

120 FERC ¶ 61,178
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Xcel Energy Services Inc.

Docket No. EL06-101-000

v.

Midwest Independent Transmission System
Operator, Inc.

ORDER APPROVING UNCONTESTED SETTLEMENT
AND DISMISSING COMPLAINT

(Issued August 21, 2007)

1. Xcel Energy Services, Inc. (Xcel), on behalf of its subsidiaries Northern States Power Company Minnesota and Northern States Power Company Wisconsin (together, NSP Companies), and the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) filed an uncontested settlement agreement (settlement) in this proceeding that resolves all issues between the parties relating to the complaint filed by Xcel against Midwest ISO in this proceeding. We will approve the uncontested settlement and will correspondingly dismiss Xcel's complaint.
2. The complaint pertained to NSP Companies' dispute with Midwest ISO over the replacement energy and revenue sufficiency guarantee charges to be assessed for two outages of generation facilities owned jointly by NSP Companies and the Southern Minnesota Municipal Power Agency. With the assistance of the Commission's Dispute Resolution Service, the parties agreed to resettle those charges as well as certain other charges.
3. Section 4.4 of the settlement provides that the standard of review for any modifications to the settlement "that are not agreed to by the Parties, including any

modifications proposed by a Party, a non-party or the Commission acting *sua sponte*, shall be the [*Mobile Sierra*] ‘public interest’ standard of review.”¹

4. The settlement is fair and reasonable and in the public interest, and is hereby approved. The Commission’s approval of the settlement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings. Consistent with our approval of the settlement, which resolves the parties’ dispute, we will dismiss the complaint.

5. This order terminates Docket No. EL06-101-000.

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

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.

¹ *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.

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KELLY, Commissioner, *concurring*:

The settling parties request that the Commission apply the *Mobile-Sierra* “public interest” standard of review with respect to any modifications to the settlement, whether proposed by a party, a non-party or the Commission acting *sua sponte*. This settlement resolves issues arising from charges assessed on the NSP Companies in connection with two generation facility outages during April 14 to May 1, 2005. It is uncontested, does not affect non-settling parties, and resolves the amount of the claimed obligations between the parties for the relevant prior period. The settlement does not contemplate ongoing performance under the settlement into the future, which would raise the issue of what standard the Commission should apply to review any possible future modifications sought by non-parties or the Commission. Indeed, in a sense, the standard of review is irrelevant here. Therefore, while I do not agree with the order’s statements regarding the applicability of the *Mobile-Sierra* “public interest” standard of review (*see* footnote 1), I concur with the order’s approval of this settlement agreement.

Suede 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 any change to the Settlement that may be sought by 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.*,² 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.*,³ I disagree with the Commission’s characterization in this order of case law on the applicability of the “public interest” standard.

Finally, it is worth noting that the standard of review is, in a sense, irrelevant here for the reasons set forth in Commissioner Kelly’s separate statement.

For these reasons, I respectfully dissent in part.

Jon Wellinghoff
Commissioner

² 117 FERC ¶ 61,055 (2006).

³ 117 FERC ¶ 61,149 (2006).

