145 FERC ¶ 61,138
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

November 18, 2013

In Reply Refer To:
Empire District Electric Company
Docket No. ER12-1813-000

Davis Wright Tremaine LLP
Attention: Margaret H. Claybour
1919 Pennsylvania Avenue NW
Suite 800
Washington, DC 20006-3401

Dear Ms. Claybour:

1. On June 13, 2013, you filed an offer of settlement (Settlement) in the above-captioned proceeding on behalf of Empire District Electric Company (Empire), the cities of Monett, Mt. Vernon and Lockwood, Missouri, and Chetopa, Kansas (Cities), and the Kansas Corporation Commission (Kansas Commission) (collectively, Settling Parties) that, if accepted, would resolve all the issues set for hearing by the Commission in this proceeding.[1] On July 16, 2013, the Settlement Judge reported the Settlement to the Commission as a reasonable negotiated resolution of the issues set for hearing.[2]

2. The Settlement would revise Empire's Open Access Transmission Tariff (OATT) to replace its stated rates with a Formula Rate Template (TFR Template) and Formula Rate Implementation Protocols (Protocols) (collectively, TFR Tariff). The TFR Tariff that the Commission is being asked to approve in the instant settlement revises the proposed TRF Tariff that Empire originally filed with the Commission for approval in this proceeding on May 18, 2012 and that the Commission set for hearing.

3. Trial Staff objected to certain aspects of the Settlement including: (1) Empire's inclusion of long term debt of $55 million and related interest expense, associated with gas mortgage bonds issued by its subsidiary, in its capital structure and cost of debt;

[1] *Empire District Electric Co.*, 140 FERC ¶ 61,087 (2012).

[2] *Empire District Electric Co.*, 144 FERC ¶ 63,008 (2013).

(2) the standard of review for modifications to the Settlement, which the Commission is here directing to be modified; and (3) a request for blanket waiver of any of the Commission's regulations that may be necessary to effectuate the Settlement. Inasmuch as the Settlement establishes no precedent or policy and may be approved as uncontested by the parties[3] and is a fair resolution of the proceeding, the Commission finds the issues (other than that related to standard of review) noted by Trial Staff are not a bar to approval of the Settlement. Accordingly, with the modification of the applicable standard of review for changes to the Settlement after approval, we find that the Settlement appears to be fair and reasonable and in the public interest, and it is hereby approved, subject to the conditions discussed below.

4. Article VIII, paragraph 8.3, of the Settlement provides that the standard of review for proposed modifications to the TFR Tariff shall be the "just and reasonable" standard of review. Article VIII, paragraph 8.4, provides that the standard of review for any modifications to the Settlement, whether proposed by a Settling Party, any party with standing under the Federal Power Act § 206, or the Commission acting *sua sponte*, shall be solely the strictest standard set forth in *United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 348 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish, Washington*, 554 U.S. 527 (2008); or *NRG Power Marketing, LLC, et al., v. Maine Public Utilities Commission*, 558 U.S. 165 (2010). Because the Settlement Agreement appears to invoke the *Mobile-Sierra* "public interest" presumption with respect to third parties and the Commission acting *sua sponte*, we will analyze the applicability here of that more rigorous application of the just and reasonable standard.

5. 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*,[4] however, the

[3] *See Magellan Pipeline Co., L.P.*, 137 FERC ¶ 61,222 (2011) (treating offer of contested settlement as uncontested under Rule 602(h)(2)(i), 18 C.F.R. 385.602(h)(2)(i) (2013), where contest was not raised by a party and presiding officer determined there were no genuine issues of material fact with respect to contested issues).

[4] *New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 370-71

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.

6. The Settlement implements a change in Empire's OATT and modifies Empire's generally applicable rate schedules for any Empire customers that would take service under the TFR Tariff. Therefore, the Settlement does not embody contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption.

7. As we have stated recently, in the context of reviewing settlements that do not involve "contract rates," the Commission has discretion as to whether to approve a request to impose on itself or third parties the more rigorous application of the statutory "just and reasonable" standard of review that is often characterized as the *Mobile-Sierra* "public interest" standard of review.[5] The Commission also stated in these orders that it will not approve imposition of that more rigorous application of the statutory "just and reasonable" standard of review on future changes to an agreement sought by the Commission or non-settling third parties, absent compelling circumstances such as were found to exist in *Devon Power*. We find that the circumstances presented here do not satisfy that test. Thus, we find it unjust and unreasonable to impose the more rigorous application of the statutory "just and reasonable" standard of review in the instant proceeding with respect to future changes to the Settlement sought by the Commission acting *sua sponte*, or at the request of a non-settling third party.

8. Therefore, the Commission approves the Settlement and Empire's revised TFR Tariff, subject to the Settling Parties' filing, within 30 days of the date of this letter order, a revised Settlement that modifies the Article VIII, paragraph 8.4, standard of review provision as discussed above.

(D.C. Cir. 2013).

[5] *See, e.g., MidAmerican Energy Co.*, 138 FERC ¶ 61,028, at P 7 (2012) (citing *Devon Power LLC*, 134 FERC ¶ 61,208, *order on reh'g*, 137 FERC ¶ 61,073 (2011) (*Devon Power*), *aff'd, New England Power Generators Ass'n v. FERC*, 707 F.3d 364 (D.C. Cir. 2013); *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 (2011); *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105, at P 24 (2011)).

9. The Commission's approval of the Settlement and its revised TFR Tariff does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. Refunds and adjustments shall be made pursuant to the Settlement. Empire shall comply with *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,274 (2008) in order to implement the Settlement as modified and the revised TFR Tariff.

By direction of the Commission. Commissioner Norris is concurring with a separate statement attached.

Kimberly D. Bose,
Secretary.

cc: All Parties

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Empire District Electric Company Docket No. ER12-1813-000

(Issued November 18, 2013)

NORRIS, Commissioner, *concurring*:

I concur in the outcome of this order, which conditionally approves an uncontested settlement addressing revisions to Empire's OATT to incorporate formula rates. The Commission's approval is conditioned upon the Settling Parties submitting a revised settlement that modifies section 8.4 of the settlement to no longer bind non-parties and the Commission acting *sua sponte* to the *Mobile-Sierra* public interest standard of review with respect to future changes to the settlement. I agree with the order that the settlement agreement implements changes to Empire's OATT and rate schedules, which are generally applicable to Empire customers, and thus is not the type of contract rate to which the public interest presumption would apply. However, while the D.C. Circuit has determined that the Commission may exercise discretion under the Federal Power Act to apply the public interest standard where the *Mobile-Sierra* presumption does not apply,[1] I continue to disagree, as a policy matter, that the Commission should exercise such discretion.[2]

I believe the Commission can exercise its respect for rate certainty and stability and recognize the value of settlements, while protecting the rights of third parties and without sacrificing a future Commission's ability to review rates that may no longer be just and reasonable due to a change in circumstances. Therefore, I disagree with the analysis in this order of whether the Commission should permit the application of the public interest standard to future changes to the settlement.

For these reasons, I respectfully concur.

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John R. Norris, Commissioner

[1] *New England Power Generators Ass'n, Inc. v. FERC*, No. 11-1422, at 10-12 (D.C. Cir. Feb. 15, 2013).

[2] *Devon Power LLC*, 134 FERC ¶ 61,208 (2011), *Norris, dissenting in part*.