

135 FERC ¶ 61,105  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

High Island Offshore System, LLC

Docket No. RP09-487-000

ORDER APPROVING, AS MODIFIED, UNCONTESTED SETTLEMENT

(Issued April 29, 2011)

1. In this order, the Commission approves, as modified, an uncontested settlement of issues concerning a general Natural Gas Act (NGA) section 4 rate filing by High Island Offshore System, LLC (HIOS).<sup>1</sup> According to HIOS, the proposed settlement resolves all issues set for hearing in the rate proceeding, with the exception of one issue reserved for Commission determination concerning a proposed storm event surcharge. For the reasons expressed below, the Commission approves the Settlement, as modified, as fair and reasonable and in the public interest. This approval is subject to HIOS modifying the Settlement to remove any provision that purports to bind the Commission or non-settling third parties to the more rigorous application of the statutory “just and reasonable” standard of review for future changes to the Settlement. That more rigorous application is often characterized as the *Mobile-Sierra* “public interest” standard.<sup>2</sup>

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<sup>1</sup> HIOS Offer of Settlement and Explanatory Statement dated March 15, 2010, Docket No. RP09-487-000 (HIOS Settlement or Settlement). As explained below, the Commission is not ruling on the reserved issue in this order.

<sup>2</sup> *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*). As the Supreme Court has found, the NGA’s “just and reasonable” standard is the only statutory standard of review. *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Washington*, 554 U.S. 527, 545 (2008) (*Morgan Stanley*).

## **Background**

2. On March 31, 2009, HIOS filed revised tariff sheets comprising a general NGA section 4 rate change application in the instant docket. According to HIOS the proposed rates were designed to recover HIOS' claimed overall annual cost of service of approximately \$58 million, and were developed using a base period consisting of the twelve months ended December 31, 2008, adjusted for known and measurable changes projected to occur through the end of adjustment period ending on September 30, 2009. The Commission accepted and suspended proposed rates subject to refund and the outcome of an evidentiary hearing.<sup>3</sup>

3. On March 15, 2010, HIOS filed, pursuant to Rule 602 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602 (2009), the Settlement. HIOS states that the Settlement resolves the issues set for hearing, save for one reserved issue relating to the applicability of the storm tracker provided for in the Settlement.<sup>4</sup> On March 28, 2011, HIOS filed an unopposed motion to the Commission requesting that it approve the uncontested Settlement while deferring action on the Reserved Issue, if necessary. HIOS concedes that the Settlement originally contemplated that the Reserved Issue be done in conjunction with the Settlement but now requests that the Commission act on all aspects of the Settlement other than the Reserved Issue. HIOS requests action on its motion before May 1, 2011 and states that if this relief is granted it will not reinstate the higher subject to refund rates effective April 1, 2011 or collect any surcharge for any period during which the Settlement rates were in effect as it is permitted under the Settlement if the Settlement is not approved by April 1, 2011.<sup>5</sup>

4. The main provisions of the settlement may be summarized as follows.

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<sup>3</sup> *High Island Offshore System LLC*, 127 FERC ¶ 61,097 (2009).

<sup>4</sup> Settlement section 3.2. (Reserved Issue).

<sup>5</sup> The new lower rates contained in the Settlement are currently in effect on the HIOS system, prior to the Commission's approval of the instant Settlement, pursuant to HIOS' unopposed request to implement section 1.1(b) of the Settlement. That section states that HIOS will file, to place into effect the Settlement rates, on an interim basis, to become effective on April 1, 2010 and to remain in effect until the earlier of April 1, 2011, or the Effective Date of the Settlement. The section also provides HIOS the right to reinstate its subject-to-refund rates and to surcharge or direct bill its shippers for the difference between the Settlement rates and the subject-to-refund rates in the event that this Settlement does not become effective by April 1, 2010. *High Island Offshore System LLC*, 131 FERC ¶ 61,290 (2010).

5. Article I sets forth the “black box” settlement rates that HIOS will be authorized to charge in settlement of all issues raised in this proceeding. Article I also sets forth certain cost of service items that are assumed to be components of the “black box” rates, including depreciation and negative salvage rates.

6. Article II describes a three-year moratorium on HIOS’ right to file to change the Settlement rates under section 4 of the NGA, and on the “settling participants” right to initiate a complaint as to the Settlement rates under section 5 of the NGA. Article II also requires HIOS to make an NGA section 4 general rate filing within five years of the effective date of the instant Settlement. Article II further provides that as part of any new rate proceeding filed after the term of the Settlement has expired, HIOS shall be obligated to include a new East Breaks gathering rate zone in such filing.

7. Article III sets forth a new storm event surcharge tracker mechanism that HIOS will be authorized to implement in its tariff, subject to the Commission’s determination as to whether the storm event surcharge should apply to certain of HIOS’ Rate Schedule FT-2 shippers (the Reserved Issue).

8. Article IV provides for certain future rate protection to settling participant shippers during a defined period of time in the event of the spin-off or spin-down by HIOS of its gathering-functionalized facilities.

9. Article V requires HIOS to file to increase the requested level of firm certificated capacity in a pending proceeding before the Commission (Docket No. CP10-43-000).

10. Article VI addresses the conditions for establishing the effectiveness of the Settlement, and provides for the circumstances where a settling participant may withdraw its consent. Article VI also sets forth the term of the Settlement.

11. Article VII sets forth the obligations of the settling participants to withdraw oppositional pleadings from certain Commission dockets.

12. Article VIII sets forth HIOS’ refund obligations.

13. Article IX states that

To the extent the Commission considers any change to any then-effective provision(s) of the Settlement, it is agreed that the standard of review for any such proposed change shall be the most stringent standard permissible under applicable law, including the “public interest” standard for review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Co.* 535 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Co.*, 350 U.S. 348 (1956), as recently applied by the Supreme Court in *NRG Power Marketing, LLC v. Maine Public Utilities Commission* 130 S. Ct. 693 (2010).

14. Initial comments to the Settlement were due April 5, 2010, with Reply Comments due April 14, 2010. Comments on the Settlement were filed by ExxonMobil Gas & Power Marketing Company, Enbridge Offshore Pipelines (UTOS) LLC, Nexen Marketing U.S.A. Inc. and Nexen Petroleum U.S.A. Inc., BP America Production Company and BP Energy Company, Indicated Shippers and Commission Trial Staff. Reply comments were filed by HIOS and Indicated Shippers. No participant filed comments opposing the Settlement. All comments filed addressed the Reserved Issue. On April 23, 2010, the Presiding Law Judge certified the Settlement to the Commission as uncontested.<sup>6</sup>

### **Discussion**

15. The Settlement is uncontested and except as described above resolves all issues in this proceeding.<sup>7</sup> As discussed below, 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) (2010), subject to one modification.

16. As noted above, Section 9.5 of the Settlement contains a provision that would impose the most stringent standard permissible under applicable law, including the *Mobile-Sierra* “public interest” standard of review<sup>8</sup> on any future changes to the Settlement, regardless of who proposed the change. That provision raises two issues: (1) how the provision affects the standard to be applied by the Commission in determining whether to approve the Settlement; and (2) whether the Commission should exercise its discretion to approve that provision of the Settlement. For the reasons discussed below, the Commission finds that, in determining whether to approve the Settlement, we should apply the same “fair and reasonable and in the public interest”

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<sup>6</sup> *High Island Offshore System, LLC*, 131 FERC ¶ 63,007 (2010).

<sup>7</sup> The Commission is not ruling on the Reserved Issue in this order. As requested in HIOS’ March 28, 2011 motion, the Commission will defer action on the Reserved Issue in order to provide the pipeline and its customers all the other benefits of the Settlement aside from the Reserved Issue.

<sup>8</sup> Section 9.5 of the Settlement states that “the standard of review for any such proposed change shall be the most stringent standard permissible under applicable law, including the ‘public interest’ standard for review set forth” in *Mobile-Sierra*. We interpret Article IX of the Settlement as requiring not only the settling parties, but the Commission and third parties, to satisfy the “public interest” standard in order to make future changes to the Settlement.

standard we ordinarily use in acting on uncontested offers of settlement.<sup>9</sup> In addition, the Commission finds that the Settlement's *Mobile-Sierra* provision must be modified so as not to impose the public interest standard of review on future changes proposed by the Commission and non-settling parties.

**A. Initial Standard of Review of Settlement**

17. Under *Mobile-Sierra*, as interpreted by the Supreme Court in *Morgan Stanley*,<sup>10</sup> the Commission must presume that rates set by contracts that are freely negotiated at arm's-length between willing buyers and sellers meet the statutory "just and reasonable" standard of review. Recent court decisions have required the Commission to reexamine the issue of when and whether it should approve settlements that propose to impose the *Mobile-Sierra* public interest standard on future challenges to settlements. In *Me. Pub. Utils. Comm'n v. FERC*,<sup>11</sup> the court remanded to the Commission an order approving a contested settlement agreement redesigning the New England market for installed electric generation capacity. That settlement imposed the *Mobile-Sierra* public interest presumption on certain future challenges to the auction results and transition payments. The D.C. Circuit found that applying the public interest standard to challenges by non-settling parties unlawfully deprived those parties of their rights under the Federal Power Act (FPA). The United States Supreme Court reversed the D.C. Circuit, finding that "the *Mobile-Sierra* standard applies to challenges initiated by third parties"<sup>12</sup> and thus the Commission must presume that "contract rates freely negotiated between sophisticated parties meet the just and reasonable standard."<sup>13</sup> However, the Supreme Court remanded to the D.C. Circuit the question of whether the auction results and transition payments purportedly subject to the *Mobile-Sierra* clause are contract rates to which the Commission must apply the public interest presumption, and if not, whether the Commission has the discretion to approve a provision that applies that standard to future challenges to those results and payments.<sup>14</sup> The D.C. Circuit then remanded the case to

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<sup>9</sup> 18 C.F.R. § 385.602(g)(3) (2010).

<sup>10</sup> *Morgan Stanley*, 554 U.S. at 530.

<sup>11</sup> 520 F.3d 464 (D.C. Cir. 2008); 625 F.3d (D.C. Cir. 2010).

<sup>12</sup> *NRG Power Mktg v. Me. Pub. Utils. Comm'n*, 130 S.Ct. 693, 700 (2010) (*NRG*) (quoting *Morgan Stanley*, 554 U.S. at 546).

<sup>13</sup> *Id.* at 699.

<sup>14</sup> *Id.* at 701.

the Commission to explain, among other things, “why, if the auction rates are not contract rates, they are entitled to *Mobile-Sierra* treatment.”<sup>15</sup>

18. In its March 2011 order on remand in *Devon Power*,<sup>16</sup> the Commission held that the settlement rates in that case are not “contract rates” that, under *Mobile-Sierra*, require a presumption that the rates are statutorily just and reasonable. The Commission explained that the rates set by the capacity auctions represent tariff, not contract, rates, which apply to all suppliers and purchasers in the ISO-New England market, not just the settling parties. However, the Commission also concluded that it has the discretion to consider and decide whether future challenges to those rates must nevertheless overcome the more rigorous public interest standard of review.<sup>17</sup> The Commission determined, for various reasons that based on the circumstances of the *Devon Power* proceeding, it was appropriate to exercise that discretion and approve a public interest standard binding not only on the settling parties but also the Commission and third parties.<sup>18</sup>

19. We find that HIOS’ offer of settlement in this case is not a contract to which the *Mobile-Sierra* presumption applies. HIOS’ *pro forma* service agreements include provisions incorporating into each shipper’s service agreement the rates, terms and conditions of the applicable Rate Schedule and the General Terms and Conditions of HIOS’ tariff. Thus, the rates agreed to in the Settlement are tariff rates that will be generally applicable to all present and future customers of HIOS paying its maximum recourse rates, not just to the Settling Participants.

20. Accordingly, in considering whether to approve the uncontested offer of settlement before us, the *Mobile Sierra* public interest presumption does not apply. Rather, in determining whether to approve HIOS’ offer of settlement, including its *Mobile-Sierra* provision, we apply the standard set forth in section 602(g)(3) of our settlement rules for approval of uncontested offers of settlement: “An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.” In this regard, we are required to make an independent judgment as to whether an uncontested settlement satisfies that standard.<sup>19</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *Devon Power LLC*, 134 FERC ¶ 61,208 (2011) (*Devon Power*)

<sup>17</sup> *Id.* P 2.

<sup>18</sup> *Id.* P 18-23.

<sup>19</sup> *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 701 (D.C. Cir. 2007).

21. In these circumstances, the inclusion in HIOS' uncontested settlement of a *Mobile-Sierra* public interest standard does not alter the standard we apply under section 385.602(g)(3) of our regulations in order to determine whether to approve an uncontested settlement. Nor does such a provision alter our responsibility to make an independent judgment as to whether the uncontested settlement satisfies the "fair and reasonable and in the public interest" standard. Therefore, we now turn to a consideration of whether the instant settlement satisfies that standard.

**B. Whether to Approve the Settlement, including Its *Mobile Sierra* Provision**

22. In this case, the active parties in HIOS' rate case proceeding engaged in extensive negotiations to address the concerns of all participants in a fair and mutually acceptable manner. The Settlement, which resolves all issues set for hearing with one exception, represents the culmination of those efforts. The Settlement provides for significantly lower rates than HIOS originally proposed in this case. It also includes a three-year rate moratorium, providing rate stability to the parties. Therefore, apart from the Settlement's *Mobile-Sierra* provision discussed below, the Commission finds the Settlement to be fair and reasonable and in the public interest.

23. Consistent with *Devon Power*, the Commission has the discretion to consider and decide whether provisions in uncontested settlements requiring future challenges to a settlement or its rates to overcome the more rigorous "public interest" standard of review are "fair and reasonable and in the public interest."<sup>20</sup> We find here that inclusion of such a provision in the Settlement is not fair and reasonable and in the public interest insofar as it would purport to bind the Commission and non-settling third parties to the public interest standard of review for future changes or challenges to the Settlement. The circumstances of the HIOS Settlement do not reflect the same type of interests as the settlement approved in *Devon Power* so as to warrant binding the Commission and non-settling third parties to the higher standard.

24. We find that the circumstances surrounding HIOS' Settlement do not rise to the extraordinary level of those present in *Devon Power*. As we stated in *Devon Power*, if the Commission believes in the context of reviewing settlements that do not constitute "contract rates" that "it is unjust and unreasonable to lock in a more stringent application of the just and reasonable standard, the Commission has the discretion not to impose that more stringent standard of review."<sup>21</sup> We exercise that discretion here. There were specific reasons that the Commission allowed the more stringent standard in *Devon*

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<sup>20</sup> *Devon Power*, 134 FERC ¶ 61,208 at P 9.

<sup>21</sup> *Id.*, P 24.

*Power* that are not present here. Most significantly, in the *Devon Power* situation, the issue of price certainty was critical to the Forward Capacity Market's goal of attracting and retaining investors in order to ensure reliability. There are no similar concerns in the instant proceeding. The instant Settlement is not intended to correct serious deficiencies in the natural gas market, but simply to resolve an ordinary pipeline rate case of general applicability. In addition, in this case, unlike *Devon Power*, there are no demonstrable market forces that contributed to the derivation of the Settlement rates.

25. Accordingly, absent compelling circumstances, such as we found to exist in *Devon Power*, the Commission will not approve the application of the *Mobile Sierra* public interest standard of review proposed in section 9.5 of HIOS' Settlement to the Commission or non-settling third parties.<sup>22</sup>

26. While we are requiring the Settlement's *Mobile-Sierra* provision be modified as discussed above, the Commission continues to recognize the role of settlements in providing rate certainty. The Commission has discretion whether to initiate section 5 proceedings, either on its own motion or at the request of others.<sup>23</sup> In deciding whether to exercise that discretion with respect to the instant Settlement or any other settlement, the Commission would take into account the parties' interest in maintaining the Settlement.

27. Lastly, because HIOS made its baseline electronic tariff filing pursuant to Order No. 714 but did not file the Settlement in the eTariff format required by Order No. 714, HIOS is required to make a compliance filing through eTariff to ensure that its electronic tariff provisions reflect the Commission action in this order.<sup>24</sup> In its compliance filing, HIOS should request in its transmittal letter that the Settlement rates, terms and conditions become effective April 1, 2010, as stated in the Settlement. HIOS' eTariff baseline filing is effective as of September 30, 2010.

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<sup>22</sup> While we find it unjust and unreasonable to impose the stricter standard on the Commission and on non-settling third parties, the parties to the Settlement are free to impose such a standard on themselves.

<sup>23</sup> *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), *affirmed*, *Ocean States Power v. FERC*, 1996 U.S. App. LEXIS 11096 at \*18.

<sup>24</sup> *See Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 96 (2008).

The Commission orders:

(A) The settlement filed on March 15, 2010 is approved, subject to HIOS making a compliance filing within 15 days of the issuance of this order to modify the Settlement as directed in the body of this order.

(B) Docket No. RP09-487-000 is terminated.

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

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

High Island Offshore System, LLC

Docket No. RP09-487-000

(Issued April 29, 2011)

NORRIS, Commissioner, *concurring*:

I concur in the outcome of this order, which conditionally approves a settlement of High Island Offshore System, LLC's (HIOS) general section 4 rate case, subject to HIOS revising the Settlement so as not to impose the "public interest" standard of review on future changes proposed by the Commission and non-settling parties. I agree that the rates agreed to in the Settlement are generally applicable tariff rates rather than contract rates, and that as a result, the public interest presumption does not apply.<sup>1</sup> 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.<sup>2</sup> 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 rates in the Settlement.<sup>3</sup>

For these reasons, I respectfully concur.

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John R. Norris, Commissioner

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<sup>1</sup> *High Island Offshore System, LLC*, 135 FERC ¶ 61,105 at P 19-21 (2011)

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

<sup>3</sup> *High Island*, 135 FERC ¶ 61,105 at P 23-25. 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 section 5 proceedings, the Commission "would take into account the parties' interest in maintaining the Settlement." *Id.* P 26; *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).