

125 FERC ¶ 61,174
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.

Modesto Irrigation District

Docket No. EL03-159-004

ORDER DENYING REHEARING

(Issued November 14, 2008)

1. In this order, the Commission denies a request for rehearing of the Commission's order approving a settlement agreement in the captioned proceeding for Modesto Irrigation District (Modesto).¹ This settlement agreement resolves 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 Modesto. We will deny the request 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.² Commission Trial Staff subsequently entered into settlement agreements with several of the entities named in those Show Cause Orders.

¹ *Modesto Irrigation District*, 108 FERC ¶ 61,260 (2004) (*Modesto*).

² *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. Request for Rehearing

3. On September 21, 2004, California Parties³ filed a request for rehearing of the Commission's order approving the Modesto settlement agreement. California Parties first state that the Modesto settlement agreement impermissibly deviates from Rule 602, 18 C.F.R. § 385.602, and the Commission's policy for approving contested settlement agreements, which is governed by the four-pronged approach that was articulated in *Trailblazer Pipeline Company*.⁴ California Parties contend that the Commission could not approve the settlement agreement at issue here under the *Trailblazer* approaches.⁵ Next, California Parties contend that the Commission ignored the genuine issues of material fact raised by the California Parties' comments opposing the Modesto settlement agreement, 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).⁶

4. California Parties next contend that the Commission impermissibly precluded the development of an evidentiary record—the commencement of discovery and evidentiary procedures—prior to approving the Modesto settlement agreement.

5. California Parties also challenge the Commission's choice of remedies in the approved settlement agreement (i.e., profit disgorgement) as being “significantly understated.”⁷ According to California Parties, the alleged profit calculations in this settlement agreement is 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, and the Commission failed to consider non-monetary remedies.

6. California Parties maintain that the Commission acted *ultra vires* in opening the proceedings associated with the Partnership and Gaming Orders and other proceedings. California Parties explain that the Ninth Circuit Court of Appeals directed the

³ 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.

⁴ 85 FERC ¶ 61,345 (1998), *reh'g denied*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

⁵ California Parties Request for Rehearing § III.A.

⁶ *Id.* § III.B.

⁷ *Id.* § II.D.1.

Commission to allow the California Parties to introduce evidence concerning sellers' market manipulation; they cite section 313(b) of the Federal Power Act, which provides that the Commission "may modify its findings ... [and] file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order."⁸ California Parties state that the Commission must consider all of the issues they raise and report to the Court. Further, according to the California Parties this settlement agreement is a violation of due process by purporting to settle their claims.

7. California Parties assert that the Commission erred in not requiring an admission of wrongdoing in the Modesto settlement agreement.

8. Finally, California Parties state that the settlement agreement contains a *Mobile-Sierra* public interest standard provision that would govern changes to the Modesto settlement agreement.⁹ They state that the Commission cannot limit the rights of third parties with such a standard. Further, they remark that the Commission adopted the *Mobile-Sierra* standard in this settlement agreement without explanation for its deviation from prior practice.

III. Discussion

9. The Commission agrees with and reiterates the findings of the presiding judge in the certification order 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.¹⁰ The Commission has broad discretion in managing its proceedings.¹¹ The Commission, rather than intervenors in its proceedings, determines what issues shall be the subject of enforcement proceedings and whether the

⁸ 16 U.S.C. § 313(b) (2006).

⁹ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

¹⁰ *Modesto Irrigation District*, 106 FERC ¶ 63,034, at P 37 (2004); *see also infra* note 23 and accompanying text.

¹¹ *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).

balance of concessions and assumptions in settlement agreements produces a just and reasonable result.¹² The Commission's broad discretion extends, among other things, to the decision whether to initiate an enforcement proceeding,¹³ as well as the conduct of the proceeding and any settlement efforts.¹⁴

10. The Commission agrees with the presiding judge who certified this settlement agreement that the settlement agreement is correctly confined to the scope of paper trading and circular scheduling which the Commission mandated in the Gaming Order. As previously explained, other issues discussed by California Parties—such as complaints concerning the opportunity for discovery and choice of remedies—are appropriately addressed, if at all, in requests for rehearing of the Show Cause Orders,¹⁵ and not in the context of this individual settlement proceeding, with limited exception as discussed below. California Parties' challenges here are an impermissible collateral attack on these prior orders.¹⁶ 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.¹⁷

¹² *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)).

¹³ *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”)).

¹⁴ *Id.* (citing *Baltimore Gas*, 252 F.3d at 458 (decision to settle is committed to FERC’s non-reviewable discretion)).

¹⁵ *Modesto*, 108 FERC ¶ 61,260 at P 4.

¹⁶ 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).

¹⁷ *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).

11. 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 express dissatisfaction that the settlement agreement does not require an admission of wrongdoing. The Commission will address these issues in turn.

12. 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,¹⁸ or in the context of the proceeding, will produce an acceptable outcome.¹⁹ *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 does not create a genuine, material issue.²⁰ In the absence of any genuine, material issue, the Commission can dispose of the matter before it in a summary fashion.

13. On balance, the approval of this settlement agreement would provide significant benefits, including certainty and finality on major issues, to the Settling Parties. In addition, the settlement agreement would not adversely affect the interests of those parties that continue to litigate their claims. Accordingly, under the second *Trailblazer* approach, the Commission approved this settlement agreement as a package that produces overall just and reasonable results. In the same vein, under the third approach, the Commission finds that the benefit of this settlement agreement outweighs the nature of the objections of those opposing the settlement agreement. 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

¹⁸ *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974).

¹⁹ *Trailblazer*, 85 FERC ¶ 61,345 at 62,342.

²⁰ *El Paso Natural Gas Co.*, 25 FERC ¶ 61,292, at 61,673 (1983).

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.²¹ The broad release provisions in the settlement agreement and any lack of an admission of wrongdoing, for example, are part of the balance of risks and rewards—or losses and gains—assumed by the Settling Parties and approved by the Commission in this settlement agreement. Further, the Commission agrees with the presiding judges that intervenors have not raised any contested genuine issues of material fact. Therefore, the Commission properly approved the settlement agreement in accord with Rule 602.²²

14. With respect to whether the Commission acted *ultra vires*, section 313(b) of the Federal Power Act, quoted above, provides that the Commission “may modify” its findings and file modified or new findings with the court. It is within the Commission’s discretion, however, to enforce or to settle.²³ As discussed above, the Commission has elected to endorse the party’s settlement in this proceeding because the settlement agreement, on balance, provides significant benefits and produces overall just and reasonable results. Moreover, there is ample precedent for parties to proceedings set for trial-type evidentiary hearings to work with Trial Staff to resolve disputes through settlement agreements.²⁴

15. 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 standard of review as currently written. As such, the settlement agreement (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 request for rehearing is hereby denied as discussed in the body of this order.

²¹ Gaming Order, 103 FERC ¶ 61,345 at P 1, 2, 72; Partnership Order, 103 FERC ¶ 61,346 at P 2, 3, 48.

²² 18 C.F.R. § 385.602(h)(1)(i) (2008).

²³ *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).

²⁴ See, e.g., Gaming Order, 103 FERC ¶ 61,345 at P 73.

(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.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Modesto Irrigation District

Docket No. EL03-159-004

(Issued November 14, 2008)

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

This order states that the subject settlement agreement binds 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*,¹ the Commission may not accept the standard of review as written in the subject settlement. 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.² The contracts that are accorded this special application of the “just and reasonable” standard are those “freely negotiated wholesale-energy contracts” that were given a unique role in the FPA.³ 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.”⁴ 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.

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

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

³ *Id.*

⁴ *Maine PUC*, 520 F.3d at 478.

Our review of the agreement in question here – which arose from the Commission’s issuance of a show cause order 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 it more closely resembles 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.

Jon Wellinghoff
Commissioner

Suedeem G. Kelly
Commissioner