

FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, DC 20426

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

Westar Energy, Inc.

Docket No. ER05-925-000

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued November 7, 2006)

1. On July 7, 2006, Westar Energy, Inc. (Westar), Missouri Joint Municipal Electric Utility Commission, Oklahoma Municipal Power Authority, Kansas Electric Power Cooperative, Inc., Kansas Municipal Utilities, Kansas Power Pool, Kansas City, Kansas, Board of Public Utilities, Kansas Municipal Energy Agency, and Kansas Corporation Commission filed a settlement agreement to resolve all outstanding issues in the above-referenced docket. Specifically, the settlement resolves the formula rate Westar will use to determine charges for transmission service, and also resolves the rates Westar will charge for ancillary services. The Commission's Trial Staff filed comments in support of the settlement on July 17, 2006. No other comments were received. On August 1, 2006, the Chief Administrative Law Judge certified the settlement to the Commission as uncontested.

2. The settlement is in the public interest and is hereby approved. The documents submitted with the settlement are accepted for filing and made effective as provided in the settlement. The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. The settlement provides that the standard of review applicable to proposed modifications permitted under the settlement will be the just and reasonable standard. The standard of review applicable to proposed changes that are prohibited under the settlement will be the public interest standard.<sup>1</sup>

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<sup>1</sup> *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 (1<sup>st</sup> 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.

3. Southwest Power Pool (SPP) will file with the Commission to revise the SPP regional OATT in order to implement the settlement rates effective as of December 1, 2005, as set forth in Article II paragraph 4 of the settlement. SPP will also issue refunds, with interest, consistent with section 35.19a of the Commission's regulations,<sup>2</sup> for the difference between the total payments made to SPP for service in the Westar Pricing Zone after Westar's proposed rates went into effect on December 1, 2005, and the payments that would have been made under the settlement rates. As provided in Article II of the settlement, Westar shall file a report of refunds within 30 days of the date the refunds are made.

4. The rate schedule sheets submitted as part of the settlement are properly designated and are accepted for filing and made effective as set forth in the settlement. *See Designation of Electric Rate Schedule Sheets*, Order No. 614, 65 Fed. Reg. 18,221, (FERC Stats. & Regs. Preambles July 1996 – December 2000 ¶ 31,096 (2000)).

5. This order terminates Docket No. ER05-925-000. A new subdocket will be assigned in Docket No. ER05-925 upon receipt of the required refund report.

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

Commissioner Wellinghoff dissenting in part with a separate statement attached.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>2</sup> 18 C.F.R. § 35.19a (2006).

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KELLY, Commissioner, *dissenting in part*:

The parties to this settlement agreement request that the Commission apply the *Mobile-Sierra* “public interest” standard of review to proposed changes that are prohibited under the settlement. In the absence of an affirmative showing by the contracting parties and reasoned analysis by the Commission regarding the appropriateness of approving the “public interest” standard with respect to future changes to this settlement sought by a non-party or by the Commission acting *sua sponte*, I do not believe the Commission should approve this contract provision.

Under the Federal Power Act and the Natural Gas Act, rates, terms and conditions of service must be “just and reasonable” and not unduly discriminatory or preferential. Parties to a contract or agreement may waive their statutory rights to the “just and reasonable” standard and request that the Commission instead apply the higher “public interest” standard under the *Mobile-Sierra* doctrine,<sup>1</sup> with respect to future changes sought by the one of the parties after the contract or agreement has been approved by the Commission.

In some cases, contracting parties request that the Commission apply the “public interest” standard to review of any future changes sought by the Commission acting *sua sponte* or on behalf of a non-party.<sup>2</sup> Courts have found that the Commission

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<sup>1</sup> This doctrine is named after the Supreme Court’s rulings in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

<sup>2</sup> Until fairly recently, the Commission did not approve agreements whereby the parties sought to bind the Commission to a “public interest” standard of review with respect to the Commission acting *sua sponte* or at the request of non-parties to change rates, terms and conditions in order to protect non-parties. See, e.g., *ITC Holdings Corp.*, 102 FERC ¶ 61,182 at P 77, *reh’g denied*, 104 FERC ¶ 61,033 (2003); *Westar Generating, Inc.*, 100 FERC ¶ 61,255 at 61,917 (2002); *Niagara Mohawk Power Corporation*, 97 FERC ¶ 61,018 at 61,060 (2001); *Turlock Irrigation District*, 88 FERC ¶ 61,322 at 61,978 (1999); *Montana Power Company*, 88 FERC ¶ 61,019 at 61,051 (1999); and *Carolina Power & Light Co.*, 67 FERC ¶ 61,074 at 61,205 (1994).

has the authority not to accept such a request.<sup>3</sup> In making such a request, I believe the contracting parties must affirmatively demonstrate why their request to require the Commission to apply the higher “public interest” standard with respect to future changes sought by the Commission acting *sua sponte* or on behalf of non-parties is consistent with the Commission’s fulfillment of its statutory responsibilities under FPA sections 205 and 206. In conducting its initial review of agreements where the parties seek to hold the Commission and non-parties to the higher “public interest” standard with respect to future changes, the Commission should consider whether the higher “public interest” standard of review is appropriate within the context of the particular contract or agreement. Under certain circumstances, I believe it may be appropriate for the Commission to approve such provisions, as stated in my concurring statement in *Entergy*;<sup>4</sup> however, the appropriateness of such a provision has not been demonstrated under the facts of this case.

This order concludes without a reasoned analysis, in footnote 1, that the “public interest” standard should apply in this case. In addition, the order implies that the case law regarding the applicability of the *Mobile-Sierra* “public interest” standard is clear. In fact, it is not. Courts have recognized that “cases even within the D.C. Circuit . . . do not form a completely consistent pattern.”<sup>5</sup> Furthermore, I do not agree with the footnote’s characterization of the recent *Maine PUC v. FERC* case, as restricting the Commission’s discretion regarding the application of the “public interest” standard only “under limited circumstances.”

Accordingly, I dissent in part from this order’s approval of this settlement.

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Suedeem G. Kelly

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<sup>3</sup> See, e.g., *Maine PUC v. FERC*, 454 F.3d 278 (D.C. Cir. 2006).

<sup>4</sup> See *Entergy Services, Inc.*, 117 FERC ¶ 61,055 (2006).

<sup>5</sup> See *Boston Edison Co. v. FERC*, 233 F.3d 60, 67 (1st Cir. 2000).

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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, 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.*,<sup>1</sup> 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.*,<sup>2</sup> I disagree with the Commission’s characterization in this order of case law on the applicability of the “public interest” standard.

For these reasons, I respectfully dissent in part.

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Jon Wellinghoff  
Commissioner

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<sup>1</sup> 117 FERC ¶ 61,055 (2006).

<sup>2</sup> 117 FERC ¶ 61,149 (2006).