

157 FERC ¶ 61,219
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

December 19, 2016

In Reply Refer To:
Southwest Power Pool, Inc.
Docket No. ER15-2356-000

Wright & Talisman
1200 G Street, NW
Suite 600
Washington, DC 20005

Attention: Matthew J. Binette, Esq.

Dear Mr. Binette:

1. On September 27, 2016, you filed, in the above-referenced proceeding, a Settlement Agreement between Southwest Power Pool, Inc. (SPP) and MidAmerican Energy Company (MidAmerican) (collectively, Settling Parties). On October 17, 2016, the Commission Trial Staff filed comments in support of the Settlement Agreement. On October 31, 2016, the Settlement Judge certified the Settlement Agreement to the Commission as an uncontested settlement.¹

2. The Settlement Agreement addresses issues related to an executed Market Participant Service Agreement between SPP as Transmission Provider and MidAmerican as Customer (Substitute Market Participant Service Agreement).

3. Article 7 of the Settlement Agreement states that

[t]o the extent that the Commission considers any changes of the provisions of this Settlement Agreement, the standard of review for such changes shall be the most stringent standard permissible under applicable law. For the avoidance of doubt, the standard of review to be applied by the

¹ *Sw. Power Pool, Inc.*, 157 FERC ¶ 63,016 (2016).

Commission in considering any change to this Settlement Agreement proposed by a Settling Party, other than amendments agreed to by both Settling Parties, shall be solely the “public interest” standard as set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.* and *FPC v. Sierra Pacific Power Co.* (collectively “*Mobile-Sierra*”), as clarified in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, and refined in *NRG Power Marketing v. Maine Public Utilities Commission*. The standard of review to be applied by the Commission in considering any change to this Settlement Agreement that is proposed by the Commission acting *sua sponte* or by any party that is not a Settling Party shall be the “public interest” standard set forth in *Mobile-Sierra* or the most stringent standard permitted by law.

4. Because the Settlement Agreement appears to invoke the *Mobile-Sierra* “public interest” presumption with respect to third parties and the Commission acting *sua sponte*, we will analyze the applicability here of that more rigorous application of the just and reasonable standard.

5. The *Mobile-Sierra* “public interest” presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either: (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm’s length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption. In *New England Power Generators Association v. FERC*,² however, the D.C. Circuit determined that the Commission is legally authorized to impose a more rigorous application of the statutory “just and reasonable” standard of review on future changes to agreements that fall within the second category described above.

6. The Substitute Market Participant Service Agreement embodies rates, terms, or conditions that are generally applicable. The Substitute Market Participant Service Agreement sets the terms for service pursuant to the *pro forma* Market Participant Agreement set forth in Attachment AH of the SPP Tariff. The Settlement Agreement and

² *New England Power Generators Ass’n v. FERC*, 707 F.3d 364, 370-71 (D.C. Cir. 2013).

the Substitute Market Participant Service Agreement thus pertain to the SPP Tariff and service provided thereunder. For this reason, we find that the Substitute Market Participant Service Agreement does not embody “contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption.”³

7. As we have stated, in the context of reviewing settlements that do not involve “contract rates,” the Commission has discretion as to whether to approve a request to impose on third parties the more rigorous application of the statutory “just and reasonable” standard of review that is often characterized as the *Mobile-Sierra* “public interest” standard of review.⁴ The Commission also stated in these orders that it will not approve imposition of that more rigorous application of the statutory “just and reasonable” standard of review on future changes to an agreement sought by non-settling third parties, absent compelling circumstances such as were found to exist in *Devon Power*. We find that the circumstances presented here do not satisfy that test. Thus, we find it unjust and unreasonable to impose the more rigorous application of the statutory “just and reasonable” standard of review in the instant proceeding with respect to future changes to the Settlement Agreement sought by a non-settling third party.

8. With the exception of the issue discussed above, the Settlement Agreement appears to be fair and reasonable and in the public interest.⁵ As such, the Settlement Agreement is conditionally approved subject to the Settling Parties filing, within 30 days of the date of this order, a revised settlement agreement reflecting a revision to the standard of review provision that applies to third parties. SPP is also directed to file

³ *Panhandle Eastern Pipe Line Co.*, 143 FERC ¶ 61,041, at P 84 (2013); *Entergy Arkansas, Inc.*, 143 FERC ¶ 61,299, at P 92 (2013).

⁴ See, e.g., *MidAmerican Energy Co.*, 138 FERC ¶ 61,028, at P 7 (2012) (citing *Devon Power, LLC*, 134 FERC ¶ 61,208, *order on reh'g*, 137 FERC ¶ 61,073 (2011) (*Devon Power*), *aff'd*, *New England Power Generators Ass'n v. FERC*, 707 F.3d 364; *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 (2011); *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105, at P 24 (2011)).

⁵ Likewise, with the exception of the issue discussed above, the Commission's approval of the Settlement Agreement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

revised tariff records in eTariff format,⁶ within 30 days of the date of this order, to reflect the Commission's action in this order.

By direction of the Commission.

Kimberly D. Bose,
Secretary.

⁶ *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008).