

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.

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| Midwest Independent Transmission System Operator, Inc. | Docket Nos. ER05-6-079 |
| Midwest Independent Transmission System Operator, Inc. PJM Interconnection, LLC, <i>et al.</i> | EL04-135-082 |
| Midwest Independent Transmission System Operator, Inc. PJM Interconnection, LLC, <i>et al.</i> | EL02-111-099 |
| Ameren Services Company, <i>et al.</i> | EL03-212-095 |

ORDER APPROVING UNCONTESTED PARTIAL SETTLEMENT

(Issue November 3, 2006)

1. On August 8, 2006, the Dayton Power & Light Company (Dayton) and Strategic Energy, L.L.C. (Strategic) (collectively, Settling Parties) filed an Uncontested Partial Settlement (Settlement) resolving all Seams Elimination Cost Adjustment (SECA) issues between these two parties set for hearing in the above-captioned dockets. Specifically, under the proposed settlement, the Settling Parties have agreed that Strategic's total SECA-related obligations to Dayton shall be \$1,458,186 (Settlement Amount). The Settling Parties further agree that Dayton shall refund to Strategic \$874,912, which represents the difference between the amount already paid by Strategic in SECA charges and the Settlement Amount. According to the Settlement provisions, PJM Interconnection shall collect from Dayton and distribute to Strategic the refund amount of \$874,912 within sixty (60) days of the Commission's approval of the Settlement.

2. On August 14, 2006, Commission Trial Staff filed initial comments supporting the Settlement. No reply comments were filed. The Presiding Administrative Law Judge certified the Settlement to the Commission as uncontested on September 20, 2006.¹

3. The subject Settlement is fair and reasonable and in the public interest; it 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. The standard of review for any modifications to this Settlement requested by a Settling Party that are not agreed to by all Settling Parties shall be the "public interest" standard under the *Mobile-Sierra* doctrine.² The standard of review for any non-Settling Party to the Settlement Agreement and the Commission will be the most stringent standard permissible under applicable law.

4. Dayton is directed to file a compliance report regarding any refunds pursuant to this Settlement within fifteen (15) days after making such refunds. Dayton shall furnish copies of the report to the affected wholesale customers and to each state Commission within whose jurisdiction the wholesale customers distribute and sell electric energy at retail.

5. This order terminates Docket Nos. ER05-6-079, EL04-135-082, EL02-111-099 and EL03-212-095. A new subdocket will be assigned upon the receipt of the required compliance filing.

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)

Magalie R. Salas
Secretary.

¹ *Midwest Independent System Operator, Inc.*, 116 FERC ¶ 63,058 (2006).

² *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956). As a general matter, parties may bind the Commission to the 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 most stringent standard permissible under applicable law” with respect to any future changes proposed by a non-settling party or the Commission. This settlement resolves issues related to the Seams Elimination Cost Adjustment (SECA) monetary obligations between the parties for the period ending March 31, 2006. This settlement is uncontested, does not affect non-settling parties, and resolves the amount of the claimed SECA 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 unexplained inference that the *Mobile-Sierra* “public interest” standard of review applies with respect to any future modifications sought by a non-party or the Commission, or the reasoning regarding the applicability of the *Mobile-Sierra* “public interest” standard of review (*see* footnote 2), I concur with the order’s approval of this settlement agreement.

Suedeen 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 future changes to the instant settlement that may be sought by any of the parties. With regard to such changes sought by either a non-party or the Commission acting *sua sponte*, the parties have asked the Commission to apply the most stringent standard permissible under applicable law. In response to the latter request, the Commission states that the “public interest” standard should apply to future changes sought by 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.*,¹ I believe that it is inappropriate for the Commission to 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.*,² I disagree with the Commission’s characterization in this order of case law on the applicability of the “public interest” standard.

¹ 117 FERC ¶ 61,055 (2006).

² 117 FERC ¶ 61,149 (2006).

Docket No. ER05-6-079, *et al.*

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For these reasons, I respectfully dissent in part.

Jon Wellinghoff
Commissioner