parties, none of whom supported the settlement agreements.

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<sup>17</sup> *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

<sup>18</sup> 18 C.F.R. § 385.602(h)(1)(i) (2008).

### C. Certain Parties

11. In its request for rehearing, Certain Parties contend that the Commission approved overly broad release language in the Powerex settlement agreement. Specifically, they contend that the Commission erred in approving the settlement agreement without requiring the removal or modification of overly broad language releasing Powerex from further investigation and liability. They contend that the Commission erred by approving language releasing Powerex from investigation and liability for activities outside the scope of these proceedings. Further, they contend that, by approving such overly broad release language, the Commission abdicates its statutory duty to investigate complaints and deprives consumers of their complaint rights under the FPA. Moreover, the approval deprives parties of their appellate rights. Certain Parties maintain that the Commission exceeded its statutory authority by improperly releasing Powerex from any unknown and/or unasserted causes of action relating to conduct in violation of any Commission regulation, requirement, order, or statute. Certain Parties also assert that Trial Staff lacks authority to execute settlement agreements addressing claims outside the scope of these proceedings. Finally, Certain Parties contend that the Commission failed to engage in reasoned decision-making when it summarily disposed of comments opposing the release language.

### III. Discussion

12. As a preliminary matter, Rules 213(a)(2) and 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), .713(d)(1) (2008), prohibit an answer to a request for rehearing unless otherwise ordered by the decisional authority. We are not persuaded to accept Colorado River's answer and will, therefore, reject it.

13. Without further explanation or detail, California Parties assert that the Commission failed to address the Settling Parties' tariff violations.<sup>19</sup> At the outset, the Commission finds that California Parties have failed to plead with sufficient specificity in support of this position and rejects the California Parties' argument for that reason. They have not identified specific tariff provisions in question or the impact of the alleged violations. In addition, the Commission agrees with and reiterates the findings of the presiding administrative law judges in their certification orders that the Commission has exclusive authority to enforce the Federal Power Act and that its decisions as to the scope of the issues it will pursue in an enforcement proceeding are non-reviewable.<sup>20</sup> The

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<sup>19</sup> California Parties Request for Rehearing at 6-7.

<sup>20</sup> *Aquila Merchant Servs., Inc.*, 105 FERC ¶ 63,014, at P 46 (2003) (citing *Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices*, 103 FERC ¶ 61,019, at 61,074, *order on reh'g*, 104 FERC ¶ 61,146, at 61,527 (2003)); *Portland General Elec. Co.*, 105 FERC ¶ 63,029 (2003); *see also infra* note 32 and accompanying text.

Commission has broad discretion in managing its proceedings.<sup>21</sup> The Commission, rather than intervenors in its proceedings, determines what issues shall be the subject of enforcement proceedings and whether the balance of concessions and assumptions in settlement agreements produces a just and reasonable result.<sup>22</sup> The Commission's broad discretion extends, among other things, to the decision whether to initiate an enforcement proceeding,<sup>23</sup> as well as the conduct of the proceeding and any settlement efforts.<sup>24</sup>

14. The Commission agrees with the presiding judges who certified these settlement agreements that the settlement agreements are correctly confined to the scope of the False Import issue, which the Commission mandated in the Gaming Order. As previously explained, other issues discussed by California Parties, Port of Seattle, and Certain Parties—such as opportunity for discovery and choice of remedies—are appropriately addressed, if at all, in requests for rehearing of the Show Cause Orders,<sup>25</sup> and not in the context of these individual proceedings, with limited exception as discussed below.

15. Moreover, Port of Seattle's contentions relating to the Gaming and Partnership Orders—for example, that these orders are predicated on no factual record and, thus, there is no factual record in these instant proceedings—should have been raised in the requests for rehearing of the Gaming and Partnership Orders and not in the instant proceedings. Port of Seattle's challenges here are an impermissible collateral attack on

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<sup>21</sup> See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978) (agencies have broad discretion over the formulation of their procedures); *Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1578-79 (D.C. Cir. 1992) (the Commission has discretion to mold its procedures to the exigencies of the particular case); *Woolen Mill Assoc. v. FERC*, 917 F. 2d 589, 592 (D.C. Cir. 1990) (the decision as to whether to conduct an evidentiary hearing is in the Commission's discretion).

<sup>22</sup> *Ex Parte Contacts and Separation of Functions*, Order No. 718, 125 FERC ¶ 61,063, at P 9 (2008) (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (agency decisions regarding conduct of enforcement actions are presumptively unreviewable by the courts)).

<sup>23</sup> *Id.* (citing *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459 (D.C. Cir. 2001) (“agency's decision not to exercise its enforcement authority, or to use it in a particular way, is committed to its absolute discretion”)).

<sup>24</sup> *Id.* (citing *Baltimore Gas*, 252 F.3d at 458 (decision to settle is committed to FERC's non-reviewable discretion)).

<sup>25</sup> *Aquila Merchant Services, Inc.*, 106 FERC ¶ 61,234 at P 4; *Portland General*, 106 FERC ¶ 61,236 at P 5; *Powerex*, 106 FERC ¶ 61,304 at P 4.

these prior orders.<sup>26</sup> Collateral attacks on final orders and relitigation of applicable precedent by parties that were active in earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency.<sup>27</sup>

16. A few arguments, however, are properly put before the Commission on rehearing, as they raise issues with the settlement agreements themselves and not the underlying proceedings that led to the settlements. For example, California Parties and Certain Parties assert that the general release provisions are too broad. The Commission will address such issues in turn.

17. In its evaluation of a contested settlement agreement, the Commission must be able to make an independent determination based on substantial record evidence that the settlement agreement will result in just and reasonable rates,<sup>28</sup> or in the context of the proceeding, will produce an acceptable outcome.<sup>29</sup> *Trailblazer* outlines four circumstances under which the Commission may approve a contested settlement: (1) the Commission may make a merits determination on each contested issue; (2) even if some aspects of a settlement are problematic, the Commission nevertheless may approve a contested settlement as a package upon determining that the overall result of the settlement is just and reasonable; (3) the Commission may determine that the benefits of the settlement outweigh the nature of the objections and the contesting parties' interest is too attenuated; or (4) the Commission may sever the contesting parties, approving the settlement agreement as uncontested as to the settling parties only and leaving the contesting parties free to pursue their claims through continued litigation. Further, if a party's interests are not immediately and irreparably affected by approval of a settlement agreement in a consolidated docket, that party's opposition to a settlement agreement

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<sup>26</sup> Collateral estoppel prohibits a party from bringing a different claim on an issue that has already been decided (Restatement (Second) of Judgments §§ 17(c), 27), provided the issue was actually litigated and determined, and the determination was essential to that judgment. *Norfolk and Western Ry. Co. v. United States*, 768 F.2d 373 (D.C. Cir. 1985).

<sup>27</sup> See, e.g., *Pac. Gas & Elec. Co.*, 121 FERC ¶ 61,065, at P 38 (2007); *KeySpan-Ravenswood, Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 107 FERC ¶ 61,142, at P 22 (2004); *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,336 (2003), *order on reh'g*, 110 FERC ¶ 61,033, at P 56 (2005) (Commission "will not allow relitigation of our station power precedent"), *affirmed sub nom. Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006).

<sup>28</sup> *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974).

<sup>29</sup> *Trailblazer*, 85 FERC at 62,342.

does not create a genuine, material issue.<sup>30</sup> In the absence of any genuine, material issue, the Commission can dispose of the matter before it in a summary fashion.

18. Despite Port of Seattle's opposition to the settlement agreements, there are no genuine issues of material fact that remain in dispute. Clearly, the settlement agreements that Port of Seattle contests do not resolve anything as to Port of Seattle because Port of Seattle is not a party to them, and Port of Seattle retains the ability to pursue its claims against the Settling Parties in the underlying proceedings. Therefore, based on the record taken as a whole, the Commission finds that the settlement agreements provide acceptable outcomes to the contested issues in these cases.

19. Referring to the Powerex settlement agreement, Certain Parties contend that Trial Staff lacks authority to enter into agreements with the Settling Parties that address claims outside these proceedings.

There is ample precedent, however, for parties to proceedings set for trial-type evidentiary hearings to work with Trial Staff, as in this case, to resolve disputes through settlement agreements.<sup>31</sup> Although, parties enter such settlement agreements to resolve specific disputes, it is not uncommon to draft the release provisions broadly in anticipation of future disputes related to the matters addressed in the settlement agreement that inevitably will arise. In this case, the agreed upon release provisions in the settlement agreements are delimited by the issues within the scope of the investigation and enforcement proceedings that resulted in the Commission's issuance of the Gaming and Partnership Orders.

20. Notwithstanding the release provisions, the Commission does not abdicate its statutory duty to investigate complaints as argued by Certain Parties, because the Commission finds the release provisions of these settlement agreements to apply only within the context of the proceedings specifically named in the settlement agreements (as discussed above in Trial Staff's quoted comments, for example). Further, the Commission's release of Settling Parties with respect to the matters addressed in the settlement proceedings via settlement agreements is an act within the Commission's discretion to enforce or to settle.<sup>32</sup>

21. On balance, the approval of these settlement agreements would provide significant benefits, including certainty and finality on major issues, to the Settling Parties. In addition, the settlement agreements would not adversely affect the interests of those

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<sup>30</sup> *El Paso Natural Gas Co.*, 25 FERC ¶ 61,292, at 61,673 (1983).

<sup>31</sup> *See, e.g.*, Gaming Order, 103 FERC ¶ 61,345 at P 73.

<sup>32</sup> *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (enforcement discretion); *Burlington Res. Inc. v. FERC*, 513 F.3d 242, 247 (D.C. Cir. 2008) (same).

parties that continue to litigate their claims.<sup>33</sup> Accordingly, under the second *Trailblazer* approach, the Commission approved these settlement agreements as packages that produce overall just and reasonable results. In the same vein, under the third approach, the Commission finds that the benefit of these settlement agreements outweighs the nature of the objections of those opposing the settlement agreements. As the Commission reasoned in the orders below, a principal benefit of these settlement packages is that the Settling Parties will return the total revenues from their participation in the alleged gaming practices, not merely the profits, and a settlement that will return total revenues as opposed to profits alone may be more than would be achieved through litigation.<sup>34</sup> The broad release provisions in the settlement agreements and any lack of an admission of wrongdoing in the Reliant settlement agreement, for example, are part of the balance of risks and rewards—or losses and gains—assumed by the Settling Parties and found by the Commission to be acceptable outcomes of the contested issues. Therefore, the Commission properly approved the settlement agreements in accord with Rule 602.<sup>35</sup>

22. Lastly, with respect to the *Mobile-Sierra* public interest standard, we agree that a settlement agreement cannot limit the rights of third parties with such a standard. In light of *Maine Public Utilities Commission v. FERC*, 520 F.3d 464, 477-78 (D.C. Cir. 2008), the Commission may not accept the standards of review as currently written. As such, the settlement agreements (that bind non-contracting parties to the public interest standard) must be revised to reflect standards of review applicable to non-settling third parties. An acceptable substitute provision applicable to non-settling third parties would be the “most stringent standard permissible under applicable law.”

The Commission orders:

(A) The requests for rehearing are hereby denied as discussed in the body of this order.

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<sup>33</sup> The interests of the “non-implicated” parties of which Port of Seattle speaks have been considered and are protected under their right to litigate their claims.

<sup>34</sup> Gaming Order, 103 FERC ¶ 61,345 at P 1, 2, 72; Partnership Order, 103 FERC ¶ 61,346 at P 2, 3, 48.

<sup>35</sup> 18 C.F.R. § 385.602(h)(1)(i).

(B) The Settling Parties are directed to revise the standards of review governing their settlement agreements, as discussed in the body of this order, and to make a compliance filing within 30 days of the issuance date of this order.

By the Commission. Commissioners Wellinghoff and Kelly concurring in part with a separate joint statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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(Issued November 14, 2008)

WELLINGHOFF and KELLY, Commissioners, *concurring in part*:

This order states that the subject settlement agreements bind non-contracting parties to the “public interest” standard of review. This order further states that in light of the U.S. Court of Appeals for the District of Columbia Circuit’s (D.C. Circuit) decision in *Maine Public Utilities Commission v. FERC*,<sup>1</sup> the Commission may not accept the standards of review as written in the subject settlements. In addition, this order states that an acceptable substitute provision applicable to future changes sought by non-settling third parties would be the “most stringent standard permissible under applicable law.”

The U.S. Supreme Court has held that whenever the Commission reviews certain types of contracts, the Federal Power Act (FPA) requires it to apply the presumption that the contract meets the “just and reasonable” requirement imposed by the FPA.<sup>2</sup> The contracts that are accorded this special application of the “just and reasonable” standard are those “freely negotiated wholesale-energy

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<sup>1</sup> 520 F.3d 464, 478, *petition for reh’g denied*, No. 06-1403, slip op. (D.C. Cir. Oct. 6, 2008) (*Maine PUC*).

<sup>2</sup> *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733, 2737 (2008) (*Morgan Stanley*).

contracts” that were given a unique role in the FPA.<sup>3</sup> In contrast, the D.C. Circuit determined that the proper standard of review for a different type of agreement, with regard to changes proposed by non-contracting third parties, was the “‘just and reasonable’ standard in section 206 of the Federal Power Act.”<sup>4</sup> The agreement at issue in *Maine PUC* was a multilateral settlement negotiated in a Commission adjudication of a utility’s proposal to revise its tariff substantially to enable it to establish and operate a locational installed electricity capacity market.

Our review of the agreements in question here – which arose from the Commission’s issuance of two show cause orders directing certain entities to explain why they should not be found to have engaged in gaming and/or anomalous market behavior in violation of the California Independent System Operator Corporation’s and the California Power Exchange’s tariffs – indicates that they more closely resemble the *Maine PUC* adjudicatory settlement than the *Morgan Stanley* wholesale-energy sales contracts, which, for example, were freely negotiated outside the regulatory process. Therefore, the “most stringent standard permissible under applicable law” as applied here to changes proposed by non-parties means the “just and reasonable” standard of review.

For these reasons, we concur in part.

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Jon Wellinghoff  
Commissioner

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Sudeen G. Kelly  
Commissioner

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<sup>3</sup> *Id.*

<sup>4</sup> *Maine PUC*, 520 F.3d at 478.