

119 FERC ¶ 61,169
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

May 18, 2007

In Reply Refer To:
San Diego Gas & Electric Company
Docket Nos. ER07-284-000,
ER07-284-001 and ER07-284-002

San Diego Gas & Electric Company
101 Ash Street
San Diego, CA 92101

Attn: Georgetta J. Baker, Esq.
Attorney for San Diego Gas & Electric Company

Dear Ms. Baker:

1. On March 28, 2007, San Diego Gas & Electric Company (SDG&E) filed an offer of settlement to resolve all issues in this proceeding. Comments in support of the offer of settlement were filed by the Public Utilities Commission of the State of California on April 12, 2007, and by Commission Trial Staff on April 17, 2007. No reply comments were filed. On April 23, 2007, the settlement was certified to the Commission as uncontested.
2. The settlement agreement is 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. The Commission retains the right to investigate the rates, terms and conditions under the just and reasonable and not unduly discriminatory or preferential standard of section 206 of the Federal Power Act, 16 U.S.C. § 824e (2000).
3. The rate schedule sheets submitted as part of the settlement are not in compliance with Order No. 614. *See* Designations of Electric Rate Schedule Sheets, Order No. 614, 65 Fed. Reg. 18,221, FERC Stats. & Regs., Regulations Preambles July 1996 - December 2000, ¶ 31,096 (2000). SDG&E is directed to modify the rate schedule sheets to conform with Order No. 614, and refile them within thirty (30) days of the issuance of this order.

4. Within thirty (30) days from the date of this letter, any amounts collected in excess of the settlement rates shall be refunded together with interest computed under section 35.19a of the Commission's regulations, 18 C.F.R. § 35.19a (2007). Within fifteen (15) days after making such refunds, SDG&E shall file with the Commission a compliance refund report showing monthly billing determinants, revenue receipt dates, revenues under the present and settlement rates, the monthly revenue refund, and the monthly interest computed, together with a summary of such information for the total refund period. SDG&E shall furnish copies of the report to the affected customers and to each state commission within whose jurisdiction the affected wholesale customers distribute and sell electric energy at retail.

5. This order terminates Docket Nos. ER07-284-000, ER07-284-001, and ER07-284-002.

By direction of the Commission. Commissioner Kelly concurring with a separate statement attached.
Commissioner Moeller concurring in part with a separate statement attached.

Philis J. Posey,
Deputy Secretary.

cc. All Parties

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company

Docket No. ER07-284-000
ER07-284-001
ER07-284-002

(Issued May 18, 2007)

KELLY, Commissioner, *concurring*:

The settlement that we approve in this order resolves issues with the formula rate that will apply to San Diego Gas & Electric Company's (SDG&E) customers. These formula rate revisions will become part of SDG&E's tariff. The parties to this settlement request that future changes to the settlement be subject to the "just and reasonable" standard of review. I agree with the parties that the "just and reasonable" standard should apply here and with the order's acceptance of that standard of review. I write separately to explain why.

Not all agreements that the Commission approves pursuant to the Federal Power Act (FPA) can be made subject to the higher "public interest" standard of review for future modifications resulting from the Commission acting *sua sponte* or pursuant to a request by a non-party to the agreement. But some can. For example, the law is clear that private contracts such as bilateral sales agreements can be subject to the "public interest" standard of review.¹ As I explained in my separate statement in *Transcontinental Gas Pipe Line Corporation*,² when parties seek to have the Commission approve their contracts subject to the "public interest" standard of review for

¹ See *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*), where the Supreme Court held that what has become known as the "public interest" standard of review should be applied to the changes sought by electric and gas utility sellers in long-term, fixed-rate bilateral sales contracts on file at the Commission with a utility buyer (i.e., utility sellers may not change the rate in an established long-term, fixed-rate bilateral sales contract unless the contract rate is "so low as to conflict with the public interest." See *Mobile* at 345; *Sierra* at 355.) Similarly, in *Public Utility Dist. No. 1 of Snohomish County, Wash., et al. v. FERC*, 471 F.3d 1053 (9th Cir. 2006) (*Snohomish*), the court held that the *Mobile-Sierra* "public interest" doctrine could be applied to the changes sought by a utility buyer to its market-based rate bilateral sales contract with an electric utility seller if certain conditions were met.

² 117 FERC ¶ 61,232 (2006).

future modifications resulting from the Commission acting *sua sponte* or pursuant to a request by a non-party to the settlement, the Commission should consider whether this standard is appropriate within the context of the particular contract or agreement. If parties, for example, make an affirmative showing that their contracts are like those in *Mobile* and *Sierra*, I would approve applying the “public interest” standard to future changes to those contracts.

In this case, the parties have agreed that the “just and reasonable” standard will apply to all future changes. Because the type of agreement at issue here is at the opposite end of the spectrum, factually and legally, from the type at issue in *Mobile* and *Sierra*, I believe their choice is appropriate and I do not believe that it would have been appropriate for them to seek a “public interest” standard of review for future modifications.

The agreements at issue in *Mobile* and *Sierra* were private bilateral sales contracts, and they did not involve a tariff of general applicability that could apply to a wide range of customers over time. By contrast, the tariff that is the subject of this settlement is not private and not a bilateral sales contract. The settlement agreement is not private because the affected tariff is not private. In turn, the tariff is not private largely because it is not bilateral. Rather, it involves generally applicable rates, terms, and conditions of service for all current and future customers and the uncontested settlement here is only among the utility and the 10 intervenors in this rate case. Some of these terms and conditions will be generally applicable to all of the utility’s customers under this tariff for six years, from July 1, 2007 through August 31, 2013.

Even assuming the tariff provisions at issue in this case could be called a “contract,” they would not be a type of “contract” that can, or should, be made subject to the “public interest” standard for future modifications that may be proposed by the Commission acting *sua sponte* or upon complaint by a non-party pursuant to FPA section 206. As noted above, the persons and entities who will pay the rates determined by these tariff provisions are not limited to only those who signed this settlement agreement; the customer base subject to these tariff rates, terms, and conditions can shift over time, with old customers leaving and new customers arriving. FPA section 206 gives these new customers the right to challenge tariff provisions that are unjust, unreasonable, unduly discriminatory, or preferential; and it gives the Commission the responsibility to entertain these challenges. *Mobile* and *Sierra* did not involve any such situation, and, therefore, their reasoning regarding the appropriate review of contractual arrangements did not, and did not have to, take any such situations into account. Thus, the holdings of these cases would not be available to justify imposing a “public interest” standard for a settlement agreement such as this one. I struggle to find any viable legal or policy reasons to allow the parties to a settlement involving long-lived, generally applicable tariff rates, terms and conditions to take away this right to seek a future change under the statutory “just and reasonable” standard from those who never had the opportunity to participate in these

settlement negotiations.

Accordingly, I am pleased that the parties here requested that the just and reasonable standard apply to any future changes and I support this order approving their settlement.

Sudeen G. Kelly

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company

Docket Nos. ER07-284-000;
ER07-284-001; ER07-284-002

(Issued May 18, 2007)

MOELLER, Commissioner *concurring in part*:

While the settlement agreement does not state the applicable standard of review for changes, the explanatory statement clearly indicates that changes to the settlement agreement shall be subject to the “just and reasonable” standard. I would remind parties that the standard of review they intend to apply to changes to the settlement agreement must match the standard set forth in the explanatory statement. An explanatory statement does not control the terms of a settlement agreement and in the event of a conflict, I intend to rely on the terms of the settlement agreement, not the explanatory statement, in determining the applicable standard of review.

Philip D. Moeller
Commissioner