

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.

Pacific Gas and Electric Co.

Docket No. ER05-116-000

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued November 2, 2006)

1. On May 22, 2006, Pacific Gas and Electric Company (PG&E), the Western Area Power Administration (Western) and certain Western customers filed a Settlement Agreement (Settlement) to resolve all issues pending in above captioned docket arising from PG&E's filing of customer-specific rates for wholesale distribution service between it and Western.¹ On June 8, 2006, the Commission Trial Staff filed comments in support of the Settlement. No other comments were received. On June 26, 2006, the Settlement Judge certified the Settlement to the Commission as uncontested.

2. The Commission finds the proposed settlement to be fair and reasonable and in the public interest. Accordingly, the Commission approves the proposed settlement. As agreed to by the parties, the applicable standard of review for any changes to the Settlement Agreement is the *Mobile-Sierra* public interest standard.² The Commission's approval of this settlement does not constitute approval of or precedent regarding any principle or issue in this proceeding.

¹ The active Western customers are Tuolumne Public Power Agency, Calaveras Public Power Agency, and the Power and Water Resources Pooling Authority and its Individual Members and Stakeholders, specifically PA Participant Arvin-Edison Water Storage District.

² *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). As a general matter, parties may bind the Commission to a public interest standard. *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 960-62 (1st Cir. 1993). Under limited circumstances, such as when the agreement has broad applicability, the Commission has the discretion to decline to be so bound. *Maine Public Utilities Commission v. FERC*, 454 F.3d 278, 286-87 (D.C. Cir. 2006). In this case we find that the public interest standard should apply.

3. However, the tariff sheets accompanying the instant settlement do not comply with the requirements of Order No. 614.³ The tariff service agreement submitted with the settlement states that it is “Third Revised Service Agreement No. 17, Supersedes Second Revised...” The service agreement that is superseded by the instant settlement tariff sheets must be the one currently in effect. PG&E’s settlement states that the service agreement currently in effect was filed as part of a settlement approved in Docket No. ER04-690-001.⁴ That agreement is Substitute Service Agreement No. 17. PG&E must change its designation to properly reflect the agreement being superseded. Therefore, PG&E must designate the refiled tariff service agreement as Substitute Third Revised Service Agreement No. 17, and indicate that it supersedes Substitute Service Agreement No. 17.

4. Accordingly, PG&E is directed to file corrected designations in compliance with Order No. 614 within thirty (30) days from this order.

5. This order terminates Docket No. ER05-116-000.

By the Commission. Commissioner Kelly dissenting in part with a separate statement attached.

Commissioner Wellinghoff dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

³ *Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000), Tariff, Rate Schedule and Service Agreement Guidelines Item No. 2.

⁴ *PG&E Explanatory Statement* at 4 and *Settlement Agreement* at 4.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Co.

Docket No. ER05-116-000

(Issued November 2, 2006)

KELLY, Commissioner, *dissenting in part*:

The parties to this settlement agreement request that the Commission apply the *Mobile-Sierra* “public interest” standard of review to any future modifications proposed by a party, a non-party, or the Commission acting *sua sponte*. In the absence of an affirmative showing by the contracting parties and reasoned analysis by the Commission regarding the appropriateness of approving the “public interest” standard with respect to future changes to this settlement sought by a non-party or by the Commission acting *sua sponte*, I do not believe the Commission should approve this contract provision.

Under the Federal Power Act and the Natural Gas Act, rates, terms and conditions of service must be “just and reasonable” and not unduly discriminatory or preferential. Parties to a contract or agreement may waive their statutory rights to the “just and reasonable” standard and request that the Commission instead apply the higher “public interest” standard under the *Mobile-Sierra* doctrine,¹ with respect to future changes sought by the one of the parties after the contract or agreement has been approved by the Commission.

In some cases, contracting parties request that the Commission apply the “public interest” standard to review of any future changes sought by the Commission acting *sua sponte* or on behalf of a non-party.² Courts have found that the Commission

¹ This doctrine is named after the Supreme Court’s rulings in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

² Until fairly recently, the Commission did not approve agreements whereby the parties sought to bind the Commission to a “public interest” standard of review with respect to the Commission acting *sua sponte* or at the request of non-parties to change rates, terms and conditions in order to protect non-parties. *See, e.g., ITC Holdings Corp.*, 102 FERC ¶ 61,182 at P 77, *reh’g denied*, 104 FERC ¶ 61,033 (2003); *Westar Generating, Inc.*, 100 FERC ¶ 61,255 at 61,917 (2002); *Niagara Mohawk Power Corporation*, 97 FERC ¶ 61,018 at 61,060 (2001); *Turlock Irrigation District*, 88 FERC ¶ 61,322 at 61,978 (1999); *Montana Power Company*, 88 FERC ¶ 61,019 at

has the authority not to accept such a request.³ In making such a request, I believe the contracting parties must affirmatively demonstrate why their request to require the Commission to apply the higher “public interest” standard with respect to future changes sought by the Commission acting *sua sponte* or on behalf of non-parties is consistent with the Commission’s fulfillment of its statutory responsibilities under FPA sections 205 and 206. In conducting its initial review of agreements where the parties seek to hold the Commission and non-parties to the higher “public interest” standard, the Commission should consider whether the higher “public interest” standard of review is appropriate within the context of the particular contract or agreement. Under certain circumstances, I believe it may be appropriate for the Commission to approve such provisions, as stated in my concurring statement in *Entergy*;⁴ however, the appropriateness of such a provision has not been demonstrated under the facts of this case.

In addition, this order concludes, without a reasoned analysis that the “public interest” standard should apply in this case. Although the order recognizes that the Commission has discretion to decline to be “bound” by the “public interest” standard,⁵ it implies that the case law regarding the applicability of the *Mobile-Sierra* “public interest” standard is clear. In fact, it is not. Courts have recognized that “cases even within the D.C. Circuit . . . do not form a completely consistent pattern.”⁶ Furthermore, I do not agree with the footnote’s characterization of the recent *Maine PUC v. FERC* case, as restricting the Commission’s discretion regarding the application of the “public interest” standard only “under limited circumstances.”

61,051 (1999); and *Carolina Power & Light Co.*, 67 FERC ¶ 61,074 at 61,205 (1994).

³ See, e.g., *Maine PUC v. FERC*, 454 F.3d 278 (D.C. Cir. 2006).

⁴ See *Entergy Services, Inc.*, 117 FERC ¶ 61,055 (2006).

⁵ This approach marks a departure from the proposal in the Notice of Proposed Rulemaking on the *Standard of Review for Modifications to Jurisdictional Agreements*, Notice of Proposed Rulemaking, 113 FERC ¶ 61,317 (2005), which would have required the Commission to review modifications to all jurisdictional agreements (except specified electric transmission service agreements and natural gas transportation agreements) under the “public interest” standard, unless the contracting parties used prescribed language specifying that they intend to permit the Commission to apply the “just and reasonable” standard to a previously-executed agreement.

⁶ See *Boston Edison Co. v. FERC*, 233 F.3d 60, 67-68 (1st Cir. 2000).

Accordingly, I dissent in part from this order's approval of this settlement.

Sudeen G. Kelly

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Co.

Docket No. ER05-116-000

(Issued November 2, 2006)

WELLINGHOFF, Commissioner, dissenting in part:

The parties in this case have asked the Commission to apply the “public interest” standard of review when it considers future changes to the instant settlement that may be sought by any of the parties, a non-party, or the Commission acting *sua sponte*.

Because the facts of this case do not satisfy the standards that I identified in *Entergy Services, Inc.*,¹ I believe that it is inappropriate for the Commission to grant the parties’ request and agree to apply the “public interest” standard to future changes to the settlement sought by a non-party or the Commission acting *sua sponte*. In addition, for the reasons that I identified in *Southwestern Public Service Co.*,² I disagree with the Commission’s characterization in this order of case law on the applicability of the “public interest” standard.

For these reasons, I respectfully dissent in part.

Jon Wellinghoff
Commissioner

¹ 117 FERC ¶ 61,055 (2006).

² 117 FERC ¶ 61,149 (2006).