

126 FERC ¶ 61,026
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

January 14, 2009

In Reply Refer To:
High Island Offshore System, LLC
Docket No. RP03-221-011

Mr. Richard W. Porter
Director, Rates & Regulatory Affairs
Enterprise Products Partners, L.P.
1100 Louisiana Street
Suite 1000
Houston, TX 77002

Reference: Stipulation and Agreement

Dear Mr. Porter:

1. In *Petal Gas Storage, L.L.C. v. FERC*,¹ the court remanded two decisions in proceedings pursuant to the Natural Gas Act (NGA) that involved the use of a proxy group, i.e., *High Island Offshore System, L.L.C. (HIOS)*² and *Petal Gas Storage, L.L.C.*³ In *HIOS*, the court remanded to the Commission its decision regarding the composition of the proxy group and the placement of HIOS within the proxy group in terms of risk.
2. On remand, the Commission determined that, due to the passage of time and changed circumstances on HIOS, the parties should be given an opportunity to settle the issues pending before the Commission. Therefore, on April 18, 2008, the Commission

¹ 496 F.3d 695 (D.C. Cir. 2007).

² 110 FERC ¶ 61,043 (2005), *order on reh'g*, 112 FERC ¶ 61,050 (2005), *order on reh'g*, 113 FERC ¶ 61,280 (2005).

³ 97 FERC ¶ 61,097 (2001), *order on reh'g*, 106 FERC ¶ 61,325 (2004).

issued an “Order on Remand Establishing Settlement Procedures,” referring the outstanding issues in this matter to a settlement judge.⁴

3. On May 28, 2008, HIOS filed, pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.602 (2008), an offer of settlement in the form of a Stipulation and Agreement (Settlement), which resolves the issues in this remanded proceeding. As discussed more fully herein, the Commission approves the Settlement as fair and reasonable and in the public interest.

4. According to the Settlement, HIOS will prospectively apply a \$0.01/Dth surcharge to certain Rate Schedules FT-1 and IT services, including new services beginning after the Settlement’s effective date. HIOS may include the surcharge on its tariff within 15 days of the effective date of the Settlement and that the surcharge will remain in effect until HIOS has collected \$1 million in surcharge revenues. Once the surcharge has been collected, HIOS must file tariff sheets with the Commission eliminating the settlement surcharge. If HIOS collects surcharge revenues exceeding \$1 million dollars, it will issue either a refund or credit to the affected companies at the Commission-approved interest rate. The Settlement will become effective on the first day of the month following the month in which the Commission: 1) issues a final order (i.e. not subject to rehearing) approving the agreement; and 2) waives HIOS’s compliance with Commission regulations, to the extent that such waiver is necessary for compliance with the Settlement.

5. Pursuant to Rule 602(f)(2) of the Commission’s Rules of Practice and Procedure,⁵ initial comments on the Settlement were due by June 5, 2008, and reply comments were due by June 16, 2008. Commission Trial Staff filed initial comments supporting the settlement. No other comments were filed. On June 11, 2008, the Settlement Judge certified the Settlement to the Commission as uncontested.⁶

6. The Settlement is uncontested and resolves all issues in this proceeding. The Commission finds that the Settlement is fair and reasonable and in the public interest and, therefore, the Commission approves the Settlement pursuant to Rule 602(g), 18 C.F.R. § 385.602(g) (2008). Commission approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue involved in this proceeding.

⁴ *High Island Offshore System, L.L.C.*, 123 FERC ¶ 61,058, at P 12 (2008)

⁵ 18 C.F.R. § 385.602(f)(2) (2008).

⁶ *High Island Offshore System, L.L.C.*, 123 FERC ¶ 63,016, at P 10 (2008)

7. The applicable standard of review for future changes to the Settlement is set forth in Article III, section 3.5, of the Settlement, which provides that any future changes to the Settlement proposed by a Settling Participant, or by the Commission acting *sua sponte*, must meet the *Mobile-Sierra* “public interest” standard.⁷ However, the Settlement further provides that “The standard for review of any change proposed by any other entity shall be the ‘just and reasonable’ standard of the Natural Gas Act.” Therefore, the Commission retains the right, in response to a complaint filed by an entity other than the Settling Participants, to investigate the rates, terms, and conditions under the just and reasonable and not unduly discriminatory or preferential standard of section 5 of the Natural Gas Act, 15 U.S.C. § 717(d) (2006).

8. This letter order terminates Docket No. RP03-221-011.

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

Nathaniel J. Davis, Sr.,
Deputy Secretary.

cc: All Parties

⁷ *United Gas Pipe Line Co. v. Mobile Gas Service Co.*, 350 U.S. 332 (1956) (*Mobile*); *Federal Power Commission v. Sierra Pacific Co.*, 350 U.S. 348 (1956) (*Sierra*).

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FEDERAL ENERGY REGULATORY COMMISSION

High Island Offshore System, LLC

Docket No. RP03-221-011

(Issued January 14, 2009)

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

The instant settlement's standard of review provisions would have the Commission apply the "public interest" standard to any changes proposed by the parties or the Commission acting *sua sponte*.

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.¹ 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.² 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."³ 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 Commission acting *sua sponte*.⁴

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, for the reasons discussed above, we believe that the

¹ *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733, 2737 (2008) (*Morgan Stanley*).

² *Id.*

³ *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*).

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

majority should not have accepted the provision of the instant settlement that applies the “public interest” standard to the Commission acting *sua sponte*. Instead, changes proposed by the Commission acting *sua sponte* should be reviewed under the “just and reasonable” standard.

For these reasons, we dissent in part.

Jon Wellinghoff
Commissioner

Sudeen G. Kelly
Commissioner