

126 FERC ¶ 61,027
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Devon Power LLC

Docket No. ER03-563-064

ORDER ON REMAND

(Issued January 15, 2009)

1. This case is before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit).¹ The D.C. Circuit remanded for further consideration the Commission's approval of the application of the *Mobile-Sierra* public interest standard of review² to any proposed changes to a settlement approving ISO-New England Inc.'s (ISO-NE) Forward Capacity Market (Settlement Agreement). The Settlement Agreement remains approved, but conditioned on the settling parties revising the standard of review applicable to non-settling third parties.

Background

2. In these proceedings, the Commission addressed a proposal by ISO-NE to establish a locational installed capacity mechanism. On March 6, 2006, a broad group of the parties to this proceeding (collectively, settling parties) filed the proposed Settlement Agreement resolving all issues in this matter. The Settlement Agreement contains an alternative to a locational installed capacity mechanism, called the Forward Capacity Market. In general, when fully implemented, the Forward Capacity Market will establish annual auctions to procure capacity three-plus years in advance of the commitment period.³ The first Forward Capacity Market auction commitment period is June 1, 2010 to May 31, 2011. The Settlement Agreement also contains a transition period prior to the

¹ *Maine PUC v. FERC*, 520 F.3d 464 (D.C. Cir. 2008) (*Maine PUC v. FERC*).

² See *United Gas Pipe Line Co. v. Mobile Gas Service Co.*, 350 U.S. 332 (1956) (*Mobile*); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

³ The first auction was held less than three years in advance, due to the software implementation schedule.

first commitment period, which began December 1, 2006 and ends June 1, 2010. During this time, fixed payments will be made to all installed capacity resources. The settling parties asked that the Commission consider the Settlement Agreement as a package under the approaches outlined in *Trailblazer Pipeline Company*.⁴ Among other things, section 4.C of the Settlement Agreement states that the transition payments and the final prices from the Forward Capacity Auctions cannot be changed unless required by the public interest under the *Mobile-Sierra* public interest standard of review (*Mobile-Sierra* provision).⁵

The Commission's Order

3. On June 16, 2006, the Commission approved the Settlement Agreement, including the public interest standard of review.⁶

The Court's Ruling

4. On review, the court upheld the Commission's approval of the Settlement Agreement implementing the Forward Capacity Market. However, the court disagreed with the Commission that it can approve a settlement agreement that applies the "highly-deferential public interest" standard of review to future rate challenges brought by non-contracting third parties. The court found that when a non-contracting third party files a complaint against a settled rate or charge, the Commission must adjudicate the challenge under the just and reasonable standard of review. Therefore, the D.C. Circuit remanded to the Commission its approval of the application of the *Mobile-Sierra* public interest standard of review.

Discussion

5. In light of *Maine PUC v. FERC*, the Commission will approve the settlement conditioned on the settling parties revising the standard of review applicable to non-settling third parties, consistent with the court's decision. The settling parties are directed to submit such a revision as a compliance filing within 30 days of the date of this order.

⁴ 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110 (1999) (*Trailblazer*).

⁵ See Settlement Agreement at section 4.C.

⁶ *Devon Power LLC*, 115 FERC ¶ 61,340 (2006), *order on reh'g*, 117 FERC ¶ 61,133 (2006), *remanded in part sub nom. Maine PUC v. FERC*, 520 F.3d 464 (D.C. Cir. 2008).

6. In taking this action, we emphasize that the Commission found the Settlement Agreement, a contested settlement, to be just and reasonable based on a voluminous record. Non-parties to this settlement will have a high burden should they seek to modify the settlement in the future under a just and reasonable standard.

The Commission orders:

The settling parties are hereby directed, within 30 days of the date of this order, to submit a compliance filing revising the standard of review applicable to non-settling third parties, as directed in the body of this order.

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

(S E A L)

Kimberly D. Bose,
Secretary.

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

In *Maine Public Utilities Commission v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) determined that the proper standard of review for the subject agreement, with regard to changes proposed by non-settling third parties, was the “‘just and reasonable’ standard in section 206 of the Federal Power Act.”¹ 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*.² Therefore, we agree with the order’s finding that the parties must revise the standard of review applicable to non-settling third parties, consistent with the court’s decision. However, we also believe that the order should have directed the parties to similarly revise the settlement to change the standard of review applicable to the Commission acting *sua sponte*.

For this reason, we concur in part.

Suedeem G. Kelly
Commissioner

Jon Wellinghoff
Commissioner

¹ *Maine Pub. Utils. Comm’n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008) (*Maine PUC*).

² *See Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201 (2008) (Comm’rs Wellinghoff and Kelly dissenting in part).