

124 FERC ¶ 61,294
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.

California Power Exchange Corporation

Docket No. EL03-223-002

ORDER ACCEPTING UNCONTESTED SETTLEMENT

(Issued September 29, 2008)

1. On July 2, 2008, the Pacific Gas & Electric Company (PG&E), the California Power Exchange Corporation (CalPX), and the American Home Assurance Company (AHAC)¹ filed a Joint Offer of Settlement on behalf of themselves in the above-captioned docket. The subject settlement resolves all issues in the above-captioned docket.
2. Initial comments were due on July 22, 2008, and reply comments were due on August 1, 2008. No comments were filed.
3. The settlement is fair and 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.
4. Paragraph 13 of the settlement provides that:

This Settlement may be amended only by an agreement in writing signed by all Parties. The Parties agree that this Settlement is subject to the "Mobile-Sierra" doctrine²

¹ In addition to AHAC, the settlement agreement applies to AHAC's affiliates: Lexington Insurance Co., National Union Fire Insurance Co. of Pittsburgh, PA, American International Specialty Lines Insurance Co., AIU Insurance Co., Starr Excess Liability Insurance Co., Ltd., and other entities related to American International Group, Inc.

² Citing *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).

The Commission interprets this provision as an attempt to subject the settlement to the “public interest” standard of review. 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.”

5. This order terminates Docket No. EL03-223-002.

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

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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WELLINGHOFF and KELLY, Commissioners, dissenting in part:

The instant settlement states at paragraph 13 that “[t]he parties agree that this settlement is subject to the *Mobile-Sierra* doctrine” In today’s order, the majority states that it interprets that provision as an attempt to subject the settlement to the “public interest” standard of review.

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 parties’ proposed standard of review. 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.

Jon Wellinghoff
Commissioner

Suedeen G. Kelly
Commissioner

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

² 123 FERC ¶ 61,201 (2008).

³ 123 FERC ¶ 61,252 (2008).