

171 FERC ¶ 61,185
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

May 29, 2020

In Reply Refer To:
Midcontinent Independent System
Operator, Inc.
Docket No. ER20-1342-000

Midcontinent Independent System
Operator, Inc.
720 City Center Drive
Carmel, IN 46032

Attn: Jacob Krouse, Esq.
Attorney for Midcontinent Independent System Operator, Inc.

Dear Mr. Krouse:

1. On March 18, 2020, Dynegy Marketing and Trade, LLC and Illinois Power Marketing Company, Tilton Energy LLC, American Municipal Power, Inc., Northern Illinois Municipal Power Agency, Illinois Municipal Electric Agency, Midcontinent Independent System Operator, Inc. (MISO), and PJM Interconnection, L.L.C. (PJM) filed a Settlement Agreement and Offer of Settlement (Settlement) addressing five complaints alleging that overlapping or duplicative congestion charges were assessed by MISO and PJM to owners of generation resources or owners of shares of such resources that are pseudo-tied from MISO into PJM. On April 7, 2020, Commission Trial Staff filed comments supporting the Settlement. On April 20, 2020, the Settlement Judge certified the Settlement to the Commission as an uncontested settlement.¹

2. Pursuant to Article VI of the Settlement,

[t]he standard of review for any modifications to this Settlement proposed in proceedings under section 206 of the FPA by a Settling Party, without the written agreement of all other Settling Parties, shall be the “public interest”

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 63,011 (2020).

application of the just and reasonable standard of review, as explained in *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 554 U.S. 527 (2008) and *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 558 U.S. 165 (2010). The standard of review for any modifications to this Settlement requested in proceedings under section 206 of the FPA by anyone other than a Settling Party, including the Commission acting *sua sponte*, shall be the most stringent standard permissible under applicable law.

3. Because the Settlement Agreement appears to provide that the standard of review applicable to modifications to the Settlement Agreement proposed by the parties is to be the “public interest” standard of review but appears to provide that the standard of review applicable to modifications to the Settlement Agreement proposed by third parties and the Commission acting *sua sponte* is to be “the most stringent standard permissible under applicable law,” we clarify the framework that would apply if the Commission were required to determine the standard of review in a later challenge to the Settlement Agreement by a third party or by the Commission acting *sua sponte*.

4. The *Mobile-Sierra* “public interest” presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm’s length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption. In *New England Power Generators Association v. FERC*,² however, the D.C. Circuit determined that the Commission is legally authorized to impose a more rigorous application of the statutory “just and reasonable” standard of review on future changes to agreements that fall within the second category described above.

5. The Settlement resolves all issues set for hearing in Docket Nos. EL16-108, EL17-29, EL17-31, EL17-37, and EL17-54.³ The Settlement appears to be fair and

² *New England Power Generators Ass’n v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

³ *Tilton Energy LLC v. Midcontinent Indep. Sys. Operator, Inc.*, 167 FERC ¶ 61,147 (2019); *Am. Mun. Power, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 167 FERC ¶ 61,148 (2019); *N. Ill. Mun. Power Agency v. PJM Interconnection, L.L.C.*,

reasonable and in the public interest, and is hereby approved, effective as of the date of this order, as requested. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings.

By direction of the Commission.

Kimberly D. Bose,
Secretary.

167 FERC ¶ 61,149 (2019); *Dynegy Marketing and Trade, LLC v. Midcontinent Indep. Sys. Operator, Inc.*, 167 FERC ¶ 61,150 (2019), *see also Tilton Energy LLC v. Midcontinent Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,122 (2019).