

139 FERC ¶ 61,148
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Atlantic Path 15, LLC

Docket Nos. ER11-2909-004
EL11-29-003
ER12-1224-000

ORDER APPROVING UNCONTESTED SETTLEMENT
AND DENYING REHEARING

(Issued May 23, 2012)

1. In this order, the Commission approves an uncontested settlement filed by Atlantic Path 15, LLC (Atlantic) on March 7, 2012 (Settlement):¹ the Settlement resolves all issues in the above-captioned proceedings set for hearing and settlement judge proceedings by the Commission in its order on April 19, 2011.² In addition, the Commission denies the requests for rehearing of Six Cities³ and the Public Utilities Commission of the State of California (CPUC).

¹ On March 7, 2012, the Settlement was inadvertently filed in a new docket number, ER12-1224-000. On March 8, 2012, the Settlement was re-filed in Docket Nos. ER11-2909 and EL11-29.

Atlantic submitted tariff record changes with the Settlement using Type of Filing Code (TOFC) 10 – Rate Schedule Change Other Than Rate Increases. TOFC 10 is a statutory filing code that should not be used for settlements. The appropriate TOFC for this type of filing is 80 – Compliance.

² *Atlantic Path 15, LLC*, 135 FERC ¶ 61,037 (2011) (April 2011 Order).

³ The Six Cities are the cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California.

I. Background

2. On February 18, 2011, Atlantic filed tariff revisions to reflect a proposed rate reduction to its transmission revenue requirement (TRR) for services over the Path 15 transmission line upgrade in California (February 2011 Filing).⁴ Pursuant to the terms of a prior settlement, Atlantic agreed to file rate cases not more than three years apart, and that it would not seek a return on equity (ROE) in excess of 13.5 percent.⁵ The February 2011 Filing was the second of the triennial rate filings required by the prior settlement.

3. In the February 2011 Filing, Atlantic proposed to reduce its annual TRR from \$30,900,000 to \$30,303,018, a reduction of \$516,982. The proposed TRR was based on a test year consisting of the 12 months ending on December 31, 2010, with an adjustment to reflect increased costs that Atlantic will incur from an erosion control program to be implemented by the Western Area Power Administration (WAPA) through 2013. Atlantic also requested a continuation of its ROE of 13.5 percent.

4. The Commission issued an order on April 19, 2011, which found that Atlantic's proposed TRR, including the requested 13.5 ROE and the inclusion of the soil erosion cost adjustment, raised issues of material fact that could not be resolved based on the record. The Commission also found that the 13.5 percent ROE may no longer fall within the zone of reasonable returns. Accordingly, the April 2011 Order accepted Atlantic's proposed TRR, suspended it for a nominal period, made it effective subject to refund, and established hearing and settlement judge procedures.⁶ The April 2011 Order also instituted an investigation pursuant to section 206 of the Federal Power Act.⁷ Additionally, the Commission directed the presiding judge to determine the appropriate range of reasonable returns, and to set the ROE at the upper end of this range, not to exceed the filed 13.5 percent.⁸

⁴ See April 2011 Order, 135 FERC ¶ 61,037 at P 2-3.

⁵ *Id.* P 4; see also *Western Area Power Admin.*, 99 FERC ¶ 61,306, at 62,280, *reh'g denied*, 100 FERC ¶ 61,331 (2002), *aff'd sub nom. Pub. Util. Comm'n of Cal. v. FERC*, 367 F.3d 925 (D.C. Cir. 2004).

⁶ April 2011 Order, 135 FERC ¶ 61,037 at P 18.

⁷ *Id.* P 21.

⁸ *Id.* P 20.

5. On May 11, 2011, Atlantic filed a request for rehearing of the April 2011 Order, requesting that the Commission summarily affirm a continuation of Atlantic's 13.5 percent ROE. On May 19, 2011, Southern California Edison Company also filed a request for rehearing, asserting that the Commission in its April 2011 Order failed to summarily rule that Atlantic's inclusion of WAPA's erosion control costs in its proposed TRR violated the terms of a settlement accepted by the Commission in 2009. In its January 4, 2012 order denying both rehearing requests, the Commission reiterated its findings in the April 2011 Order, and noted that, if the hearing were to determine that the appropriate range of reasonable returns included 13.5 percent, the presiding judge should set the ROE at that level.⁹ In addition, the Commission found it more appropriate to address the erosion cost adjustment at hearing.¹⁰ Six Cities and CPUC filed requests for rehearing of the January 2012 Order.

6. After settlement judge procedures proved unsuccessful, the parties filed direct and answering testimony. The parties then restarted settlement negotiations, which culminated in Atlantic filing the instant Settlement.

II. Settlement

A. Overview

7. The Settlement establishes Atlantic's TRR at \$28,750,000, effective October 13, 2011. The revised TRR represents a reduction of \$1,533,018 from the \$30,303,018 Atlantic filed for in the February 2011 Filing.¹¹ The Settlement additionally provides for the payment of refunds, with interest, for the difference between the TRR filed by Atlantic and the TRR set forth in the Settlement.¹² The Settlement specifies that refunds will be provided within 30 days after the Settlement becomes final.¹³

8. The Settlement requires Atlantic to file a revised TRR no later than February 18, 2014, and to request an effective date of April 20, 2014.¹⁴ It also requires Atlantic to use

⁹ *Atlantic Path 15, LLC*, 138 FERC ¶ 61,005, at P 17 (2012) (January 2012 Order).

¹⁰ *Id.* P 18.

¹¹ Settlement, Offer of Settlement, Art. 1.

¹² *Id.* at Art. 2.

¹³ *Id.*

¹⁴ *Id.* at Art. 4.

calendar year 2013 as the test year in the filing and to support its proposed ROE using a current discounted cash flow analysis consistent with Commission precedent. Parties remain free to argue that the costs included in the filing should be adjusted or changed for ratemaking purposes.¹⁵

9. Finally, the Settlement provides for the preservation of the pending rehearing requests of CPUC and Six Cities of the January 2012 Order. Article 3 of the Offer of Settlement states that, if the Commission grants rehearing of the January 2012 Order and determines that it erred in deciding that “if the hearing determines that the appropriate range of reasonable returns includes 13.5 percent, the ROE shall be set at that level,” then Atlantic will reduce its TRR by an additional \$50,000.¹⁶

B. Comments and Certification

10. On March 19, 2012, the Commission trial staff submitted initial comments in support of the Settlement. No other comments were filed. On March 29, 2012, the presiding judge certified the Settlement to the Commission as uncontested.¹⁷

III. Requests for Rehearing

11. In their rehearing request, Six Cities argue that the Commission imposed a new and arbitrary limitation in the January 2012 Order on the scope of the issues set for hearing in the April 2011 Order. Six Cities state that the Commission limited the presiding judge in his or her determination of a just and reasonable ROE for Atlantic by stating that “if the hearing determines that the appropriate range of reasonable returns includes 13.5 percent, the ROE shall be set at that level.”¹⁸ Six Cities argue that the hearing rather should address where within the upper end of the range of reasonable returns Atlantic’s ROE should be set, subject to a cap of 13.5 percent.¹⁹ Otherwise, the presiding judge is improperly constrained from finding, based upon record evidence, that a ROE other than 13.5 percent would produce just and reasonable rates.²⁰ Six Cities urge

¹⁵ *Id.*

¹⁶ *Id.* at Art. 3.

¹⁷ *Atlantic Path 15, LLC*, 138 FERC ¶ 63,020 (2012).

¹⁸ Six Cities Request for Rehearing at 1-2 (citing January 2012 Order, 138 FERC ¶ 61,005 at P 17).

¹⁹ *Id.* at 2.

²⁰ *Id.* at 3.

the Commission to make clear that its rulings on Atlantic's ROE are limited to the specific facts presented by Atlantic's filing, and that the Commission will continue to make determinations with respect to other transmission owners that may have been granted incentive ROEs on a case-by-case basis.²¹

12. CPUC argues in its request for rehearing that the January 2012 Order significantly changes the April 2011 Order by conditionally accepting a 13.5 percent ROE, and in limiting the hearing to whether or not this return is reasonable.²² CPUC argues that this is a departure that is arbitrary and capricious, and not the product of reasoned decision-making.²³ CPUC argues that the January 2012 Order concluded that a hearing would not determine where within the upper end of the zone of reasonableness the ROE would fall, and, instead, would be limited to determining whether or not a 13.5 percent ROE was a reasonable return. This, CPUC argues, could result in an ROE at the very top of the zone of reasonableness, even though the April 2011 Order set for hearing the issue of where within the upper end of the zone of reasonableness the ROE should be set.²⁴ The January 2012 Order therefore narrowed parties' rights to present evidence on the upper range of the zone of reasonableness of the ROE, which violates CPUC's right to due process.²⁵ Additionally, CPUC argues in its request for rehearing that the Commission's use of a 13.5 percent ROE as a "benchmark" is unjust and unreasonable, because it does not consider current market conditions, and because it is much higher than necessary to attract capital and does not consider customers' interests.²⁶

IV. Commission Determination

A. Settlement

13. The Settlement appears to be fair and reasonable and in the public interest and is hereby approved. The Commission's approval does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. The Commission retains

²¹ *Id.* at 9.

²² CPUC Request for Rehearing at 3.

²³ *Id.* at 4.

²⁴ *Id.* at 8.

²⁵ *Id.* at 4, 8, 20-21 (citing *Williston Basin Interstate Pipeline Company v. FERC*, 165 F.3d 54, 63 (D.C. Cir. 1999)).

²⁶ *Id.* at 11-19.

the right to investigate the rates, terms and conditions under the just and reasonable and not unduly discriminatory or preferential standard of section 206 of the Federal Power Act, 16 U.S.C. § 824e (2006).

14. In accordance with Article 2 of the Offer of Settlement, Atlantic is directed to make refunds, with interest calculated pursuant to section 35.19a of the Commission's regulations,²⁷ within 30 days of the date of this order. We also direct Atlantic to file a refund report with the Commission within 15 days of the date refunds are made. We note that the refund report will be processed in accordance with the Commission's most recent notice on changes to eTariff refund report codes.²⁸

B. Requests for Rehearing

15. Requests for rehearing were filed by CPUC and Six Cities. For the reasons discussed below, we reject these requests. It is well established that "[t]he Commission does not allow rehearing of an order denying rehearing," and has stated that "[a]ny other result would lead to never-ending litigation as every response by the Commission to a party's arguments would allow yet another opportunity for rehearing unless presumably that response were word-for-word identical to what the Commission earlier said."²⁹ Rehearing of an order on rehearing lies only when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.³⁰ Here, the requests for rehearing do not persuade the Commission that the January 2012 Order denying rehearing modifies the underlying order.

16. We therefore reject both CPUC's and Six Cities' arguments that the January 2012 Order modifies the determination in the April 2011 Order regarding the treatment of Atlantic's ROE at hearing. The April 2011 Order, which noted that Atlantic's incentive

²⁷ 18 C.F.R. § 35.19a (2011).

²⁸ See *Notice of Changes to eTariff Refund Report Type of Filing Codes*, Docket No. RM01-5-000 (November 17, 2011).

²⁹ See *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh'g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292, *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252, at P 37 (2009).

³⁰ See, e.g., *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 423 (1st Cir. 2001); *Southwest Power Pool, Inc.*, 132 FERC ¶ 61,255 at P 9; *Cargill Power Markets, LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,093 at P 6.

ROE was established prior to Order No. 679 and does not have specific incentive adders, directed the presiding judge to determine the appropriate range of reasonable returns, and to set the ROE at the upper end of this range, with a cap at the filed 13.5 ROE.³¹ This requirement is reiterated in the January 2012 Order, which further noted that if the appropriate range of reasonable returns includes 13.5, then the ROE shall be set at that level.³² This statement does not modify the cap of 13.5 percent for the ROE established in the April 2011 Order, nor does it limit the determination of a range of reasonable returns, either above or below 13.5 percent. Both orders require the presiding judge to set the ROE at the top of the range, subject to a cap of no more than 13.5 percent, and both allow for a hearing to determine the appropriate range. The January 2012 Order merely provides a clarification, which does not modify the result reached in the April 2011 Order; the Commission therefore made no significant modification on rehearing that would warrant the possibility of a second rehearing. In these circumstances, the requests for a second rehearing were neither required nor appropriate, and so the rehearing requests will be rejected.

17. Per Article 3.6 of the Offer of Settlement, denial of the requests for rehearing of the January 2012 Order has no impact on the Settlement. Accordingly, the Commission finds that the Settlement resolves all of the issues between the Settling Parties in the above-referenced dockets.

The Commission orders:

(A) The Settlement filed on March 7, 2012 is approved, as discussed in the body of this order.

(B) Atlantic is hereby directed to make refunds with interest within 30 days of the date of this order.

(C) Atlantic is hereby directed to file a refund report with the Commission within 15 days of the date refunds are made.

³¹ April 2011 Order, 135 FERC ¶ 61,037 at P 20 (citing *Promoting Transmission Investment through Pricing Reform*, Order No 679, FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, *order on reh'g*, 119 FERC ¶ 61,062 (2007)).

³² January 2012 Order, 138 FERC ¶ 61,005 at P 17.

(D) The requests for rehearing of Six Cities and CPUC are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.