

136 FERC ¶ 61,014
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.

Carolina Gas Transmission Corporation

Docket No. RP11-2076-000

ORDER APPROVING, AS MODIFIED, UNCONTESTED SETTLEMENT

(Issued July 5, 2011)

1. On April 29, 2011, pursuant to Rule 207(a)(5),¹ Carolina Gas Transmission Corporation (Carolina Gas) submitted a petition for approval of a Stipulation and Agreement (Settlement) regarding changes to Carolina Gas' transportation rates and certain tariff provisions (Petition). Carolina Gas included *pro forma* tariff sheets implementing the settlement rates and other terms of the settlement. 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 Carolina Gas modifying the Settlement to remove any provision that, with respect to future changes to the Settlement sought by non-settling third parties or the Commission acting *sua sponte*, purports to bind the Commission to the more rigorous application of the statutory "just and reasonable" standard of review that is often characterized as the *Mobile-Sierra* "public interest" standard.²

¹ 18 C.F.R. § 385.207(a)(5) (2011).

² *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. According to the Settlement, Carolina Gas was formed in 2006 when South Carolina Pipeline Corporation (SCPC), a Hinshaw pipeline serving South Carolina markets, acquired by merger SCG Pipeline, Inc. (SCG), an interstate pipeline originating in Georgia at the tailgate of the Elba Island LNG terminal and extending into Jasper County, South Carolina where it interconnected with SCPC. SCPC also changed its name to Carolina Gas and the Commission granted Carolina Gas all of the authorizations necessary for it to commence operations as an interstate pipeline and a “natural-gas company” within the meaning of section 2(6) of the NGA, 15 U.S.C. § 717a(6). Carolina Gas states that in that 2006 merger and certificate proceeding, Carolina Gas and its customers reached a settlement that established Carolina Gas’ currently effective rates and resolved all issues resulting from the pipeline’s transition to Commission regulation and adoption of the principles of federal open access transportation and straight fixed variable rate design.³ Carolina Gas notes that the Commission found the settlement, and the settlement rates proposed therein, to be fair and reasonable and in the public interest.⁴ Carolina Gas states that its FERC-jurisdictional base rates have not changed since that time.

3. Carolina Gas further states that now, more than five years after the filing of the merger and certificate proceeding, Carolina Gas, its customers and other interested participants have reached agreement on new rates for Carolina Gas and on certain other changes to the terms pursuant to which Carolina Gas will provide transportation service. Accordingly Carolina Gas filed the instant Settlement in lieu of an NGA section 4 general rate filing. Carolina Gas states that the parties have invested substantial time and effort to reach resolution on these issues. Carolina Gas further states that it believes that its customers either support or do not oppose the Settlement and that it does not expect any protests to the Settlement.

4. Carolina Gas states that it is mindful that the Commission encourages pipelines and their customers to resolve rate and tariff matters before filing with the Commission to change its rates or other tariff provisions as such a process enables the prompt, efficient resolution of rate and tariff related matters for the benefit of all concerned, “without the expense of a hearing and lengthy litigation.” Accordingly, Carolina Gas states that it is submitting the Settlement following guidance provided by the Commission in *Dominion Transmission, Inc.*, 111 FERC ¶ 61,285 (2005).

³ Petition at 2-3.

⁴ *Carolina Gas Transmission Corp.*, 116 FERC ¶ 61,049 (2006).

5. Carolina Gas states that the Settlement resolves all rate issues between Carolina Gas and its customers. The principal terms of the Settlement Agreement are summarized below.

6. Article I provides background information about Carolina Gas' formation and previous rate settlement. It also discusses the negotiation process that Carolina Gas, its customers and other interested parties engaged in to reach the instant Settlement Agreement.

7. Article II defines the Settling Parties and states that Carolina Gas does not expect any protests of the Settlement Agreement to be filed.

8. Article III provides details regarding the Settlement Rates and specifies that Attachment 2 to the Settlement Agreement states those Settlement Rates for all of Carolina Gas' current rate schedules. According to the Settlement, the Settlement Rates are based on the same rate design and allocation principles underlying the rates established in the 2006 merger and certificate proceeding. Attachments 3 and 4 to the Settlement Agreement list the underlying billing determinants and depreciation and amortizations rates.

9. Article IV establishes a rate moratorium period, which, subject to certain specified exceptions, provides that Carolina Gas may not file an NGA section 4 general rate case that would result in placing rates into effect before May 1, 2014. The Settling Parties also waive their NGA section 5 rights to challenge the issues resolved by the Settlement during the moratorium.

10. Article V addresses clarifications to section 15.3(b) of the general terms and conditions of Carolina Gas' tariff, specifically with respect to Carolina Gas' authority to issue operational flow orders.

11. Article VI identifies the terms pursuant to which the Settlement Agreement shall become effective. This Article provides, subject to the moratorium period, that the Settlement shall terminate when Carolina Gas files its next general rate case pursuant to NGA section 4, when Carolina Gas files a superseding rate settlement, or when a rate proceeding is instituted against Carolina Gas pursuant to NGA section 5, whichever is earliest.

12. Article VII provides that the terms of the Settlement Agreement are not severable.

13. Article VIII includes various reservations about the effect of the Settlement Agreement, including that it shall not be admissible as evidence against the Settling Parties, that it does not hold precedential value with respect to the terms and conditions established therein, and that Carolina Gas and other parties shall not be bound by its terms unless and until it is approved and made effective pursuant to its terms.

14. Article IX establishes that the standard of review for future modifications to the Settlement Agreement, once it has been made effective, is the most stringent standard permissible under applicable law, which, the Settlement states, is often referred to as the *Mobile-Sierra* “public interest” standard.

15. Carolina Gas requests that the Commission approve the Settlement, unmodified, in order to allow it to become effective November 1, 2011. The Patriots Energy Group⁵ filed comments in support of the Settlement. No party filed adverse comments.

Discussion

16. In this case, Carolina Gas, its customers and other interested parties have all engaged in extensive negotiations to address the concerns of all participants. The Settlement, which resolves by mutual agreement Carolina Gas’ transportation rates and other tariff modifications, without the need for an NGA general section 4 rate proceeding, represents the culmination of those efforts. As discussed below, the Commission finds that the Settlement appears to be 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) (2011), subject to one modification.

17. As noted above, Article IX of the Settlement contains a provision that would impose the most stringent standard permissible under applicable law, which the Settlement defines to be the *Mobile-Sierra* “public interest” standard of review, on any future changes to the Settlement, regardless of who proposed the change. Because the terms of the Settlement, if approved, will be incorporated into the service agreements of all present and future shippers,⁶ we find that the *Mobile-Sierra* presumption, as defined by the U.S. Supreme Court,⁷ does not apply to the Settlement. 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

⁵ According to their filing, the Patriots Energy Group is a joint action agency whose members include York County Natural Gas Authority, Chester County Natural Gas Authority, and Lancaster County Natural Gas Authority.

⁶ See, e.g., Carolina Gas tariff, Form of Service Agreement for Rate Schedule FT, Article III.

⁷ *Morgan Stanley* at 546; *NRG Power Mktg v. Me. Pub. Utils. Comm’n*, 130 S.Ct. 693,700 (2010) (NRG).

often characterized as the *Mobile-Sierra* “public interest” standard of review.⁸ The Commission has also stated in those orders that we will not approve imposition of that more rigorous application of the “just and reasonable” standard of review to 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*.⁹ We find that the circumstances surrounding Carolina Gas’ Settlement do not satisfy that test, and thus we find it unjust and unreasonable to impose the more rigorous application of the “just and reasonable” standard of review in the instant proceeding with respect to future changes to the Settlement sought by the Commission or non-settling third parties.

18. While we are requiring the Settlement’s standard of review 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.¹⁰ 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.

19. Lastly, because Carolina Gas 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, Carolina Gas is required to make a compliance filing through eTariff to ensure that its electronic tariff provisions reflect the Commission action in this order.¹¹ In its compliance filing, Carolina Gas should request in its transmittal letter that the Settlement rates, terms and conditions become effective November 1, 2011, as stated in the Settlement.

⁸ See e.g., *Devon Power LLC*, 134 FERC ¶ 61,208 (2011) (*Devon Power*). See also *High Island Offshore System, LLC*, 135 FERC ¶ 61,105, at P 24 (2011) (*HIOS*); *Petal Gas Storage LLC*, 135 FERC ¶ 61,152, at P 17 (2011) (*Petal*); *Southern LNG LLC*, 135 FERC ¶ 61,153, at P 24 (2011) (*Southern LNG*).

⁹ See *HIOS*, 135 FERC ¶ 61,105 at P 25; *Petal*, 135 FERC ¶ 61,152 at P 18; *Southern LNG*, 135 FERC ¶ 61,153 at P 25.

¹⁰ *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.

¹¹ See *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 96 (2008).

The Commission orders:

(A) The settlement filed on April 29, 2011 is approved, subject to Carolina Gas 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. RP11-2076 is terminated.

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

(S E A L)

Kimberly D. Bose,
Secretary.

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Docket No. RP11-2076-000

(Issued July 5, 2011)

NORRIS, Commissioner, *concurring*:

I concur in the outcome of this order, which conditionally approves a Stipulation and Agreement (Settlement) that resolves Carolina Gas Transmission Corporation's (Carolina Gas) transportation rates and certain tariff modifications without the need for a general Natural Gas Act section 4 proceeding, subject to Carolina Gas revising the Settlement so as not to impose the "public interest" standard of review on future changes proposed by the Commission or non-settling parties. I agree that the transportation rates and tariff modifications agreed to in the Settlement are generally applicable tariff provisions, 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 rates and tariff modifications in the Settlement.³

For these reasons, I respectfully concur.

John R. Norris, Commissioner

¹ *Carolina Gas Transmission Corporation*, 136 FERC ¶ 61,014 at P 17 (2011).

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

³ *Carolina Gas*, 136 FERC ¶ 61,014 at P 17. 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 18; *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).