

127 FERC ¶ 61,292  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

American Electric Power Service Corporation

Docket No. ER07-1069-000

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued June 24, 2009)

1. On February 23, 2009, American Electric Power Service Corporation (AEP) filed an Offer of Settlement (Settlement) on behalf of its affiliates, Public Service Company of Oklahoma and Southwestern Electric Power Company, and on behalf of Arkansas Electric Cooperative Corporation, East Texas Electric Cooperative, Inc., Northeast Texas Electric Cooperative, Inc., Tex-La Electric Cooperative of Texas, Inc., Golden Spread Electric Cooperative, Inc., and Oklahoma Municipal Power Authority.<sup>1</sup>
2. On March 10, 2009, the Commission's Trial Staff filed comments in support of the Settlement. No reply comments were filed. On March 20, 2009, the Settlement Judge certified the Settlement to the Commission as uncontested.<sup>2</sup>
3. The Settlement resolves all issues set for hearing in the above-captioned proceeding, including AEP's proposal to increase its zonal rates and to convert its stated zonal rates into formula rates.<sup>3</sup> The Settlement is fair and reasonable and in the public interest and is hereby approved. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.
4. Pursuant to Article 6.7 of the Settlement, the standard of review for modifications to the Settlement that are proposed by any party to the Settlement after it is approved by

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<sup>1</sup> AEP states that Southwest Power Pool has confirmed that it will file conformed tariff sheets implementing the Settlement once it is approved by the Commission.

<sup>2</sup> *American Elec. Power Serv. Corp.*, 126 FERC ¶ 63,009 (2009).

<sup>3</sup> *American Elec. Power Serv. Corp.*, 120 FERC ¶ 61,205 (2007).

the Commission shall be the public interest standard under the *Mobile-Sierra* doctrine.<sup>4</sup> The standard of review for any proposed modifications to the Settlement requested by a non-party, or initiated by the Commission, shall be the most stringent standard permissible under applicable law.

5. Refunds and adjustments shall be made pursuant to the Settlement.
6. This order terminates Docket No. ER07-1069-000.

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

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>4</sup> *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).

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KELLY, Commissioner, and WELLINGHOFF, Chairman, *concurring in part*:

The proposed standard of review in the settlement would have the Commission apply the “most stringent standard permissible under applicable law” to any changes proposed by non-parties or the Commission acting *sua sponte*.

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>1</sup> The contracts that are accorded this special application of the “just and reasonable” standard are those “freely negotiated wholesale-energy contract[s]” that were given a unique role in the FPA.<sup>2</sup> In contrast, the U.S. Court of Appeals for the District of Columbia Circuit (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>3</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. The D.C. Circuit’s holding in *Maine PUC* applies with at least equal force to changes to an agreement sought by the Commission acting *sua sponte*.<sup>4</sup>

Our review of the agreement in question here 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

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

<sup>2</sup> *Id.*

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

<sup>4</sup> *See Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201 (2008) (Comm’rs Wellinghoff and Kelly dissenting in part).

outside the regulatory process. Therefore, the “most stringent standard permissible under applicable law” as applied here to changes proposed by either non-parties or the Commission acting *sua sponte* means the “just and reasonable” standard of review. In those instances, the Commission retains the right to investigate the rates, terms, and conditions of the settlement under the “just and reasonable” standard of review set forth under FPA section 206.<sup>5</sup>

For these reasons, we concur in part.

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Suedeem G. Kelly

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Jon Wellinghoff

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<sup>5</sup> 16 U.S.C. § 824e (2006).