

125 FERC ¶ 61,115
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

October 29, 2008

In Reply Refer To:
Midwest Independent Transmission
System Operator, Inc.
Docket Nos. ER06-1051-000
ER06-1051-001
ER06-1051-002
ER06-1051-003

Duane Morris LLP
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Dear Mr. DeSalle:

1. On February 14, 2008, you filed a Settlement Agreement and Explanatory Statement (Settlement) on behalf of the Midwest Independent Transmission System Operator, Inc. (Midwest ISO), MinnDakota Wind LLC (MinnDakota), and Northern States Power (NSP) (collectively, Settling Parties). The Settlement resolves all of the issues set for hearing in this proceeding¹ concerning an unexecuted Large Generator Interconnection Agreement (LGIA) among MinnDakota Wind LLC (MinnDakota) as interconnection customer, the Midwest ISO as transmission provider, and NSP as transmission owner. Specifically, the Settlement resolves disputes among the Settling Parties regarding an alleged change in the point of interconnection for MinnDakota's new 200 MW wind generation project, and the applicability of LGIA Article 11.4 pricing

¹ *Midwest Independent Transmission System Operator, Inc.*, 117 FERC ¶ 61,010 (2006).

provisions following the Commission's order on transmission expansion planning protocols.²

2. Under the Settlement, the Settling Parties agree that MinnDakota shall be allowed to proceed with the Large Generator Interconnection Procedures using the proposed Brookings substation point of interconnection. The Settling Parties also acknowledge that the outcome of the Midwest ISO transmission pricing policy and its applicability to MinnDakota shall be subject to the outcome of the terms of a final order in Docket Nos. ER06-18-000 and ER06-1439, *et al.* In addition, MinnDakota will accept the Commission's final determination in these dockets as if the Settlement had not been entered into prior to such determination.

3. On March 5, 2008, Commission Trial Staff filed comments supporting the Settlement. On March 21, 2008, the Settlement Judge certified the Settlement to the Commission as uncontested.

4. Under Article 21 of the Settlement, the standard of review for any modifications to this Settlement requested by a Party that are not agreed to by all Parties shall be the public interest standard under the *Mobile-Sierra* doctrine.³ The standard of review for any subsequent modifications to this Settlement requested by a non-Party to the Settlement will be the most stringent standard permissible under the law.

5. The Settlement is fair and reasonable and in the public interest and is hereby approved. The Commission's approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

² *Midwest Independent Transmission System Operator, Inc.*, 114 FERC ¶ 61,106, *order on technical conference, reh'g and compliance*, 117 FERC ¶ 61,241 (2006), *order on reh'g*, 118 FERC ¶ 61,208 (2007).

³ *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) (*Mobile-Sierra*).

6. This letter order terminates Docket Nos. ER06-1051-000, ER06-1051-001, ER06-1051-002, and ER06-1051-003.

By direction of the Commission. Commissioner Wellinghoff and Kelly concurring in part with a separate joint statement attached.

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System Docket Nos. ER06-1051-000
Operator, Inc. ER06-1051-001
ER06-1051-002
ER06-1051-003

(Issued October 29, 2008)

WELLINGHOFF and KELLY, Commissioners, *concurring in part*:

The proposed standard of review in the settlement would have the Commission apply the “most stringent standard permissible under applicable law” to any changes proposed by non-parties or the Commission acting *sua sponte*. The settlement further states that the Commission’s rights under Federal Power Act (FPA) section 206¹ are not abridged except as indicated in the settlement with respect to the standard that would be used in such a proceeding.

The U.S. Supreme Court has held that whenever the Commission reviews certain types of contracts, the Federal Power Act (FPA) requires it to apply the presumption that the contract meets the “just and reasonable” requirement imposed by the FPA.² The contracts that are accorded this special application of the “just and reasonable” standard are those “freely negotiated wholesale-energy contract[s]” that were given a unique role in the FPA.³ In contrast, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) determined that the proper standard of review for a different type of agreement, with regard to changes proposed by non-contracting third parties, was the “‘just and reasonable’ standard in section 206 of the Federal Power Act.”⁴ The agreement at issue in *Maine PUC* was a multilateral settlement negotiated in a Commission adjudication of a utility’s proposal to revise its tariff substantially to enable it to establish and operate a locational installed electricity capacity market. The D.C. Circuit’s

¹ 16 U.S.C. § 824e (2006).

² *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733, 2737 (2008) (*Morgan Stanley*).

³ *Id.*

⁴ *Maine Public Utilities Commission v. FERC*, 520 F.3d 464, 478, *petition for reh’g denied*, No. 06-1403, slip op. (D.C. Cir. Oct. 6, 2008) (*Maine PUC*).

rationale in *Maine PUC* applies with at least equal force to changes to an agreement sought by the Commission acting *sua sponte*.⁵

Our review of the agreement in question here indicates that it more closely resembles the *Maine PUC* adjudicatory settlement than the *Morgan Stanley* wholesale-energy sales contracts, which, for example, were freely negotiated outside the regulatory process. Therefore, the “most stringent standard permissible under applicable law” as applied here to changes proposed by either non-parties or the Commission acting *sua sponte* means the “just and reasonable” standard of review. In those instances, the Commission retains the right to investigate the rates, terms, and conditions of the settlement under the “just and reasonable” standard of review set forth under FPA section 206.

For these reasons, we concur in part.

Jon Wellinghoff

Suedeem G. Kelly

⁵ See *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201 (2008) (Comm’rs Wellinghoff and Kelly dissenting in part).