

128 FERC ¶ 61,118
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Startrans IO, L.L.C.

Docket No. ER08-413-004

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued July 31, 2009)

1. On May 28, 2009, Startrans IO, L.L.C. (Startrans IO) filed an Offer of Settlement and a Settlement Agreement (Settlement) on behalf of itself, Pacific Gas and Electric Company (PG&E), and Southern California Edison Company (SoCal Edison).
2. On May 29, 2009 and June 8, 2009, respectively, the California Public Utilities Commission (CPUC) and Trial Staff filed comments supporting the Settlement. On June 9, 2009, the Presiding Judge certified the Settlement to the Commission as uncontested.
3. The Settlement resolves all outstanding issues in Docket No. ER08-413-004. The Settlement is fair, 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 section 10.10 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 the Commission shall be the public interest standard under the *Mobile-Sierra* doctrine.¹ 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. The standard of review for any proposed modifications to the Startrans IO Transmission Owner Tariff sheets attached to the Settlement that are proposed after the end of the moratorium period shall be the just and reasonable standard.

¹ *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).

5. Under the terms of the Settlement, the CPUC has agreed to withdraw without prejudice its request for rehearing filed on May 1, 2008 in Docket No. ER08-413-002. Similarly, Startrans IO has agreed to withdraw without prejudice that portion of its request for rehearing filed on April 30, 2008 in Docket No. ER08-413-002 addressing the construction work in progress cost issue. Startrans IO will retain, however, the right to pursue the portion of its pending April 30, 2008 rehearing request in Docket No. ER08-413-002 addressing the acquisition adjustment issue. The Settlement establishes the process by which the outcome of the portion of Startrans IO's request for rehearing addressing the acquisition adjustment issue will be reflected in Startrans IO's transmission revenue requirement. PG&E, San Diego Gas & Electric Company (SDG&E) and SoCal Edison (IOUs) retain the right to pursue their joint request for rehearing filed on April 30, 2008 in Docket No. ER08-413-002. The Settlement sets forth the reduction in Startrans IO's transmission revenue requirement if the IOUs prevail – before the Commission or on appeal – on the issues in their joint request for rehearing.

6. On June 19, 2009, Startrans IO filed a motion requesting that the Commission act on its pending request for rehearing of the acquisition adjustment issue in Docket No. ER08-413-002 concurrently with the Settlement. The Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California; PG&E and SDG&E jointly filed an answer. Trial Staff also filed an answer. The Commission does not find that the acquisition adjusting issue raised on rehearing in Docket No. ER08-413-002 and the Settlement are related. Therefore, we are not persuaded that it is necessary to act concurrently on the request for rehearing and the Settlement. Accordingly, we deny Startrans IO's motion.

7. This order terminates Docket No. ER08-413-004.

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

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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WELLINGHOFF, Chairman, and KELLY, Commissioner, *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.¹ 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.² 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.”³ 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 rationale in *Maine PUC* applies with at least equal force to changes to an agreement sought by the Commission acting *sua sponte*.⁴

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 outside the regulatory process. Therefore, the standard of review that the Commission must apply to changes proposed by either non-parties or the Commission acting *sua sponte* is the “just and reasonable” standard of review. In those instances, the Commission retains the right to

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

² *Id.*

³ *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*).

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

investigate the rates, terms, and conditions of the settlement under the “just and reasonable” standard of review set forth under FPA section 206.⁵

For these reasons, we concur in part.

Jon Wellinghoff

Suedeem G. Kelly

⁵ 16 U.S.C. § 824e (2006).