

128 FERC ¶ 61,121
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Midwest Independent Transmission System
Operator, Inc.

Docket Nos. ER07-1375-000
ER07-1375-001
ER08-320-000
(consolidated)

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued August 3, 2009)

1. On May 22, 2009, Summit Wind LLC (Summit), ITC Midwest LLC (ITC Midwest), Great River Energy (Great River), and Midwest Independent Transmission System Operator, Inc. (Midwest ISO) jointly filed an Offer of Settlement (Settlement) to resolve all issues set for hearing in the above-captioned proceedings¹ including a determination of how much Summit must pay for the network upgrades required for the proposed interconnection between its wind-powered generation project and ITC Midwest's transmission facilities.
2. On June 11, 2009, Trial Staff filed comments in support of the Settlement. On June 24, 2009, the Settlement Judge certified the Settlement to the Commission as uncontested.²
3. The Commission finds that the Settlement is fair and reasonable and in the public interest and is hereby approved. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.
4. Pursuant to Section 7 of the Settlement, the standard of review for modifications to the Settlement that are proposed by any party to the Settlement after it is approved by the

¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,113 (2008) (*Midwest ISO*).

² *Midwest ISO*, 127 FERC ¶ 63,029 (2009).

Commission shall be the public interest standard under the *Mobile-Sierra* doctrine.³ The standard of review for any proposed modifications to the Settlement requested by a non-party or initiated by the Commission acting *sua sponte* shall be the most stringent standard permissible under applicable law.

5. This order terminates the above captioned dockets.

By the Commission. Chairman Wellinghoff and Commissioner Kelly concurring in part with a separate joint statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System
Operator, Inc.

Docket Nos. ER07-1375-000
ER07-1375-001
ER08-320-000

(Issued August 3, 2009)

WELLINGHOFF, Chairman, and KELLY, Commissioner, *concurring in part*:

The proposed standard of review in the settlement would have the Commission apply the “most stringent standard permissible under applicable law” to any changes proposed by non-parties or the Commission acting *sua sponte*.

The U.S. Supreme Court has held that whenever the Commission reviews certain types of contracts, the Federal Power Act (FPA) requires it to apply the presumption that the contract meets the “just and reasonable” requirement imposed by the FPA.¹ The contracts that are accorded this special application of the “just and reasonable” standard are those “freely negotiated wholesale-energy contract[s]” that were given a unique role in the FPA.² In contrast, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) determined that the proper standard of review for a different type of agreement, with regard to changes proposed by non-contracting third parties, was the “‘just and reasonable’ standard in section 206 of the Federal Power Act.”³ The agreement at issue in *Maine PUC* was a multilateral settlement negotiated in a Commission adjudication of a utility’s proposal to revise its tariff substantially to enable it to establish and operate a locational installed electricity capacity market. The D.C. Circuit’s rationale in *Maine PUC* applies with at least equal force to changes to an agreement sought by the Commission acting *sua sponte*.⁴

¹ *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733, 2737 (2008) (*Morgan Stanley*).

² *Id.*

³ *Maine Public Utilities Commission v. FERC*, 520 F.3d 464, 478, *petition for reh’g denied*, No. 06-1403, slip op. (D.C. Cir. Oct. 6, 2008) (*Maine PUC*).

⁴ *See Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201 (2008) (Comm’rs Wellinghoff and Kelly dissenting in part).

Our review of the agreement in question here indicates that it more closely resembles the *Maine PUC* adjudicatory settlement than the *Morgan Stanley* wholesale-energy sales contracts, which, for example, were freely negotiated outside the regulatory process. Therefore, the standard of review that the Commission must apply to changes proposed by either non-parties or the Commission acting *sua sponte* is the “just and reasonable” standard of review. In those instances, the Commission retains the right to investigate the rates, terms, and conditions of the settlement under the “just and reasonable” standard of review set forth under FPA section 206.⁵

For these reasons, we concur in part.

Jon Wellinghoff

Suedeem G. Kelly

⁵ 16 U.S.C. § 824e (2006).