

125 FERC ¶ 61,390  
FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426

December 30, 2008

In Reply Refer To:  
Norkwalk Power, LLC  
Docket Nos. ER07-799-000  
ER07-799-001  
EL07-61-000

Dickstein Shapiro LLP  
Attn: Michael J. Wentworth, Esq.  
Attorney for Norwalk Power, LLC  
1825 Eye Street, NW  
Washington, DC 20006

Dear Mr. Wentworth:

1. On December 4, 2008, you submitted an offer of settlement on behalf of Norwalk Power, LLC (NP) (Norwalk), in the above proceeding. That offer was the result of a settlement judge's working with the participants to resolve the outstanding issues. On December 10, 2008, comments supporting the offer were filed by the Commission's Staff. No reply comments were filed. On December 17, 2008, the settlement judge certified the offer to the Commission as an uncontested offer.
2. The subject settlement, as revised as ordered below, appears to be fair, reasonable and in the public interest and is hereby approved. In addition, the rate schedules submitted as part of the settlement are in compliance with *Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000), and are conditionally accepted for filing as designated. The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.
3. With respect to all modifications to the Joint Stipulation and Settlement Agreement (Settlement Agreement) or the underlying Reliability-Must-Run Agreement (RMR Agreement), section 16 of the Settlement Agreement proposes to bind non-parties and the Commission to the "most stringent standard

permissible under applicable law.”<sup>1</sup> However, section 16 would also allow the parties to propose certain changes under a "just and reasonable" standard.<sup>2</sup> We find that the Commission likewise should be bound only to a just and reasonable standard for those modifications. Accordingly, we will conditionally approve the Settlement Agreement on the condition that, with respect to section 16, Norwalk file an amended Settlement Agreement, within 45 days, to provide that in such circumstances the Commission will be bound to the "just and reasonable" standard.<sup>3</sup>

4. This letter terminates Docket Nos. ER07-799-000, ER07-799-001, and EL07-61-000.

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

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>1</sup> See *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201 (2008).

<sup>2</sup> Pursuant to section 16 of the Settlement Agreement, parties may propose changes to the Settlement Agreement that are either (1) agreed to pursuant to section 15 of the settlement agreement; or (2) expressly permitted under the terms of the Settlement Agreement or the RMR Agreement under the just and reasonable standard of review. The standard of review for any other modification proposed by the parties that is not otherwise prohibited by the terms of those agreements will be the *Mobile-Sierra* standard of review.

<sup>3</sup> See *Southern Company Services, Inc.*, 67 FERC ¶ 61,080, at 61,227-28 (1994). The Commission will not allow parties to bind it to a higher standard of review than they bind themselves.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Norwalk Power, LLC

Docket Nos. ER07-799-000  
ER07-799-001  
EL07-61-000

(Issued December 30, 2008)

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

The instant settlement's standard of review provisions 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*. By contrast, the settlement provides that the just and reasonable standard of review would apply to changes proposed by the parties pursuant to section 15 of the settlement or otherwise expressly permitted under the settlement or the related RMR Agreement. The proposed standard of review for any other modifications requested by the parties is the *Mobile-Sierra* standard.

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.<sup>1</sup> 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.<sup>2</sup> 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."<sup>3</sup> 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* applies with at least equal force to changes to an agreement sought by the

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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, 2737 (2008) (*Morgan Stanley*).

<sup>2</sup> *Id.*

<sup>3</sup> *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*).

Commission acting *sua sponte*.<sup>4</sup>

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 or the Commission acting *sua sponte* means the “just and reasonable” standard of review. In those situations, 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.<sup>5</sup>

For these reasons, we concur in part.

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Suedeem G. Kelly  
Commissioner

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Jon Wellinghoff  
Commissioner

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

<sup>5</sup> 16 U.S.C. § 824(e) (2006).