

124 FERC ¶ 61,232
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.

Southwestern Public Service Company

Docket No. ER06-274-006

Public Service Company of New Mexico

Docket No. EL05-151-003

v.

Southwestern Public Service Company

ORDER APPROVING CONTESTED PARTIAL SETTLEMENT

(Issued September 8, 2008)

1. Southwestern Public Service Company (SPS) and the Public Service Company of New Mexico (PNM) (collectively, the Settling Parties) filed an offer of settlement (Settlement), which was certified to the Commission as a contested partial settlement. The Settling Parties state that the Settlement will resolve all issues between SPS and PNM related to an interruptible power service agreement (IP Agreement) in Docket No. ER06-274-000 and all issues between SPS and PNM in the non-fuel cost adjustment clause (FCAC) portion of Docket No. EL05-151-000, *et al.* Commission Trial Staff (Staff) and Golden Spread Electric Cooperative, Inc. (Golden Spread) do not oppose the Settlement. Occidental Permian Ltd. (Occidental), as discussed herein, opposes the Settlement in three principal respects.

2. As discussed below, the Settlement constitutes a reasonable resolution of the issues and, accordingly, we approve it.

I. Background

3. The Settlement addresses issues in two separate unconsolidated dockets currently pending before the Commission. In Docket No. EL05-151-000, PNM filed a complaint

with the Commission under section 206 of the Federal Power Act (FPA)¹ alleging that the cost-based rate for interruptible power charged to PNM by SPS is excessive, unjust and unreasonable and is unduly discriminatory and/or preferential. PNM also challenged SPS's billings to PNM pursuant to FCACs in the IP Agreement and two firm power sales agreements between the two parties. On November 14, 2005, the Commission set the case for settlement judge and hearing procedures.² The FCAC issues were severed and held in abeyance pending a final Commission order on the Initial Decision in *Golden Spread Electric Cooperative, Inc.*, 115 FERC ¶ 63,043 (2006), which concerns substantially similar issues.³ Thus, with respect to Docket No. EL05-151-000, *et al.*, this Settlement is intended to resolve all of the non-FCAC issues.

4. In Docket No. ER06-274-000, SPS proposed changes in rates and rate design for several cost-based wholesale requirements customers, including PNM, to be effective February 1, 2006.⁴ SPS also proposed to unbundle the sale of interruptible power to PNM. In an order dated January 31, 2006, the Commission conditionally accepted SPS's proposed rates for filing, suspended them for five months, made them effective July 1, 2006, subject to refund, and established hearing and settlement judge procedures.⁵ Since that time, SPS has reached three different settlements in Docket No. ER06-274-000, *et al.* First, SPS and its Full Requirements Customers⁶ reached a settlement that was contested by Golden Spread and Occidental, but which the Commission ultimately approved.⁷ Second, SPS reached a separate settlement with Golden Spread and Occidental, which the Commission also approved.⁸ Third, SPS reached the instant Settlement with PNM on all

¹ 16 U.S.C. § 824e (2006).

² *Public Serv. Co. of N.M. v. Southwestern Pub. Serv. Co.*, 113 FERC ¶ 61,153 (2005).

³ On April 21, 2008, the Commission issued an order affirming in part and reversing in part the Initial Decision. *Golden Spread Elec. Coop.*, 123 FERC ¶ 61,047 (2008).

⁴ In a March 2, 2006 compliance filing in Sub-Docket No. ER06-274-001, SPS corrected errors in its initial filing.

⁵ *Southwestern Pub. Serv. Co.*, 114 FERC ¶ 61,091 (2006).

⁶ SPS's Full Requirements Customers are: Cap Rock Energy Corporation; Central Valley Electric Cooperative, Inc.; Farmers' Electric Cooperative, Inc.; Lea County Electric Cooperative, Inc.; and Roosevelt County Electric Cooperative, Inc.

⁷ *Southwestern Pub. Serv. Co.*, 120 FERC ¶ 61,243 (2007).

⁸ *Golden Spread Electric Cooperative, Inc.*, 123 FERC ¶ 61,054 (2008).

matters regarding the rates charged by SPS to PNM pursuant to the IP Agreement in Docket No. ER06-274-000, as well as the non-FCAC issues in Docket No. EL05-151-000.

II. Offer of Settlement

5. The key substantive provisions are contained in Article II of the Settlement. Within 30 days after the Settlement's effective date, SPS will pay PNM \$1.3 million. Beginning July 1, 2006 and until the wholesale partial requirements rates in Docket No. ER06-274-000 are determined (Interim Period), SPS will charge PNM an interim rate of \$3.50/kW-month demand charge and an energy charge of \$36.80/MWh, which includes \$34.43/MWh of base fuel costs and purchased energy. PNM will also pay a customer charge of \$500/month during the Interim Period. The rates charged during the Interim Period are subject to refund contingent on the outcome of Docket No. ER06-274-000, in accordance with section II.B.3 of the Settlement.

6. Section II.B.3 sets forth the rates for the period from July 1, 2006 until the effective date of rates established in a subsequent section 205 or 206 proceeding (Settlement Period). During the Settlement Period, the demand charge will be 73 percent of the demand rate for SPS's wholesale partial requirements (non-interruptible) service, as ultimately determined in Docket No. ER06-274-000. The energy charge will be 100 percent of the energy rate for SPS's wholesale partial requirements customers, as ultimately determined in Docket No. ER06-274-000. The Settlement also specifies that the combination of the demand charge and the non-fuel component of the energy rate applicable to the IP Agreement shall not exceed \$4.83/kW-month. In addition, SPS will charge PNM a customer charge of \$500/month. Within 30 days of the date on which the rates for SPS wholesale partial requirements service are determined in Docket No. ER06-274-000, SPS agrees to consult with PNM and make a compliance filing to submit revised tariff sheets to implement the rates resulting from this section of the Settlement.

7. Furthermore, as of July 1, 2006, deliveries of electric power and accompanying energy by SPS to PNM under the IP Agreement will be at the point identified as "SPS" on the Open Access Same-Time Information System (OASIS) of the Southwest Power Pool (SPP) or an alternative point agreed upon by the Settling Parties. Moreover, PNM will have to obtain transmission service within the SPP from that point to the point(s) of input to the PNM transmission system. The Settlement further states that PNM will retain all rollover rights with regard to such transmission service.

8. PNM further agrees not to seek additional relief from SPS in Docket No. ER06-274-000 or otherwise participate in that docket, except that if a participant asserts that SPS should be required to change the rate design applicable to wholesale partial

requirements service in a manner adverse to PNM, PNM may participate in the proceeding to oppose such arguments and protect its rights. The Settlement resolves all issues between SPS and PNM in Docket No. ER06-274-000 regarding rates charged by SPS to PNM pursuant to the IP Agreement, and all issues in Docket No. EL05-151-000, *et al.*, except those pertaining to the FCAC.

9. Sections II.D–II.N contain additional miscellaneous settlement provisions. Notably, section II.I states that if the Commission does not approve the Settlement without material change or condition, it shall not be binding, and the Settling Parties shall not be obligated to negotiate further other than to discuss in good faith whether the changes are acceptable. Section II.K establishes that the *Mobile-Sierra*⁹ public interest standard of review applies to proposed changes to the Settlement. Any changes that SPS or PNM may propose to the IP Agreement, however, will be subject to the just and reasonable standard.

III. Comments

A. Initial Comments

10. Golden Spread filed comments neither supporting nor opposing the Settlement with the understanding that the Settlement will not impact Golden Spread or positions it may take in other cases before the Commission. Golden Spread states that it did not participate in the settlement talks and that it derives no benefit from the Settlement. Golden Spread further states that the Settlement reflects a black-box settlement that ties PNM's rates to the outcome of litigation over cost-based partial requirement rates in Docket No. ER06-274-003 and the \$1.3 million cash payment to PNM.

11. Staff also filed comments not opposing the Settlement. Staff believes that the Settlement represents a reasoned compromise, benefits both SPS and PNM and is fair, reasonable, and in the public interest. Additionally, Staff states that the Settlement raises no major policy implications and contains no issues of first impression.

12. Occidental filed comments protesting the Settlement on three grounds and making one request for clarification. First, Occidental argues that the Settlement gives PNM an inappropriate transmission priority, asserting that the Commission should reject the Settlement because it involves rights to the SPP system without SPP being a party to the Settlement or the underlying proceedings. Moreover, according to Occidental, the Settlement conflicts with the SPP Open Access Transmission Tariff (OATT). Occidental asserts that while the SPP OATT grants transmission priority to firm service customers when their contracts expire, rollover, or are renewed, PNM is not a firm customer, and

⁹ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

the Settlement does not constitute an expiration, rollover, or renewal of a contract. Thus, Occidental states that no grandfathered rights should apply. Occidental further posits that Section II.B.4.b of the Settlement, which allows PNM to retain all rollover rights on the SPP system, violates Commission precedent that restricts rollover rights to firm transmission agreements.¹⁰

13. Second, Occidental argues that the \$1.3 million payment to PNM under the Settlement is unsupported, and there is no basis for the Commission to find that it is just and reasonable. Occidental asserts that if the Commission nonetheless accepts the payment, it should at least mandate that SPS not recover any portion from its retail or wholesale customers.

14. Third, Occidental argues that under the Commission's regulations a contested settlement must be shown to be just and reasonable before the Commission can accept it, and the Settling Parties here have not made that showing. Rather, Occidental maintains that because the IP Agreement revenues ordinarily flow to SPS's firm customers, the reduction in the IP Agreement rates will harm those customers. Although Occidental avers that there is no apparent way to determine the magnitude of harm that will result for SPS's firm customers,¹¹ Occidental's expert estimates that the Settlement could cause a 15 to 20 percent reduction in the IP Agreement demand charge for production-related costs. Additionally, Occidental alleges that the Settlement provisions setting the interruptible demand charge at 73 percent of the wholesale partial requirements demand charge and capping the IP Agreement rates are unsupported. According to Occidental, the cap harms firm customers by reducing their revenue credits and providing a corresponding subsidy to PNM.

15. Occidental also requests that the Settling Parties affirm that there are no agreements or considerations related to or underlying the Settlement not reflected in the Settlement. Occidental maintains that the issues it raises with respect to transmission priority, SPS's payment to PNM, and harm to SPS's firm customers constitute genuine issues of material fact and prove that the Settlement rates are unjust and unreasonable. On this basis, Occidental urges the Commission to reject the Settlement.

¹⁰ Occidental, October 10, 2006, Initial Comments at 10 (citing *Texas-New Mexico Power Co. v. El Paso Electric Co.*, 108 FERC ¶ 63,045, at P 3 (2004) and *Southwest Power Pool, Inc.*, 103 FERC ¶ 61,293, at P 10 (2003)).

¹¹ Occidental explains that the rates under the IP Agreement were previously bundled, such that there was no basis to determine the amount applicable to transmission service alone. Because the prior rate applicable to transmission service is unknown, one cannot readily determine the amount by which that rate has been reduced by the Settlement.

B. Reply Comments

16. Staff asserts that Occidental raises no issues of fact that would require a hearing. Staff states that, contrary to Occidental's assertions, the Settlement does not create a transmission priority for PNM. Rather Staff notes that the Settlement requires PNM to obtain transmission service directly from SPP instead of obtaining it through a grandfathered PNM/SPS contract.¹² Staff states that rollover rights associated with that service will be governed solely by the SPP OATT and applicable law governing it, and that nothing in the Settlement between PNM and SPS affects the nature of the service PNM will take from SPP. Additionally, Staff urges the Commission to ignore Occidental's arguments opposing the \$1.3 million payment from SPS to PNM. Staff states that the payment is partial consideration for PNM to withdraw its complaint and that the amount will be recovered from SPS's shareholders because any attempt to recover such an amount in a future rate case would constitute retroactive ratemaking.

17. With respect to Occidental's third argument, regarding revenue credits to firm customers, Staff asserts that Occidental has raised no issue of fact that would require a hearing. Staff argues that even if the Settlement results in reduced revenue credits, it does not follow that such a reduction will necessarily translate into higher retail and wholesale rates. Staff points out that because all costs and revenues would be at issue in a subsequent rate case, it is possible that costs could decrease or demand could increase such that, even if revenue credits were reduced, the impact on firm customers would be neutral. Therefore, Staff asserts that Occidental's argument amounts to pure speculation. Furthermore, Staff argues that the Settlement would produce just and reasonable rates as a matter of law. According to Staff, the just and reasonable standard does not require that a specific level of revenue credits from interruptible customers be assessed to fixed capacity costs. Rather, Staff states that interruptible demand rates are just and reasonable if they do not exceed the demand rate for firm service.¹³ Staff maintains that the rates under the instant Settlement satisfy that standard.

18. SPS asserts that Occidental has raised no genuine issues of material fact concerning the Settlement. Additionally, SPS states that there is no additional

¹² Staff notes that the Commission has required SPP to file a schedule for converting grandfathered contracts to SPP's OATT, *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110 (2004), and that the unbundling arrangement reflected in the instant Settlement furthers that Commission policy.

¹³ See *Terra Comfort Corp.*, 52 FERC ¶ 61,241, at 61,839 (1990); *Florida Power & Light Co.*, 33 FERC ¶ 61,116 (1985); *Kentucky Utils. Co.*, 15 FERC ¶ 61,002, at 61,005 (1981), *reh'g denied*, 15 FERC ¶ 61,222 (1981); *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 106 FERC ¶ 61,228, at 61,804 and n. 146 (2004) (citing *Northeast Utils. Serv. Co.*, 84 FERC ¶ 61,159 at 61,867-68 (1998)).

consideration underlying the Settlement beyond that set forth in the Settlement itself. SPS asserts that the Settlement does not confer an inappropriate transmission priority on PNM and that the provisions opposed by Occidental merely accomplish the unbundling of the SPS sale of interruptible power to PNM in accordance with Order No. 888.¹⁴ SPS states that Occidental creates confusion by conflating the issue of the IP Agreement's status as a grandfathered agreement under the SPP tariff and the issue of when rollover rights attach upon the termination of an existing agreement. SPS states that the intent of the Settlement is to provide that as of July 6, 2006, PNM's transmission service is to be of a different character—unbundled service procured directly from SPP, rather than bundled service taken under the grandfathered SPS agreement. SPS further states that the language pertaining to rollover rights in section II.B.4.b does not confer any new rights on PNM, but rather signals that any rollover rights that may exist under the SPP tariff will remain with PNM and not somehow revert to SPS at the end of PNM's transmission service agreement.

19. SPS also states that Occidental's concerns about the \$1.3 million payment are misplaced. SPS explains that the Settlement is a negotiated "black box" settlement, and the payment is to settle claims in Docket No. EL05-151-000 for the locked-in period from September 15, 2005 through June 30, 2006. SPS also argues that, as a retail customer, the proper venue for Occidental to argue that SPS may not recover the payment from retail customers is before the various state commissions that regulate SPS's retail rates. Furthermore, SPS states that there cannot be and will not be any recovery of the "black box" payment from SPS's wholesale customers.

20. Finally, SPS responds to Occidental's objections regarding revenue credits to firm customers. SPS states that Occidental has not claimed that the percentage discount from the partial requirements customer, i.e., Golden Spread, rate (as provided in sections II.B.2 and II.B.3 of the Settlement) is unreasonable. SPS also states that it has developed PNM's rate as a percentage of SPS's partial requirements rates since 1991. SPS notes that none of its firm wholesale customers objects to the Settlement, arguing that Occidental's claim of harm to SPS's firm customers is curious at best. SPS asserts that there is no impact on the level of credits to firm customers and that any impact on retail rates is a factor for state commissions to consider.

¹⁴ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

21. PNM states that there is no additional consideration underlying the Settlement beyond that set forth in the offer of settlement filed on September 19, 2006. Additionally, PNM asserts that Occidental's protests do not rise to the level of issues of material fact, but are instead vague and speculative allegations that should be summarily dismissed.¹⁵ PNM also states that Occidental fails to explain how it specifically will be harmed by approval of the Settlement, and that in situations where a contesting party is unaffected by a settlement and fully retains its rights to continue to litigate the issue in an ongoing proceeding, the Commission has held that it cannot demonstrate a disputed issue of material fact.¹⁶

22. PNM disputes Occidental's claim that the Settlement grants PNM grandfathered transmission service from SPS (or SPP). Instead, PNM states that the Settlement reflects the unbundling of transmission service from the IP Agreement, which the Commission has accepted, thus making PNM responsible for obtaining transmission service directly from SPP instead of obtaining it from SPS through a grandfathered PNM/SPS contract. In fact, PNM states that it has already applied for, been awarded, and begun to take transmission service from SPP in compliance with the SPP tariff at a newly designated delivery point.¹⁷ PNM further explains that the Settlement allows PNM to retain only the rollover rights associated with the transmission service it takes from SPP; it does not grant PNM any additional rollover rights. PNM states that notably absent from the Settlement is any language that directs SPS to transfer or assign transmission rights to PNM or language granting PNM any transmission priority or preference.

23. PNM next urges the Commission to reject Occidental's objections to the \$1.3 million payment from SPS to PNM under the Settlement. PNM argues that the Commission routinely approves "black-box" settlements¹⁸ and does not require settling parties to justify individual elements of a settlement package. Indeed, PNM states that doing so would likely run afoul of a Commission rule prohibiting the disclosure of the

¹⁵ In support of its contention, PNM cites *San Diego Gas and Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 115 FERC ¶ 61,271, at P 17 (2006).

¹⁶ In support of its contention, PNM cites *El Paso Natural Gas Co.*, 25 FERC ¶ 61,292, at 61,673 (1983).

¹⁷ PNM's Lead Real-Time Trader, Mark Vreeland, explains in an affidavit attached to PNM's reply comments how PNM arranged to take transmission service from SPP.

¹⁸ In support of its contention, PNM cites *Xcel Energy Services, Inc., Southwest Power Pool, Inc.*, 115 FERC ¶ 61,011 (2006) and *Maritimes and Northeast Pipeline, LLC*, 115 FERC ¶ 61,176 (2006).

substance of confidential settlement discussions.¹⁹ PNM also argues that the Commission should reject Occidental's request that the Commission prohibit SPS from seeking to recover the payment through future rates. PNM states that such requests are premature at this point and that Occidental may raise the concern in the appropriate forum when and if SPS seeks such rate treatment.

24. Finally, PNM argues that Occidental's arguments regarding revenue credits to firm customers are without merit and should be rejected. PNM asserts that a reduction in revenue credits alone does not make a rate unjust or unreasonable, and moreover there is no requirement that settling parties prove that a settlement will not have a collateral impact on non-settling parties. PNM notes that the Settlement does not restrict Occidental's right to litigate issues concerning the rates charged to firm customers in Docket No. ER06-274-000 or to raise retail rate issues in state proceedings. PNM also argues that Occidental's estimate of harm is speculative in that it is based on hypothetical transmission costs.²⁰ PNM adds that none of the parties that pay firm wholesale rates object to the Settlement.

IV. Discussion

25. For the reasons discussed below, we find that the Settlement is just and reasonable and, accordingly, we approve it. In order to approve a contested settlement, such as the one proposed here, the Commission must make "an independent finding supported by 'substantial evidence on the record as a whole' that the proposal will establish 'just and reasonable' rates."²¹ Consistent with this requirement, Rule 602(h)(1)(i) of the Commission's settlement rules²² provides that the Commission may decide the merits of contested settlement issues if the record contains substantial evidence upon which to base a reasoned decision or the Commission finds that there is no genuine issue of material fact.

¹⁹ PNM, October 19, 2006 Reply Comment at 11 (citing 18 C.F.R. § 385.602 (2006)).

²⁰ PNM also states that Occidental's allegation of harm based on reduced revenue credits is overly broad in that it would apply equally to any reduction in the IP Agreement demand charge.

²¹ *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974); *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,339 (1998), *order on reh'g*, 87 FERC ¶ 61,110 (1999).

²² 18 C.F.R. § 385.602(h)(1)(i) (2008).

26. We find that there is no genuine issue of material fact and that the Settlement is just and reasonable and not unduly discriminatory.²³ Accordingly, we approve the Settlement. We address Occidental's three objections below.

27. First, we disagree with Occidental's claim that the Settlement grants an inappropriate transmission priority to PNM on the SPP system. The Settlement, which was executed on September 19, 2006, does not establish any transmission rights on the SPP system. As noted by PNM, sections II.B.4.a and II.B.4.b contain no language that would affect a transfer or assignment of any transmission rights from SPS to PNM. Instead, these provisions clarify the rights and responsibilities as between PNM and SPS with respect to the unbundled transmission service PNM now takes from SPP. Section II.B.4.a shows that the point at which SPS must deliver electric power has changed from the point used in the previously bundled agreement—known as the Blackwater intertie—to the point that will be in use for the balance of the new unbundled IP Agreement—identified as “SPS” on SPP's OASIS. Section II.B.4.b further shows that under the newly unbundled IP Agreement, PNM is responsible for obtaining transmission service and that PNM will retain all rollover rights associated with that service. Therefore, we find that the Settlement pertains only to the rights and obligations between PNM and SPS, and we reject Occidental's contention that the Settlement confers an inappropriate transmission priority to PNM on the SPP system.

28. Furthermore, as evidenced by PNM's transmission request on SPP's OASIS, PNM requested firm point-to-point transmission service from SPP on January 31, 2006 and was awarded that service, beginning July 1, 2006, on June 28, 2006.²⁴ Despite its assertion that the Settlement bootstraps PNM's bundled interruptible service into a firm transmission entitlement with rollover rights, Occidental has made no showing that PNM acquired any rights beyond those granted through this OASIS request.

29. Second, we reject Occidental's argument that the \$1.3 million payment from SPS to PNM under the Settlement is unsupported and should not be found to be just and reasonable. The Commission has explained that “such comprehensive settlements involve a complex exchange of risks and benefits among the parties,” noting that “[t]he Commission will respect these quid pro quos because the results are in the public interest.”²⁵ To require the parties to provide detailed support for “black-box” settlements would undercut the rationale behind such settlements. We decline to require the detailed

²³ Furthermore, we note that in response to Occidental's request for clarification, SPS and PNM state that the Settlement represents the entirety of the agreement between the parties and that there is no additional consideration underlying the Settlement.

²⁴ PNM, October 19, 2006 Reply Comments, at Ex. 1.

²⁵ *El Paso Natural Gas Co.*, 82 FERC ¶ 61,337, at 62,340 (1998).

support sought by Occidental. We also reject Occidental's argument that the Commission should prohibit SPS from recovering any portion of the \$1.3 million payment from its retail or wholesale customers. It would be premature for us to address an issue that is not currently before us and is dependant on some future action by SPS. The Commission will address the matter if or when a future filing regarding the recovery of Settlement payments is made.²⁶

30. Third, we reject Occidental's argument that the rates charged pursuant to the IP Agreement—including a demand charge of 73 percent of the demand rate for firm wholesale partial requirements service as well as an overall cap of \$4.83/kW-month on the demand and non-fuel charges—are unsupported and would harm firm customers by reducing revenue credits. The rates are consistent with the Commission's general policies for setting rates for non-firm service. For example, as the Commission has previously explained, "rates for non-firm transmission service may be set up to the firm transmission rate. Such ceiling rates are seen in transmission tariffs of general availability . . . under which the transmission provider and its customer may agree to a negotiated rate that is lower than the price cap."²⁷ The rates under the IP Agreement here do not exceed 100 percent of the firm demand rates. Therefore, we find the Settlement to be just and reasonable.

31. Moreover, with respect to Occidental's argument that the Settlement will lead to decreased revenue credits to the detriment of firm shippers, we find that such allegations are speculative and beyond the scope of the Settlement at issue here. Occidental may be correct in noting that non-firm sales revenue is generally credited to rates charged firm customers reflecting fixed capacity costs.²⁸ However, the issue of whether the rates charged to firm customers in a subsequent rate case will be just and reasonable is not before us. Occidental is not bound by the instant Settlement and is therefore free to argue for a method of revenue crediting or cost allocation in a subsequent rate case that Occidental believes accounts for any decrease in revenue credits to firm customers resulting from the Settlement. Because Occidental's interests are not immediately and

²⁶ Cf., *Pub. Serv. Co. of Colorado*, 90 FERC ¶ 61,285, at 61,960 (2000).

²⁷ See *Northeast Utils. Serv. Co.*, 84 FERC ¶ 61,159, at 61,867-68 (1998)

²⁸ See *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 106 FERC ¶ 61,228, at 61,802 (2004) ("In fact, rates for non-firm or interruptible customers on file with the Commission typically reflect a contribution to fixed costs and, thereby, reduce the cost responsibility of firm customers.").

irreparably impaired by approval of the Settlement, and because Occidental's allegation of potential harm is speculative at best, we reject its objection to the Settlement.²⁹

32. Under the Settlement, the standard of review applicable to the Settling Parties, non-parties and the Commission acting *sua sponte* for any modifications to this Settlement after approval is the public interest standard under the *Mobile-Sierra* doctrine.³⁰ In light of *Maine Pub. Util. Comm'n v. FERC*, 520 F.3d 464, 477-78 (D.C. Cir. 2008), the Commission may not accept the standard of review as currently written. As such, the settlement is approved conditioned on the settling parties revising the standard of review applicable to non-settling third parties. An acceptable substitute provision applicable to non-settling third parties would be the "most stringent standard permissible under applicable law."

33. The Settlement will fully resolve all non-FCAC issues raised in Docket No. EL05-151-000, *et al.*, concerning the justness and reasonableness of the interruptible power rate charged to PNM. The Settlement will also resolve all issues between SPS and PNM related to the IP Agreement in Docket No. ER06-274-000.

34. However, the Commission notes that the revised tariff sheets filed in the Settlement are not in compliance with Order No. 614.³¹ We direct SPS to file revised tariff sheets with the correct designations in a compliance filing to be submitted within 30 days of the date of this order.

²⁹ *San Diego Gas and Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 115 FERC ¶ 61,271, at P 18 (2006)(citing *El Paso Natural Gas Co.*, 25 FERC ¶ 61,292, at 61,673 (1983) ("If a party's interests are not immediately and irreparably affected by approval of a settlement in a consolidated docket, that party's opposition to a settlement does not create a genuine, material issue. In the absence of any genuine, material issue, we can dispose of the matter before us in a summary fashion."))).

³⁰ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956). We note that any changes that SPS or PNM may propose to the IP Agreement, however, will remain subject to the just and reasonable standard under sections 205 and 206 of the FPA, respectively, as provided in section II.K of the Settlement.

³¹ *Designation of Electric Rate Schedule Sheets*, Order No. 614, 65 Fed. Reg. 18,221, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,096 (2000).

The Commission orders:

(A) The Settlement is hereby approved.

(B) SPS is directed to file revisions to the Settlement's standard of review within 30 days of the date of this order, as discussed in the body of this order.

(C) SPS is directed to file revised tariff sheets within 30 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioners Kelly and Wellinghoff dissenting in part
with a separate joint statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southwestern Public Service Company

Docket No. ER06-274-006

Public Service Company of New Mexico

Docket No. EL05-151-003

v.

Southwestern Public Service Company

(Issued September 8, 2008)

KELLY and WELLINGHOFF, Commissioners, dissenting in part:

The instant settlement states that the “public interest” standard of review will apply to any modification to the settlement not agreed to by the parties whether proposed by a party, non-party, or the Commission acting *sua sponte*.

The majority finds that, in light of the U.S. Court of Appeals for the District of Columbia Circuit’s (D.C. Circuit) decision in *Maine Public Utilities Commission v. FERC*,¹ the Commission may not accept the standard of review set forth in the instant settlement. Therefore, the majority approves the settlement conditioned on the settling parties revising the standard of review applicable to non-settling third parties. The majority also states that language applying the “most stringent standard permissible under applicable law” to non-settling third parties would be “[a]n acceptable substitute provision.”

We continue to disagree with the majority’s characterization of the D.C. Circuit’s holding in *Maine PUC* as to the applicability of the “public interest” standard. For the reasons set forth in our dissents in *Duke Energy Carolinas, LLC*² and *Westar Energy, Inc.*,³ we respectfully dissent in part.

Suede G. Kelly
Commissioner

Jon Wellinghoff
Commissioner

¹ 520 F.3d 464 (D.C. Cir. 2008) (*Maine PUC*).

² 123 FERC ¶ 61,201 (2008).

³ 123 FERC ¶ 61,252 (2008).