

125 FERC ¶ 61,066
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

October 16, 2008

In Reply Refer To:
NorthWestern Corporation
Docket Nos. ER07-46-001, OA07-7-000,
OA07-58-000 and ER08-332-000
(Not consolidated)

Leonard, Street and Deinard
Attn: Steven A. Weiler, Esq.
1627 Eye Street NW, Suite 610
Washington, DC 20006

Dear Mr. Weiler:

1. On February 15, 2008, you filed a Stipulation and Agreement and Explanatory Statement (collectively, the Settlement) on behalf of NorthWestern Corporation¹ (NorthWestern), Bonneville Power Administration, Central Montana Electric Power Cooperative, Inc., the Montana Large Customer Group,² PPL EnergyPlus, LLC, and PPL Montana, LLC (Settling Parties). The Settlement reflects the agreement of the Settling Parties to resolve all issues in the above referenced dockets, with the exception of NorthWestern's proposal to address cluster study requests submitted in Docket No. OA07-58-000.³

¹ NorthWestern owns and operates transmission facilities in Montana and South Dakota that are neither physically connected nor in the same North American Electric Reliability Council (NERC) region. NorthWestern maintains separate Open Access Transmission Tariffs (OATT) for its services in Montana and South Dakota. This proceeding addresses NorthWestern's Montana OATT services only.

² The Montana Large Customer Group is comprised of Ash Grove Cement West, ConocoPhillips, Holcim (US) Inc., Montana Refining Company, REC Advanced Silicon Materials LLC, Smurfit-Stone Container Corporation, and Stillwater Mining Company.

³ This issue is reserved in section 3.14.2 of the Settlement.

2. On February 25, 2008, Commission trial staff filed comments in support of the Settlement. No other comments were filed. On March 13, 2008, the settlement judge certified the Settlement to the Commission as uncontested.

3. Under the Settlement, the standard of review for modifications requested by a settling party that are not agreed to by all settling parties is the “public interest” standard under the *Mobile-Sierra* doctrine.⁴ The standard of review for any modifications requested by a non-party to the Settlement and the Commission is the “most stringent standard permissible under applicable law.” The Settling Parties acknowledge that the Commission’s rights under section 206 of the Federal Power Act (FPA)⁵ are not abridged, except as indicated herein with respect to the standard that would be used in such proceeding.

4. Section 3.3 of the Settlement addresses NorthWestern’s obligations with respect to operating reserve service under Schedules 5 and 6 of its OATT. In particular, section 3.3.3 of the Settlement states that agreements for one year or longer for the purchase of products to provide reserve service will be filed with the Commission under section 205. Specifically, Schedule 5 (Operating Reserve – Spinning Reserve Service) and Schedule 6 (Operating Reserve – Supplemental Reserve Service) of NorthWestern’s Montana OATT provide that:

Agreements with a term of one year or longer for the purchase of products to provide this service will be filed with the Commission under section 205 of the Federal Power Act, if (i) Transmission Provider determines the agreement must be filed or (ii) the Transmission Customer requests that the agreement be filed and the agreement has not already been filed.

Also, section 3.4 of the Settlement addresses NorthWestern’s obligations with respect to procuring additional ancillary services under Schedules 2, 3, 4, and 9 of NorthWestern’s Montana OATT and the filing and posting of such agreements. In particular, Schedule 2 (Reactive Supply and Voltage Control from Generation or Other Sources Service) provides that:

To the extent Transmission Provider does not self-provide this service, it shall ... file under Federal Power Act Section 205, any agreement with a term of one year or longer, such filing indicating that the agreement will be

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

⁵ 16 U.S.C. § 824e (2006).

used by Transmission Provider to provide ancillary services under the Tariff, the costs of which, when accepted by the Commission, will be recovered through a formula rate as calculated below.⁶

5. Section 205 of the FPA requires “every public utility [to] file with the Commission . . . schedules showing all rates and charges for any transmission or *sale* [emphasis added] subject to the jurisdiction of the Commission” The FPA does not require a public utility as purchaser to file a power purchase agreement. Any required filings for jurisdictional sales can be made by public utility sellers and the settling parties have not offered or justified any other rationale for these aspects of the settlement. We therefore direct NorthWestern to remove the provision included in Schedules 2, 3, 4, and 9 which requires NorthWestern to file under FPA section 205 any agreement for the purchase of products to provide ancillary services under these schedules and to reflect this change in a compliance filing within 30 days of the date of this order.

6. Likewise, Schedules 5 and 6 appear to require NorthWestern to file, under section 205, agreements entered into for the purchase of products to provide ancillary services. NorthWestern is directed to modify Schedules 5 and 6 accordingly, in a compliance filing within 30 days of the date of this order.

7. Section 3.14 of the Settlement addresses various OATT revisions consistent with the requirements of Order No. 890. To implement these revisions, NorthWestern is directed to revise its filing in Docket No. OA07-58-000 as follows: (1) Attachment J (Procedures for Addressing Parallel Flows); (2) Attachment A-1 Form of Service Agreement to include both long and short-term assignments; (3) Attachment L (Creditworthiness Procedures); and (4) section 17.8 (to provide a window for simultaneous transmission service requests). NorthWestern is directed to make this compliance filing with the Commission, addressing the OATT revisions, within 30 days of the date of this order.

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

9. The tariff sheets contained in the Settlement are in compliance with Order No. 614 and are conditionally accepted, as discussed above, to be made effective as set forth in the Settlement. *See Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs., Regulations Preambles July 1996 – December 2000 ¶ 31,096 (2000).

⁶ This provision is also reflected in Schedule 3 (Regulation and Frequency Response Service), Schedule 4 (Energy Imbalance Service), and Schedule 9 (Generator Imbalance Service) of NorthWestern’s Montana OATT.

10. NorthWestern is directed, pursuant to section 4.2 of the Settlement, to make refunds together with interest computed under section 35.19a of the Commission's regulations, 18 C.F.R. § 35.19a (2008). Within 15 days after making all such refunds, we also direct NorthWestern to file with the Commission a compliance refund report showing monthly billing determinants, revenue receipt dates, revenues under the present and settlement rates, monthly revenue refund, and monthly interest computed, together with a summary of such information for the total refund period. NorthWestern shall furnish copies of the report to affected customers and to each state commission that regulates the affected wholesale customers.

11. This order terminates Docket Nos. ER07-46-001, OA07-7-000 and ER08-332-000. The Commission will separately evaluate NorthWestern's proposal to address cluster study requests in Docket No. OA07-58-000.

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

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

NorthWestern Corporation

Docket Nos. ER07-46-001
OA07-7-000
OA07-58-000
ER08-332-000

(Issued October 16, 2008)

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-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. In *Maine Public Utilities Commission v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) made clear that when a rate challenge is brought by a non-contracting third party, the “proper standard of review” is the “just and reasonable” standard.² 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*.³ Unfortunately, the majority accepts ambiguous contract language despite the fact that the D.C. Circuit has already definitively spoken on this issue. Therefore, the “most stringent standard permissible under applicable law” as applied here to both non-parties and the Commission acting *sua sponte* means the “just and reasonable” standard of review. 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 16 U.S.C. § 824e (2006).

² *Maine Public Utilities Commission v. FERC*, 520 F.3d 464, 478, *petition for reh’g denied* __ F.3d __ (D.C. Cir. 2008) (*Maine PUC*).

³ *See Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201 (2008) (Comm’rs Wellinghoff and Kelly dissenting in part).

For these reasons, I concur in part.

Sudeen G. Kelly