

138 FERC ¶ 61,028
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

January 19, 2012

In Reply Refer To:
MidAmerican Energy Company
Docket No. ER09-823-000

Steptoe & Johnson LLP
Attention: Jennifer L. Key, Esq.
1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Dear Ms. Key:

1. On August 22, 2011, you filed a Settlement Agreement (Settlement) between MidAmerican Energy Company (MidAmerican) and Clipper Windpower Development Company, LLC (Clipper) in the above-referenced docket.
2. On August 30, 2011, Commission Trial Staff filed comments in support of the Settlement. No adverse or reply comments were filed, and on September 27, 2011, the presiding judge certified the Settlement to the Commission as uncontested.¹
3. The Settlement resolves all issues set for hearing in Docket No. ER09-823-000, concerning the rates, terms, and conditions of a proposed Large Generator Interconnection Agreement (LGIA) between MidAmerican and Clipper.² The Settlement appears to be fair and reasonable and in the public interest, and is hereby approved, subject to the modification directed below. The Commission's approval of the

¹ *MidAmerican Energy Co.*, 136 FERC ¶ 63,016 (2011).

² *MidAmerican Energy Co.*, 128 FERC ¶ 61,110 (2009). The original unexecuted LGIA initiating this proceeding is referred to by the parties as the 2009 LGIA, and addressed the interconnection of Clipper's proposed 50 megawatt wind farm to MidAmerican's transmission system. The Commission set for hearing the parties' dispute over whether certain facility improvements needed to interconnect the project met the 2009 LGIA's definition of "Network Upgrades" so as to be eligible for revenue crediting under the agreement. The parties sought and obtained suspension of the hearing to pursue settlement discussions which culminated in the subject Settlement and revised LGIA. This revised LGIA is part of the Settlement and is termed the 2011 LGIA.

Settlement as modified does not constitute approval of, or precedent regarding, any principle or issue involved in this proceeding.

4. Article VII of the Settlement, titled “Standard of Review,” contains two sections. Section 7.1 provides that “except as provided for in § 30.11 of the 2011 LGIA” [Exhibit B of the Settlement], the Settlement does not affect the right of any Party or the Commission, acting *sua sponte* or at the request of a third party, to seek changes to the 2011 LGIA under sections 205 or 206 of the Federal Power Act (FPA). Section 30.11 of the 2011 LGIA provides, in relevant part:

except to the extent that the Parties otherwise mutually agree as provided herein[, n]either Party shall have the right to make a unilateral filing with [the Commission] to modify this LGIA with respect to the classifications listed under “Type of Project” in Attachment 1 to Appendix A of this LGIA. Neither Party shall have the right to make a unilateral filing with [the Commission] to modify this LGIA with respect to Section 1.0 of Appendix B of this LGIA. Should [the Commission], on its own motion or on behalf of a third party, seek to modify the classifications listed under “Type of Project” in Attachment 1 to Appendix A or Section 1.0 of Appendix B of this LGIA, the standard of review for such proposed modifications will be the public interest standard (as construed in *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish, Washington*, 128 S. Ct. 2733 (2008)).

Finally, section 7.2 of the Settlement states that it is the intent of the parties that, to the maximum extent permitted by law, the provisions of the Settlement shall not be subject to change under sections 205 and 206 of the FPA absent the written agreement of the parties, and the standard of review for changes unilaterally proposed by a party or the Commission, acting *sua sponte* or at the request of a third party, shall be the *Mobile-Sierra* public interest standard of review.³

5. As explained below, the Commission will require, as a condition for approval of the Settlement, modification of the above provisions of the Settlement and 2011 LGIA that seek to bind the Commission and non-settling third parties to the *Mobile-Sierra* “public interest” standard of review.

³ See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*); *Morgan Stanley Capital Grp. v. Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527 (2008) (*Morgan Stanley*); and *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm’n*, 130 S.Ct. 693 (2010) (*NRG*).

6. We find that the Settlement and the 2011 LGIA do not establish “contract rates,”⁴ but rather establish service under MidAmerican’s open access transmission tariff. In Order No. 2003, the Commission incorporated a standard LGIA into the pro forma open access transmission tariff.⁵ The Settlement and the 2011 LGIA thus pertain to MidAmerican’s open access transmission tariff and service provided thereunder. For this reason, we find that the *Mobile-Sierra* presumption, as defined by the U.S. Supreme Court,⁶ does not apply to the Settlement.

7. As we have stated in several recent orders, 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 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.⁷ The Commission has also stated in those orders that we will not approve imposition of that more rigorous application of the statutory “just and reasonable” standard of review on future changes to settlements sought by the Commission or non-settling third parties, absent compelling circumstances such as we found to exist in *Devon Power*. We find that the circumstances surrounding the Settlement and 2011 LGIA do not satisfy that test, and 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 and 2011 LGIA sought by the Commission acting *sua sponte* or at the request of a non-settling third party.

8. While we are requiring the Settlement and 2011 LGIA’s standard of review provisions to be modified as discussed above, the Commission continues to recognize the

⁴ Cf. *El Paso Elec. Co. and Tucson Elec. Power Co.*, 136 FERC ¶ 61,150, at P 5 (2011); *El Paso Elec. Co.*, 136 FERC ¶ 61,149, at P 6 (2011).

⁵ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh’g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh’g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh’g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff’d sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

⁶ *Morgan Stanley*, 554 U.S. at 546; *NRG*, 130 S.Ct. at 700.

⁷ See, e.g., *Devon Power LLC*, 134 FERC ¶ 61,208, *order on reh’g*, 137 FERC ¶ 61,073 (2011) (*Devon Power*); see also *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 (2011); *Southern LNG LLC*, 135 FERC ¶ 61,153, at P 24 (2011); *Petal Gas Storage LLC*, 135 FERC ¶ 61,152, at P 17 (2011); *High Island Offshore System, LLC*, 135 FERC ¶ 61,105, at P 24 (2011).

role of settlements in providing rate certainty. The Commission has discretion to initiate Federal Power Act section 206⁸ proceedings, either on its own motion or at the request of others.⁹ In deciding whether to exercise that discretion with respect to the instant Settlement or any other settlement, the Commission would take into account the settling parties' interest in maintaining the settlement.

9. Within 30 days of the date of this letter order, MidAmerican is directed to make a compliance filing in eTariff format to reflect the Commission's action in this order.¹⁰ Pursuant to section 8.2 of the Settlement, if either party is unwilling to accept this modification, the Settlement shall be null and void. In such circumstance, in lieu of the compliance filing, the parties should inform the Commission of this within 30 days of the date of this letter order.

10. MidAmerican shall make refunds consistent with the terms of the Settlement. MidAmerican shall provide a refund report to the Commission within fifteen (15) days after making the refunds.

11. This letter order terminates Docket No. ER09-823-000.

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

Kimberly D. Bose,
Secretary.

⁸ 16 U.S.C. § 824e (2006).

⁹ *General Motors Corp v. FERC*, 613 F.2d 939, 944 (D.C. Cir. 1979); *Southern Union Gas Co.*, 840 F.2d 964, 968 (D.C. Cir. 1988); *see also Iroquois Gas Transmission System*, 69 FERC ¶ 61,165, at 61,631 (1994); *JMC Power Projects v. Tennessee Gas Pipeline*, 69 FERC ¶ 61,162 (1994), *reh'g denied*, 70 FERC ¶ 61,168, at 61,528 (1995); *aff'd*, *Ocean States Power v. FERC*, 1996 U.S. App. LEXIS 11096 at *18.

¹⁰ *See Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 96 (2008).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

MidAmerican Energy Company

Docket No. ER09-823-000

(Issued January 19, 2012)

NORRIS, Commissioner, *concurring*:

I concur in the outcome of this order, which conditionally approves an uncontested settlement (Settlement) that resolves a dispute over an unexecuted large generator interconnection agreement between Clipper Windpower Development Company and MidAmerican Energy Company, subject to the Settlement being revised to not impose the “public interest” standard of review on future changes proposed by the Commission and non-settling third parties. I agree that the Settlement does not establish “contract rates”, and that as a result, the public interest presumption does not apply.¹ For the reasons I expressed in my partial dissent in *Devon Power LLC*, however, I disagree that the Commission can or should exercise its discretion to extend the public interest standard of review to non-contract rates, terms and conditions.² 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 sought by the Commission or non-settling third parties.³

For these reasons, I respectfully concur.

John R. Norris, Commissioner

¹ *MidAmerican Energy Company*, 138 FERC ¶ 61,028, at P 6 (2012).

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

³ *MidAmerican Energy Company*, 138 FERC ¶ 61,028 at P 7. I note that I agree with the statement in this order that the Commission “continues to recognize the role of settlements in providing rate certainty,” and that when deciding whether to exercise its discretion to initiate Federal Power Act section 206 proceedings, the Commission “would take into account the parties’ interest in maintaining the Settlement.” *Id.* P 8; *see also Devon Power LLC, Norris, dissenting in part* at 5-6 (noting the Commission’s responsibility to take into account the need for certainty and stability and to respect settlements under the usual “just and reasonable” standard).