

128 FERC ¶ 61,181
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

August 24, 2009

In Reply Refer To:
Entergy Services, Inc.
Docket No. ER08-1056-003

Skadden, Arps, Slate, Meagher & Flom LLP
Attn: Mike Naeve, Esq.
Attorney for Entergy Services, Inc.
1440 New York Avenue, NW
Washington, DC 20005-2111

Reference: Order on Partial Uncontested Settlement

Dear Mr. Naeve:

1. On May 21, 2009, you filed an Offer of Settlement and Partial Settlement Agreement on behalf of Entergy Services, Inc. and each of the following entities: the Arkansas Public Service Commission; the Council of the City of New Orleans; the Louisiana Public Service Commission; the Mississippi Public Service Commission; East Texas Cooperatives; and the Texas Industrial Energy Consumers.
2. On May 27, 2009, Commission Trial Staff submitted comments in support of the settlement. No other comments were received. On June 19, 2009, the Presiding Administrative Law Judge certified the uncontested Partial Settlement Agreement to the Commission.
3. Section 13 of the Partial Settlement Agreement indicates that “the Parties and Commission shall be subject to the ‘just and reasonable’ standard of review. Changes to this Settlement Agreement proposed by non-settling third-parties shall be subject to the most stringent standard of review permissible under applicable law.”
4. The subject settlement is fair, 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.

5. This letter order terminates Docket No. ER08-1056-003.

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

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Services, Inc.

Docket Nos. ER08-1056-003

(Issued August 24, 2009)

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

The settlement would have the Commission apply the “most stringent standard of review permissible under applicable law” to any changes proposed by non-settling third-parties.

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 non-settling third-parties is the “just and reasonable” standard of review.

For these reasons, we concur in part.

Jon Wellinghoff

Sudeen G. Kelly