

120 FERC ¶ 61,148
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.

Midwest Independent Transmission
System Operator, Inc.

Docket Nos. ER02-2458-000,
ER02-2458-001, ER02-2458-004,
ER02-2458-005, ER02-2458-006,
ER02-2458-007, and
ER02-2458-008

ORDER CONDITIONALLY APPROVING UNCONTESTED SETTLEMENT

(Issued August 10, 2007)

1. On July 7, 2006, Midwest Independent Transmission System Operator, Inc., (Midwest ISO), Wolverine Power Supply Cooperative, Inc., (Wolverine), Michigan Electric Transmission Company, LLC, (METC), Trans-Elect, Inc., and Michigan Public Power Agency (MPPA) on behalf of itself and certain of its Members (collectively, Parties), filed a Second Amended and Restated Settlement Agreement (Second Restated Settlement) and related Second Revised Michigan joint Zone Revenue Allocation Agreement (Second Revised RAA). The Second Restated Settlement resolves the issues set for hearing in the above captioned dockets including: (1) Midwest ISO's proposal to include the three MPPA members' facilities in the joint zone rates; (2) factual issues concerning the ownership entitlements; (3) formula provisions necessary to implement further adjustments to the transmission owners' revenue requirements; and (4) whether the current loss methodology used in the METC pricing zone is appropriate as an interim formula until the appropriate updated joint zone loss factor is determined.

2. In addition, pursuant to *Midwest Independent Transmission System Operator, Inc.*, 114 FERC ¶ 61,053 (2006) (January 20 Order), the Parties state that they have filed the Second Restated Settlement pursuant to section 205 of the Federal Power Act¹ to continue charging a specified interim loss factor for the Michigan Joint Zone, and to include certain facilities of MPPA Members in the Michigan Joint Zone. The Second

¹ 16 U.S.C. § 824d (2000).

Restated Settlement revises the methodology to ensure that all holders of Ownership Entitlements pay an appropriate share of the revenue requirements related to non-METC transmission facilities included in the joint zone. The Second Restated Settlement also incorporates a final loss methodology, initially filed on June 30, 2006. On July 7, 2006, Wolverine and Midwest ISO jointly filed revised Schedules 7, 8, and 9 of the Midwest ISO Open Access Transmission and Energy Markets Tariff (TEMT) reflecting the Second Restated Settlement with a requested effective date of January 1, 2006.²

3. Initial comments were filed on July 27, 2006. No reply comments were filed. The Chief Administrative Law Judge certified the settlement to the Commission as uncontested on August 9, 2006.³

4. The Second Restated Settlement, as modified below, is in the public interest and is hereby conditionally approved. The Commission's approval of the modified Second Restated Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

5. The language in the Second Restated Settlement and Second Revised RAA provides that they are not subject to change effective on or before January 31, 2008, absent the agreement of the parties. The Second Restated Settlement and the Second Revised RAA also provide that changes other than those agreed to by the parties will be subject to the public interest standard of review.⁴ As a general matter, parties may bind the Commission to a public interest standard.⁵ Our examination of the Second Restated

² The January 20 Order accepted effective January 1, 2006, earlier proposed revisions to Schedules 7, 8, and 9 of Midwest ISO's TEMT, subject to refund and refiling on February 21, 2006 for greater specificity on the rate terms and conditions. Midwest ISO made the required refiling on February 21, 2006. *See* January 20 Order at P 18-19. The Commission has not ruled on that filing and Midwest ISO and Wolverine requested in the July 7 filing that the revised Schedules 7, 8, and 9 replace the February 21 filing in its entirety. July 7 Rate Schedule Transmittal Letter at 3.

³ *Midwest Independent Transmission System Operator, Inc.*, 116 FERC ¶ 63,029 (2006).

⁴ The Second Restated Settlement provides in pertinent part:

Section 205 Rights. . . . The standard of review for any changes other than those expressly provided for herein shall be the "public interest" standard of review as set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 322 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

⁵ *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 960-62 (1st Cir. 1993).

Settlement reveals an ambiguity that arises when the language of the Second Restated Settlement is interpreted in light of the history of this proceeding.

6. The original settlement contained substantially the same language as the Second Restated Settlement and, in response to concerns raised by Trial Staff, the parties stated that their intent was not to bind the Commission and non-parties to the public interest standard, and they agreed to clarify the settlement to that effect. The Commission accepted this clarification.⁶ However, the parties did not include this clarification in the First Restated Settlement. In addition, the parties did not include this clarification in the Second Restated Settlement at issue here. We also note that the explanatory statements for both Restated Settlements did not indicate a change in the parties' intent with respect to binding the Commission or non-parties.

⁶ In *Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,219 at P 22-24 (2004) (March 5 Order), the Commission said:

Trial Staff expresses concern that certain language in the Proposed Settlement Agreement binds the Commission to the "public interest" standard of review for all changes to the Proposed Settlement Agreement. Trial Staff asserts that in prior cases, the Commission has stated that a restriction on its authority to order changes to an agreement, like that in the Proposed Settlement Agreement, affects its ability under the Federal Power Act to protect the public interest – particularly the interest of non-parties to an agreement. Wolverine responds to Trial Staff's concern stating that the Proposed Settlement Agreement is not intended to bind the Commission acting *sua sponte* or in response to a complaint filed by a third party. According to Wolverine, the Filing Parties agree to amend the last sentence of section 8.4 of the Proposed Settlement Agreement to read as follows:

The standard of review for any changes proposed by the Executing Parties other than those expressly provided for herein shall be in the "public interest" standard of review....

We agree that the proposed revision clarifies that the imposed standard of Commission review applies only to proposed changes that are filed by signatories to the settlement agreement. Thus, Commission may, either *sua sponte* or pursuant to a complaint by a non-party to the settlement, in order to protect the interests of non-parties, investigate rates, terms and conditions under a "just and reasonable" standard at such times and under such circumstances as it deems appropriate. [footnote omitted]

7. In response to a letter from the Office of Energy Markets and Reliability dated March 30, 2007, Wolverine filed a letter stating the Parties' intent regarding the standard of review applicable to the Commission when acting *sua sponte* or in response to a complaint filed by a third party. Specifically, Wolverine states:

We are authorized to state for all the parties to the Second Amended and Restated Settlement Agreement that parties intend the "just and reasonable" standard of proof to apply to this situation and not the "public interest" burden of proof under *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ("*Mobile-Sierra*").

8. In light of Wolverine's letter, we understand that the "just and reasonable" standard will apply to the Commission and non-parties with regard to the Second Restated Settlement and the Second Revised RAA. We therefore direct the Parties to modify both the Second Restated Settlement to state that the "just and reasonable" standard will apply to the Commission and non-parties.

9. In this case we had to ask the Parties to clarify the standard of review they intended to apply to the subject documents. The Commission does not intend to make this a regular practice. We remind all parties that they should be clear as to the standard of review that they intend to be applied to their agreements so that the Commission does not have to seek such clarifications.

10. The tariff designations for the Second Revised RAA do not comply with Order No. 614, which mandates that utilities prospectively include proposed designations for all tariff sheets filed with the Commission.⁷ Because their filing included no tariff sheet designations for the Second Revised RAA, the Parties are directed to file tariff sheets in conformance with Order No. 614 within 30 days of the date of this order.

11. Further, for good cause shown a waiver of the Commission's 60-day prior notice requirement,⁸ is granted and the Second Restated Settlement, as modified, is accepted to be effective on January 1, 2006. Refunds with interest consistent with the Commission's Regulations⁹ are to be made and a refund report filed with the Commission within 60 days of the date of this order.

⁷ *Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000).

⁸ *See* 18 C.F.R. § 35.13 (2007).

⁹ *See* 18 C.F.R. § 35.19a (2007).

12. This order terminates Docket Nos. ER02-2458-000, ER02-2458-001, ER02-2458-004, ER02-2458-005, ER02-2458-006, ER02-2458-007, and ER02-2458-008. New subdockets will be assigned to the compliance filings and refund report.

By the Commission. Commissioner Kelly concurring with a separate statement attached.

(S E A L) Commissioner Wellinghoff dissenting in part with a separate statement attached.

Kimberly D. Bose,
Secretary.

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KELLY, Commissioner, *concurring*:

This order conditions approval of the Second Amended and Restated Settlement Agreement and Second Revised Michigan Joint Zone Revenue Allocation Agreement on the parties clarifying that the “just and reasonable” standard of review will apply with regard to future changes that may be proposed by a non-party or the Commission acting *sua sponte*. Although I disagree with the order’s statement that parties may generally bind the Commission to the *Mobile-Sierra* “public interest” standard, I concur with the order’s conditional approval of the agreements.

Sudeen G. Kelly

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WELLINGHOFF, Commissioner, dissenting in part:

For the reasons I stated in *Entergy Services, Inc.*¹ and *Southwestern Public Service Co.*,² I disagree with the statement in this order that, as a general matter, the parties in a case may bind the Commission to 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).