

117 FERC ¶ 61,149  
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.

Southwestern Public Service Company.

Docket No. ER06-320-000

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued November 2, 2006)

1. On June 6, 2006, Xcel Energy Services, Inc. (Xcel) filed an Offer of Settlement and Explanatory Statement in the above captioned docket on behalf of itself and its affiliate Southwestern Public Service Company (Southwestern), as well as the other parties Tri-County Electric Cooperative, Inc., Occidental Permian, Ltd., and Golden Spread Electric Cooperative. Xcel states that the settlement resolves issues concerning a proposed power supply agreement providing for the sale of full requirements power and energy to Tri-County Electric Cooperative, Inc. On June 16, 2006, the Commission Trial Staff filed comments in support of the Offer of Settlement. No other comments were received. On June 27, 2006, the Presiding Administrative Law Judge (ALJ) certified the subject settlement 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. The applicable standard of review agreed to by the Parties as to the General Terms and Conditions or the Power Agreement for any changes to the Settlement Agreement, whether proposed by a Party, a non-Party, or the Commission, acting *sua sponte*, is the *Mobile-Sierra* public interest standard.<sup>1</sup> The Commission's approval of the Offer of Settlement does not constitute approval of, or precedent regarding, any principle or issue

---

<sup>1</sup> *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 (1<sup>st</sup> 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.

in this proceeding. However, the tariff designations in the subject settlement do not comply with Order No. 614, which mandates that utilities prospectively include proposed designation for all tariff sheets filed with the Commission.<sup>2</sup> Because its filing included no tariff sheet designations, Southwestern is directed to file tariff sheets in conformance with Order No. 614 within 30 days after the consummation of the Asset Purchase Agreement.

4. This order terminates Docket No. ER06-320-000.

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.

---

<sup>2</sup> *Designation of Electric Rate Schedule Sheets*, Order No. 614, 65 Fed. Reg. 18,221 (Mar. 31, 2000), FERC Stats. & Regs. ¶ 31,096 (2000).

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Southwestern Public Service Co.

Docket No. ER06-320-000

(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,<sup>1</sup> 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.<sup>2</sup> Courts have found that the Commission has the

---

<sup>1</sup> 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*).

<sup>2</sup> 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 61,051 (1999); and *Carolina Power & Light Co.*, 67 FERC ¶ 61,074 at 61,205 (1994).

authority not to accept such a request.<sup>3</sup> 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*;<sup>4</sup> 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,<sup>5</sup> 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.”<sup>6</sup> 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.”

---

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

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

<sup>5</sup> 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.

<sup>6</sup> 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.

---

Suedeem G. Kelly

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Southwestern Public Service Co.

Docket No. ER06-320-000

(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 Agreement 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.*,<sup>1</sup> 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 Agreement sought by a non-party or the Commission acting *sua sponte*. Therefore, I dissent with respect to the Commission’s decision on that issue in this case.

In addition, I write separately to express my concern about the Commission’s characterization in this order of case law on the applicability of the “public interest” standard. First, the Commission’s passing reference to that case law, including *Northeast Utilities Service Co. v. FERC*,<sup>2</sup> implies great clarity where none exists. As I noted in *Entergy*, case law on the applicability of the “public interest” standard is not entirely clear and is, in fact, inconsistent. Indeed, courts have recognized that cases in this area “do not form a completely consistent pattern,” and have invited the Commission to establish a clear policy to resolve the issue on a prospective basis.<sup>3</sup>

Second, I disagree with the statement in this order that the Commission has discretion only “under limited circumstances” as to the applicability of the “public interest” standard. In contrast to that characterization, courts have stated that the Commission “has reasonably broad powers to regulate the substantive terms of filings that it accepts and allows to become effective” and have suggested that the Commission may not need to tolerate the “public interest” standard at all.<sup>4</sup> The recent court decision

---

<sup>1</sup> 117 FERC ¶ 61,055 (2006) (*Entergy*).

<sup>2</sup> 993 F.2d 937 (1<sup>st</sup> Cir. 1993).

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

<sup>4</sup> *Id.* at 68.

in *Maine Public Utilities Commission v. FERC*,<sup>5</sup> cited in this order, reinforces that discretion, particularly with regard to the Commission's initial review of an agreement. To the extent that the *Maine PUC* decision also suggests that the breadth of an agreement's applicability may be relevant to the exercise of the Commission's discretion, I believe that the Commission should account for that issue by considering whether the agreement was negotiated through a stakeholder process reflecting a wide range of interests. My statement in *Entergy* places this consideration in context as to the appropriate applicability of the "public interest" standard.

For these reasons, I respectfully dissent in part.

---

Jon Wellinghoff  
Commissioner

---

<sup>5</sup> 454 F.3d 278 (D.C. Cir. 2006) (*Maine PUC*).