

126 FERC ¶ 61,028
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

January 15, 2009

In Reply Refer To:
MMC Energy, Inc.

v.

California Independent System
Operator Corporation
Docket Nos. EL08-46-000
EL08-46-001

Wright & Talisman, P.C.
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Dear Mr. Statman, Mr. Waikart and Ms. Hong:

1. You filed a Settlement Agreement and Offer of Settlement in the above-captioned proceeding on October 14, 2008 (Offer of Settlement). The Offer of Settlement comprehensively resolves all issues set for hearing in the Commission's June 6, 2008 Order on Complaint in that proceeding (June 6, 2008 Order). The June 6, 2008 Order addressed a complaint filed by MMC Energy, Inc. (MMC) against California Independent System Operator Corporation (CAISO) on March 13, 2008. The order itself resolved various issues related to the MMC complaint, but set certain issues concerning "No Pay" charges imposed under CAISO's Open Access Transmission Tariff (OATT) for hearing, holding the hearing in abeyance pending the outcome of settlement judge procedures.
2. CAISO and MMC filed requests for rehearing on July 7, 2008. On September 23, 2008 MMC and CAISO filed a joint motion to defer action on pending request for rehearing. As mentioned above, on October 14, 2008 the Offer of Settlement was filed.
3. Commission Trial Staff filed initial comments concluding that the Offer of Settlement was fair, reasonable and in the public interest on November 3, 2008. No other

comments were filed. The settlement judge certified the Offer of Settlement to the Commission as uncontested on November 17, 2008.

4. Paragraph 1 of the Settlement Agreement states that any and all claims arising from or that could have been brought in Docket No. EL08-46-000 (and any subdocket), any and all claims regarding the assessment of No-Pay Charges on Spinning Reserve and Non-Spinning Reserve by MMC's Generating Units for the years 2006 and 2007 are resolved and that the Parties waive all additional claims arising under the CAISO Tariff, the Federal Power Act and state and federal law, that are related to the No-Pay Charges for Spinning and Non-Spinning Reserve.

5. Paragraph 2 of the Settlement Agreement provides that the Parties agree to release each other from any and all known claims that could have been brought in various forums related to MMC's entry into and participation in the CAISO Spinning or Non-Spinning Reserve markets prior to September 22, 2008, except for any disputes that challenge No-Pay Charges on Spinning or Non-Spinning Reserve provided by MMC's Generating Units after January 1, 2008.

6. Paragraph 3 of the Settlement Agreement states that MMC's Generating Units will refund to the CAISO the amount of \$1,000,000 in four equal installments of \$250,000 each. The first payment is to be made on the first business day after the day that the Commission issues an order accepting the Settlement without modification or condition, with the final payment to be due on June 30, 2009.

7. Paragraph 4 of the Settlement Agreement states that the Parties release each other from any liability under the June 6, 2008 Order for any amount that may be owed to the other related to the No-Pay Charges for 2006 and 2007.

8. Paragraph 5 of the Settlement Agreement states that the above-mentioned settlement amounts are not subject to interest.

9. Paragraph 6 of the Settlement Agreement provides that upon the issuance of a final Commission order accepting the Settlement, all pending requests for rehearing of the June 6, 2008 Order will be deemed withdrawn, and this docket will be terminated.

10. Paragraph 13 of the Settlement Agreement states that the Parties have agreed that (1) the standard of review for any modifications to the Settlement proposed by a Party but not agreed to by all Parties, including any modifications resulting from the Commission acting *sua sponte* shall be the "public interest" standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and (2) the standard of review for any modification to the Settlement proposed by a non-settling third party will be the most stringent standard permissible under applicable law.

11. The Commission also observes that the Offer of Settlement is not expressly confined to the issues set for hearing in the June 6, 2008 Order. Commission approval of the Offer of Settlement does not supersede or modify any determinations made in the June 6, 2008 Order, and does not constitute approval of, or precedent regarding, any principle or issue involved in this proceeding.

12. The Settlement is fair and reasonable, and in the public interest, and is approved. Commission approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue involved in these proceedings.

13. Commission approval of the Offer of Settlement moots all pending rehearing requests. This Letter Order terminates Docket Nos. EL08-46-000 and EL08-46-001.

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

Kimberly D. Bose,
Secretary.

cc: All Parties

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

MMC Energy, Inc.

Docket Nos. EL08-46-000
EL08-46-001

v.

California Independent System Operator
Corporation

(Issued January 15, 2009)

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

The instant settlement's standard of review provisions would have the Commission apply the "public interest" standard to any changes proposed by the parties or the Commission acting *sua sponte*. The instant settlement also would impose the "most stringent standard permissible under applicable law" with respect to any changes proposed by non-parties.

The U.S. Supreme Court has held that whenever the Commission reviews certain types of contracts, the 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 contracts" 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*

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 Pub. Utils. Comm'n*, 520 F.3d 464, 478, *petition for reh'g denied*, No. 06-1403, slip op. (D.C. Cir. Oct. 6, 2008) (*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 instant settlement 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 non-parties means the “just and reasonable” standard of review. Further, for the reasons discussed above, we believe that the majority should not have accepted the provision of the instant settlement that applies the “public interest” standard to the Commission acting *sua sponte*. Instead, changes proposed by the Commission acting *sua sponte* should be reviewed under the “just and reasonable” standard.

For these reasons, we concur in part and dissent in part.

Suedeem G. Kelly
Commissioner

Jon Wellinghoff
Commissioner

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