

124 FERC ¶ 61,083
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.

NSTAR Electric & Gas Corporation

Docket No. EL07-68-000

v.

ISO New England Inc.

ORDER CONDITIONALLY APPROVING UNCONTESTED SETTLEMENT

(Issued July 24, 2008)

1. On January 28, 2008, NSTAR Electric & Gas Corporation (NSTAR) and Exelon New Boston, LLC (Exelon) (collectively, the Settling Parties) submitted for filing an Offer of Settlement and related materials (Settlement) resolving all issues in NSTAR's complaint disputing ISO New England Inc.'s (ISO-NE) administration of the now-terminated Second Amended and Restated Reliability Must Run Agreement (Second Amended RMR Agreement) between ISO-NE and Exelon governing the operation of Exelon's New Boston Facility.¹ Specifically, the Settlement sets forth certain refunds agreed upon between the Settling Parties pursuant to section 10.1(b) of the Second Amended RMR.²

2. The Settlement is a "black box" agreement. The Settling Parties state that Exelon will refund a \$5 million lump-sum amount to ISO-NE, which ISO-NE will distribute to all affected New England Power Pool (NEPOOL) Participants.³

¹ While ISO-NE is not a party to the Settlement, the Settling Parties were authorized to represent that ISO-NE does not oppose the Settlement.

² Exelon New Boston LLC, Second Revised Rate Schedule FERC No. 3, Original Sheet Nos. 13-14.

³ These Participants include the parties listed in Exhibit A of the Settlement.

3. The Settling Parties state that the issuance of refunds shall be administered as follows: ISO-NE will charge Exelon \$5 million in the next possible Monthly Invoice after the Commission approves the Settlement (but no later than 45 days after final Commission approval), Exelon shall make payment to ISO-NE in accordance with ISO-NE's Billing Policy, and ISO-NE will distribute refunds as part of the same Monthly Invoice cycle in which the \$5 million is charged in accordance with ISO-NE Billing Policy.
4. Section 6.4 of the Settlement addresses modifications to the Settlement. Section 6.4 states that if the Commission acts on its own motion it will be bound by the just and reasonable standard of review; otherwise, the applicable standard of review is the *Mobile-Sierra* public interest standard.⁴
5. In light of *Maine Pub. Util. Comm'n v. FERC*, 520 F.3d 464, 477-78 (D.C. Cir. 2008), the Commission may not accept the standard of review as currently written. As such, the Settlement is approved conditioned on the settling parties revising the standard of review applicable to non-settling third parties. An acceptable substitute provision applicable to non-settling third parties would be the "most stringent standard permissible under applicable law."
6. The Settlement is otherwise fair and reasonable and in the public interest and is hereby conditionally approved. The Settlement shall be effective as of the date of this order, and shall terminate the complaint proceeding in Docket No. EL07-68-000. The Commission's conditional approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

The Commission orders:

The Settlement is hereby conditionally approved, as discussed in the body of this order.

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

(S E A L)

Kimberly D. Bose,
Secretary.

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

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KELLY and WELLINGHOFF, Commissioners, dissenting in part:

The instant settlement states that if the Commission, acting on its own motion, reviews the settlement in the future, then the “just and reasonable” standard of review will apply. The settlement further states that otherwise, the applicable standard will be the “public interest” standard of review.

The majority finds that, in light of the U.S. Court of Appeals for the District of Columbia Circuit’s (D.C. Circuit) decision in *Maine Public Utilities Commission v. FERC*,¹ the Commission may not accept the standard of review set forth in the instant settlement. Therefore, the majority approves the settlement conditioned on the settling parties revising the standard of review applicable to non-settling third parties. The majority also states that language applying the “most stringent standard permissible under applicable law” to non-settling third parties would be “[a]n acceptable substitute provision.”

We continue to disagree with the majority’s characterization of the D.C. Circuit’s holding in *Maine PUC* as to the applicability of the “public interest” standard. For the reasons set forth in our dissents in *Duke Energy Carolinas, LLC*² and *Westar Energy, Inc.*,³ we respectfully dissent in part.

Suede G. Kelly
Commissioner

Jon Wellinghoff
Commissioner

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

² 123 FERC ¶ 61,201 (2008).

³ 123 FERC ¶ 61,252 (2008).