

2. On September 28, 2009, Trial Staff filed initial comments in support of the Settlement. On October 7, 2009, the Presiding Settlement Judge certified the Settlement to the Commission as uncontested.³

3. The Settlement provides that beginning on January 1, 2009, SPS will implement a formula rate, the components of which are recalculated annually and trued up based on the then-current FERC Form No. 1. For the period July 6, 2008 through December 31, 2008, the Annual Transmission Revenue Requirement and rate base will be negotiated “black box” charges and the transmission rates for this period will be billed on a load-ratio share calculation basis. The rates effective January 1, 2009, and going forward will be billed on the basis of a Network Customer’s actual load.

4. Upon the effectiveness of the Settlement, SPS and Southwest Power Pool (SPP) will recalculate the charges produced under the formula rate based on the changes to the Xcel Energy OATT and SPP Regional OATT, and will make billing adjustments to prior bills to reflect such recalculated charges. Refunds and adjustments, with interest, shall be made pursuant to the Settlement.

5. Within 15 days of making such refunds and adjustments, Xcel must file with the Commission a compliance report showing monthly billing determinants; revenue receipt dates; revenues under the prior, present, and Settlement rates; the monthly revenue refund, and the monthly interest computed, together with a summary of such information for the total refund period. Xcel must furnish copies of the report to all participants of record in these proceedings.

6. Article VI of the Settlement provides that the applicable standard of review for a modification of the Settlement proposed by a Settling Party, but not agreed to in writing by all the Settling Parties, will be the public interest standard under the *Mobile-Sierra* doctrine.⁴ Article VI also provides that the standard of review for any modification to the Settlement proposed by a non-settling third party or initiated by the Commission will be the most stringent standard permissible under applicable law.

Regional Open Access Transmission Tariff. Approval of the Settlement is thus without prejudice to pending requests for rehearing on this carved-out classification issue, which the Settling Parties in Article V of the Settlement commit to continue negotiating in good faith to resolve.

³ *Xcel Energy Services, Inc.*, 129 FERC ¶ 63,001 (2009).

⁴ *See United Gas Pipe Line Co. v. Mobil Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

7. 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, except to the limited extent expressly provided in the Settlement.

8. The rates and revised tariff sheets submitted in the Settlement are in compliance with Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000), and are accepted for filing subject to the refund, adjustment, and true-up procedures of the Settlement, and subject to the outcome of the carved-out classification issues.

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

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Xcel Energy Services Inc.

Docket Nos. ER08-313-005
ER08-923-004

Southwest Power Pool, Inc.

Docket Nos. ER08-1307-003
ER08-1308-005
ER08-1308-001
ER08-1357-003
ER08-1358-003
ER08-1359-003

(Issued December 2, 2009)

WELLINGHOFF, Chairman, and KELLY, Commissioner, *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-settling third-parties or the Commission acting *sua sponte*.

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.¹ 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.² 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.”³ 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 *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733, 2737 (2008) (*Morgan Stanley*).

² *Id.*

³ *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*.⁴

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 standard of review that the Commission must apply to changes proposed by either non-settling third-parties or the Commission acting *sua sponte* is 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 206.⁵

For these reasons, we concur in part.

Jon Wellinghoff

Suedeem G. Kelly

⁴ See *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201 (2008) (Comm’rs Wellinghoff and Kelly dissenting in part).

⁵ 16 U.S.C. § 824e (2006).