

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.

High Island Offshore System, LLC

Docket No. RP06-244-000

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued November 3, 2006)

1. On August 11, 2006, pursuant to Rule 602 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602 (2004), High Island Offshore System, LLC (HIOS) filed an offer of settlement (Settlement) which resolves all issues in this docket. As discussed below, the Commission approves the Settlement as fair and reasonable and in the public interest.
2. On March 1, 2006, HIOS filed revised tariff sheets to implement the annual "true-up" filing requirement pursuant to the Company Use tracker mechanism established in section 28 of the General Terms and Conditions of its FERC Gas Tariff. HIOS presented both primary and alternative tariff sheets, and proposed that the primary tariff sheets be accepted and made effective April 1, 2006.
3. On March 31, the Commission issued an order in this proceeding accepting and suspending tariff sheets subject to a refund and establishing a technical conference.<sup>1</sup> As part of its order, the Commission accepted, and suspended, HIOS' proposal to establish a monthly cash-out mechanism for the true up of its Company Use (fuel use and lost-and-unaccounted-for) experience, and established a technical conference to provide parties with a forum to discuss relevant issues and concerns raised by the filing. The technical conference was convened by Commission staff on May 22, 2006.
4. The active participants subsequently held a number of settlement discussions and reached a settlement resolution of all issues in this proceeding.

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<sup>1</sup> *High Island Offshore System, LLC*, 114 FERC ¶ 61,337 (2006).

5. The following is a summary of the major provisions of the Settlement.
- a. Article I provides that the HIOS Company Use retention percentage shall be reduced to one percent, effective September 1, 2006, which shall remain in effect until superseded by any prospective percentage established pursuant to HIOS' next annual Company Use tracker filing pursuant to GT&C section 28.2 of its FERC Gas Tariff.
  - b. Article II provides for certain tariff changes that HIOS has agreed to make in settlement of this proceeding, including the filing of new GT&C section 28.2 of its FERC Gas Tariff to establish a mechanism for the semi-annual adjustment of its Company Use percentage, based on certain circumstances.
  - c. Article III sets forth the requirements for workpapers that HIOS has agreed to provide in its future fuel use tracker filings, including detailed information on prior period adjustments, and steps that HIOS has agreed to undertake to limit prior period adjustments to one year prior to the applicable billing period under existing and future OBAs.
  - d. Article IV requires HIOS to provide refunds to the settling parties of the fuel overcollection for the period August 1, 2005 through to August 31, 2006.
  - e. Article V contains provisions setting forth when the Settlement will become effective.
  - f. Article VI includes general reservations typically included in settlements of Commission proceedings.
6. The Settlement also states that to the extent the Commission may consider any change to any then-effective provisions of the Settlement, the standard of review for any such proposed change shall be the *Mobile-Sierra* "public interest" standard for review<sup>2</sup>

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<sup>2</sup> 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 the public interest standard should apply.

set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Co.*<sup>3</sup> and *Federal Power Commission v. Sierra Pacific Co.*<sup>4</sup>

7. A shortened comment period was established with initial comments to be filed before August 21, 2006, and reply comments to be filed on or before August 23, 2006. No adverse comments were filed. Pursuant to section 385.602(g)(3) of our settlement rules, 18 C.F.R. § 385.602(g)(3) (2006), the Commission finds that the uncontested settlement is fair and reasonable and in the public interest and therefore, the Settlement is approved.

8. This order does not relieve HIOS of its obligations to file the required reports under Part 284 of the Commission's regulations. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding any principle or issue in this proceeding.

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.

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<sup>3</sup> 350 U.S. 332 (1956).

<sup>4</sup> 350 U.S. 348 (1956).

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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

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<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.”

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<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.

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Suedeem G. Kelly

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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.*,<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 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.*,<sup>2</sup> 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.

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Jon Wellinghoff  
Commissioner

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

<sup>2</sup> 117 FERC ¶ 61,149 (2006).