

in violation of the CAISO and CalPX tariffs.³ Commission Trial Staff subsequently entered into settlement agreements with several of the entities named in those Show Cause Orders.

3. The settlement agreements at issue in this proceeding involve common settling parties, *viz.*, Commission Trial Staff with the Modesto and PSCNM, respectively. Moreover, just as these settlement agreements involve common parties, comments on the settlement agreements and, ultimately, on rehearing raise similar concerns and objections.

II. Request for Rehearing

4. On June 7, 2004, California Parties⁴ filed a request for rehearing of the settlement agreement between Commission Trial Staff and Modesto. First, California Parties contend that the Commission failed to clarify which Modesto partnerships are covered by the settlement agreement.

5. California Parties state that the Commission failed to clarify that Modesto's assertions are simply Modesto's assertions and not necessarily facts.

6. California Parties maintain that the Commission acted *ultra vires* in initiating the proceedings associated with the Partnership and Gaming Orders and other proceedings. California Parties explain that the Ninth Circuit Court of Appeals directed the 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."⁵ California Parties state that the Commission must consider all of the issues they raise and report to the Court.

7. Specifically, California Parties state that, to meet the statutory and court mandates the Commission should clarify that (if the scope of the proceeding is enlarged or

³ *American Electric Power Service Corporation, et al.*, 103 FERC ¶ 61,345 (2003) (Gaming Order); *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,346 (2003) (Partnership Order) (collectively, Show Cause Orders).

⁴ 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.

⁵ 16 U.S.C. § 313(b) (2006).

modified) the settlement agreement would not preclude California Parties from advocating for, or the Commission from applying, any newly-imposed rules, standards, or remedies to Modesto. They also contend that the Commission failed to clarify that the settlement agreement does not resolve any issues in other proceedings that raise related issues. They submit that the Commission failed to clarify that the settlement agreement does not preclude the Commission from ordering any remedy as to Modesto or others.

8. Finally, California Parties state that the explanatory statement to the Modesto settlement agreement suggests that the settlement agreement is governed by a *Mobile-Sierra* public interest standard.⁶ They state that the Commission cannot limit the rights of third parties with such a standard. Further, they assert that the Commission adopted the *Mobile-Sierra* standard in these settlement agreements without explanation for its deviation from prior practice.

9. On August 5, 2005, California Parties filed a request for rehearing of the Commission's order dismissing the show cause proceeding against PSCNM, which effectively approved a settlement agreement. California Parties contend that the Commission erred when it accepted Trial Staff's pleading to dismiss PSCNM, because the pleading was procedurally defective. California Parties contend that the pleading did not meet the legal standards either for the Commission to grant a motion to dismiss or approve a settlement agreement. They assert that the Commission approved the proposed settlement agreement in spite of a lack of evidentiary support. California Parties maintain that the Commission erred by accepting Trial Staff's theories for excusing PSCNM's actions.

10. According to California Parties, the Commission erred when it accepted a \$1,000,000 settlement amount as complete and total settlement of all issues related to PSCNM's extra-tariff provision of parking and lending services.

11. California Parties also contend that the Commission erred to the extent that it reviewed the proposed PSCNM settlement agreement under the *Mobile-Sierra* public interest standard.⁷

⁶ *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*). They cite to the Joint Explanatory Statement, averring that parties intended that the settlement agreement "cannot be changed [once accepted by the Commission] unless a showing is made that the public interest requires it." California Parties Request for Rehearing, EL03-193-005, at 10-11 (quoting Joint Explanatory Statement at 6; citing *Modesto*, 107 FERC ¶ 61,116 at P 5).

⁷ California Parties Request for Rehearing, Docket No. EL03-200-005, at 16.

12. Lastly, California Parties contend that the Commission erred when it failed to condition its approval of Trial Staff's motion to dismiss and the proposed settlement agreement.⁸ California Parties state that the Commission erred by rejecting their request that PSCNM's obligations to participate not be fully relieved until all of the show cause proceedings were concluded.

III. Discussion

13. With respect to whether the Modesto settlement agreement would preclude imposing new rules, standards, or remedies should the scope of the enforcement proceeding be enlarged or modified, the Commission has exclusive authority to enforce the Federal Power Act, and its decisions as to the scope of the issues it will pursue in an enforcement proceeding are non-reviewable.⁹ Moreover, the Commission has broad discretion in managing its proceedings.¹⁰ Likewise, with respect to the contention that the Commission erred by accepting a motion to dismiss PSCNM from the proceeding related to the alleged gaming and/or anomalous market behavior in 2000 and 2001 as "misabeled and premature,"¹¹ 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.¹² The Commission's broad discretion extends, among other

⁸ *Id.* at 17.

⁹ *Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices*, 103 FERC ¶ 61,019, at 61,074, *reh'g denied*, 104 FERC ¶ 61,146, at 61,527 (2003); *see also infra* note 24 and accompanying text.

¹⁰ *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).

¹¹ Request for Rehearing, Docket No. EL03-200-005, at 5.

¹² *See Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001 (1984) (Commission is master of its own calendar and procedures); *see also 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)).

things, to the decision whether to initiate an enforcement proceeding,¹³ as well as the conduct of the proceeding and any settlement efforts.¹⁴

14. Certain arguments proffered by California 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, rather than in the context of these individual proceedings, with limited exception as discussed below. California Parties’ challenges here are an impermissible collateral attack on these prior orders. 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.¹⁵

15. 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. For example, California Parties argue that the Commission failed to clarify which Modesto partnerships are covered by the settlement agreement, and they argue that the Commission accepted a procedurally defective pleading with respect to the PSCNM show cause proceeding. The Commission will address these issues in turn.

16. 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,¹⁶ or in the context of the proceeding, will produce an acceptable outcome.¹⁷ *Trailblazer* outlines four circumstances under which the Commission may approve a contested settlement: (1) the

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 *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).

¹⁶ *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974).

¹⁷ *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,342 (1998), *reh’g denied*, 87 FERC ¶ 61,110, *reh’g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

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.¹⁸ In the absence of any genuine, material issue, the Commission can dispose of the matter before it in a summary fashion.

17. With respect to California Parties' argument that the Commission failed to clarify which Modesto partnerships are covered by the settlement agreement, the Commission directed the listed entities in the Partnership Order, including Modesto, to show cause why their partnerships, alliances, or other arrangements did not constitute gaming and/or anomalous market behavior in violation of the CAISO and CalPX tariffs during the period January 1, 2000, to June 20, 2001.¹⁹ Specifically, the Commission found that there is evidence that Enron Power Marketing, Inc. and Enron Energy Services Inc. (collectively, Enron) and a number of entities "worked in concert through partnerships, alliances or other arrangements ... to engage in activities that constitute gaming and/or anomalous market behavior."²⁰ The Commission counted Modesto among the entities allegedly involved in Partnership Gaming with Enron.²¹

18. We agree that all of Modesto's statements in the settlement agreement may not necessarily represent facts. Such statements in the context of a settlement agreement, however, are a part of the package from which the Settling Parties assumed risks and benefits. California Parties make no more than a general statement about such representations in the settlement agreement by Modesto. Accordingly, 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.

19. With respect to whether the Modesto settlement agreement resolves any issues in other proceedings, the Commission finds the release provisions of the Modesto settlement

¹⁸ *El Paso Natural Gas Co.*, 25 FERC ¶ 61,292, at 61,673 (1983).

¹⁹ Partnership Order, 103 FERC ¶ 61,346 at P 1-3.

²⁰ *Id.* P 1.

²¹ *Id.* P 31 & n.49.

agreement to apply only within the context of the proceeding specifically named in the settlement agreement. The Commission does not interpret these provisions to release Modesto from claims arising outside the settled proceedings. Further, the Commission's release of Modesto with respect to the matters addressed in the settlement proceeding via a settlement agreement is an act within the Commission's discretion to enforce or to settle.²²

20. 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 parties' settlement in these proceedings because the settlement agreements, on balance, provide significant benefits and produce 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

21. On balance, the approval of these settlement agreements—Modesto's settlement agreement and what amounts to be PSCNM's settlement agreement—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 parties that continue to litigate their claims. 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 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.²⁵ The

²² See *supra* note 9.

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.

²⁵ Gaming Order, 103 FERC ¶ 61,345 at P 1, 2, 72; Partnership Order, 103 FERC ¶ 61,346 at P 2, 3, 48; see also *Modesto Irrigation District*, 106 FERC ¶ 63,036, at P 35-36 (2004) (finding \$60,000 is more than Modesto could be compelled to pay post-litigation, especially given substantial litigation risk); *PSCNM*, 112 FERC ¶ 61,033 at P 10, 22 (finding PSCNM earned only \$356,167 from parking and lending services and, therefore, \$1,000,000 is more than enough to disgorge).

release provisions in the settlement agreements and the particular settlement amounts, 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. Further, the Commission finds and reiterates that intervenors have not raised any contested genuine issues of material fact. Therefore, the Commission properly approved the settlement agreements in accord with Rule 602.²⁶

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.

(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 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.

²⁶ 18 C.F.R. § 385.602(h)(1)(i).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Modesto Irrigation District

Docket Nos. EL03-193-005

Public Service Company of New Mexico

EL03-200-005

(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*,¹ 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.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.

Our review of the agreements in question here – which arose from the

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.

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.

Jon Wellinghoff
Commissioner

Sudeen G. Kelly
Commissioner