

125 FERC ¶ 61,310  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 35

Docket No. RM05-35-000

STANDARD OF REVIEW FOR MODIFICATIONS  
TO JURISDICTIONAL AGREEMENTS

(Issued December 18, 2008)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Withdrawal of Notice of Proposed Rulemaking and Termination of Rulemaking Proceeding.

SUMMARY: The Commission withdraws a notice of proposed rulemaking, which proposed that, in the absence of specific contractual language enabling Commission review of proposed contractual modifications not agreed to by the signatories (or their successors) under a “just and reasonable” standard, the Commission would review such modifications under a “public interest” standard.

EFFECTIVE DATE: This withdrawal will become effective [Insert Date 30 days after publication in the **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION

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

Standard of Review for Modifications to Jurisdictional Agreements      Docket No. RM05-35-000

WITHDRAWAL OF NOTICE OF PROPOSED RULEMAKING AND  
TERMINATION OF RULEMAKING PROCEEDING

(Issued December 18, 2008)

1. On December 27, 2005, the Commission issued a Notice of Proposed Rulemaking (NOPR) in this proceeding.<sup>1</sup> For the reasons set forth below, we are exercising our discretion to withdraw the NOPR and terminate this rulemaking proceeding.

**I. Background**

2. In the NOPR, the Commission proposed to repeal its regulation at 18 C.F.R. § 35.1(d) and, in its place, promulgate a general rule regarding the standard of review that must be met to justify proposed modifications to Commission-jurisdictional agreements under the Federal Power Act (FPA) and Natural Gas Act (NGA) that are not agreed to by the signatories (or their successors). The Commission noted that courts were divided as to whether, in the face of contractual silence, the Commission was required to apply the “public interest” standard of review or the “just and reasonable” standard of review to

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<sup>1</sup> Standard of Review for Modifications to Jurisdictional Agreements, Notice of Proposed Rulemaking, 71 FR 303 (Jan. 4, 2006), FERC Stats. & Regs. ¶ 32,596 (2005) (NOPR).

proposed modifications.<sup>2</sup> The NOPR thus focused on the standard of review applicable to proposed changes in contracts in the absence of contractual language specifying the standard of review preferred by the parties. The NOPR did not address other issues such as the showing needed to satisfy the “Mobile-Sierra presumption.”<sup>3</sup>

3. The Commission, in the NOPR, proposed a regulation which provided that, in the absence of prescribed contractual language enabling the Commission to review proposed modifications to agreements that are not agreed to by the signatories (or their successors) under a “just and reasonable” standard of review, the Commission will review such proposed modifications under a “public interest” standard of review. The Commission concluded that the weight of court precedent supported application of the “public interest” standard when evaluating proposed changes to such contracts, unless the contract language expressly invokes the “just and reasonable” standard. The Commission stated that this standard would promote contract certainty. Additionally, the Commission recognized the importance of providing certainty and stability in competitive electric energy markets.

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<sup>2</sup> NOPR, FERC Stats. & Regs. ¶ 32,596 at P 8 (citing Boston Edison Co. v. FERC, 233 F.3d 60 (1<sup>st</sup> Cir. 2000)). The Boston Edison court stated that these issues would remain in a state of confusion until the Commission “squarely confronted the underlying issues.” Boston Edison, 233 F.3d at 68.

<sup>3</sup> Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, 128 S. Ct. 2733, 2739 (2008) (Morgan Stanley) (referring to United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (Mobile-Sierra)).

## II. Discussion

4. There is no longer a need for a rulemaking regarding the default standard of review, as the Supreme Court has addressed the law in this area. Since issuance of the NOPR, the United States Supreme Court has addressed the Mobile-Sierra doctrine in Morgan Stanley. The Court held that the Mobile-Sierra doctrine is a presumption that rates initially set in a freely negotiated contract meet the statutory just and reasonable requirement of the FPA.<sup>4</sup> The Court explained that “parties could contract out of the Mobile-Sierra presumption by specifying in their contracts that a new rate filed with the Commission would supersede the contract rate,” but otherwise “the Mobile-Sierra presumption remains the default rule.”<sup>5</sup>

5. Because the Supreme Court in Morgan Stanley has since addressed the default standard, the Commission concludes that it is no longer necessary to adopt the regulation proposed in the NOPR. The Commission therefore withdraws the NOPR and terminates this rulemaking proceeding.

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<sup>4</sup> Id. at 2737; accord id. at 2746.

<sup>5</sup> Id. at 2739; cf. Public Util. Dist. No. 1 v. FERC, 471 F.3d 1053, 1075 (9<sup>th</sup> Cir. 2006), aff’d and remanded sub nom., Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, 128 S. Ct. 2733 (2008).

The Commission orders:

The Notice of Proposed Rulemaking is hereby withdrawn and Docket No. RM05-35-000 is hereby terminated.

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

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Standard of Review for Modifications to  
Jurisdictional Agreements

Docket No. RM05-35-000

(Issued December 18, 2008)

KELLY and WELLINGHOFF, Commissioners, concurring:

This order terminates the rulemaking proceeding on the standard of review for modifications to jurisdictional agreements, withdrawing the Notice of Proposed Rulemaking (NOPR) that the Commission issued in 2005. This order states that, since the issuance of the NOPR, the United States Supreme Court addressed the Mobile-Sierra doctrine, including the default standard of review, in Morgan Stanley.<sup>1</sup> As a result, the majority finds that there is no longer a need for a rulemaking regarding the default standard of review.

We agree that the rulemaking proceeding on the standard of review for modifications to jurisdictional agreements should be terminated. However, we believe that in reaching that conclusion, it is appropriate to recognize not only the Morgan Stanley decision, but also the U.S. Court of Appeals for the District of Columbia Circuit's recent decision in Maine Public Utilities Commission v. FERC.<sup>2</sup> Because the Commission is bound by the rulings in Morgan Stanley and Maine PUC, we conclude that there is no longer a need for a rulemaking regarding the default standard of review.

For this reason, we concur with this order.

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Suede G. Kelly  
Commissioner

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Jon Wellinghoff  
Commissioner

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<sup>1</sup> Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, 128 S. Ct. 2733 (2008) (Morgan Stanley).

<sup>2</sup> Maine Public Utilities Commission v. FERC, 520 F.3d 464, petition for reh'g denied, No. 06-1403, slip op. (D.C. Cir. Oct. 6, 2008) (Maine PUC) (discussing, among other issues, the circumstances in which it is appropriate to apply the Mobile-Sierra presumption).