

129 FERC ¶ 61,192
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

December 2, 2009

In Reply Refer to:
American Electric Power
Service Corporation
Docket No. ER09-12-000

Monique Rowtham-Kennedy, Esq.
Senior Counsel
American Electric Power Service Corporation
801 Pennsylvania Avenue, NW
Suite 320
Washington, DC 20004

Dear Ms. Rowtham-Kennedy:

1. On September 16, 2009, American Electric Power Service Corporation (American) filed a proposed settlement on behalf of its affiliates, Public Service Company of Oklahoma, Inc. (PSO), and Southwestern Electric Power Company (SWEPCO), (collectively AEP) and on behalf of Arkansas Electric Cooperative Corporation, East Texas Electric Cooperative, Inc., Northeast Texas Electric Cooperative, Inc., Tex-La Electric Cooperative of Texas, Inc., and Golden Spread Electric Cooperative, Inc. The proposed settlement resolves all issues in the captioned proceeding including AEP's proposed accounting changes.¹
2. On October 6, 2009, Commission Trial Staff filed comments in support of the settlement. No other comments were filed. On October 22, 2009, the settlement was certified to the Commission as uncontested.²

¹ *American Elec. Power Serv. Corp.*, 125 FERC ¶ 61,296 (2008). The Commission set for hearing and settlement procedures AEP's filing to change its accounting for transmission and distribution plant-in-service to reclassify certain facilities that will be reflected in revenue requirements for PSO and SWEPCO transmission service under the Southwest Power Pool's open access transmission tariff. The subject settlement is the result of that hearing and settlement process.

² *American Elec. Power Serv. Corp.*, 129 FERC ¶ 63,005 (2009).

3. Article 6.7 of the settlement provides that the standard of review for modifications to the settlement not agreed to in writing by all the parties to the settlement shall be the “public interest” standard under the *Mobile-Sierra* doctrine. The standard of review for modifications requested by a non-party, or initiated by the Commission, will be the most stringent standard permissible under applicable law.

4. The settlement is fair and reasonable and in the public interest and is hereby approved. In addition, the rate schedules submitted as part of the settlement are in compliance with Order No. 614, *FERC Statutes and Regulations, Regulations Preambles July 1996 – December 2000* ¶ 31,096 (2000), and are accepted for filing as designated. The Commission’s acceptance of the settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. The settlement, having been approved, resolves all issues in the captioned proceeding.

5. This letter order terminates Docket No. ER09-12-000.

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

Nathaniel J. Davis, Sr.,
Deputy Secretary.

cc: All parties of record

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

American Electric Power Service Corporation Docket No. ER09-12-000

(Issued December 2, 2009)

KELLY, Commissioner, and WELLINGHOFF, Chairman, *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 a non-party 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 rationale in *Maine PUC* applies with at least equal force to changes to an agreement sought by the Commission acting *sua sponte*.⁴

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*).

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

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 by a non-party 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 206.¹

For these reasons, we concur in part.

Suedeem G. Kelly

Jon Wellinghoff

¹ 16 U.S.C. § 824e (2006).