

141 FERC ¶ 61,015  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Tampa Electric Company

Docket Nos. ER10-1782-000  
ER10-1782-003

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued October 5, 2012)

1. On March 23, 2012, pursuant to Rule 602 of the Commission's Rules of Practice and Procedure,<sup>1</sup> Tampa Electric Company (Tampa Electric), Seminole Electric Cooperative, Inc., the Florida Municipal Power Agency, the Orlando Utilities Commission, and Calpine Construction Finance Company, L.P. (collectively, the Settling Parties) filed an uncontested settlement agreement and revised tariff sheets (Settlement).<sup>2</sup> In this order, the Commission approves the Settlement.

**Background & Settlement**

2. On July 15, 2010, pursuant to section 205 of the Federal Power Act (FPA),<sup>3</sup> Tampa Electric filed new and revised tariff sheets for inclusion in its open access transmission tariff (OATT).<sup>4</sup> Tampa Electric proposed to establish a cost-of-service formula rate for Network Integration Transmission Service, Point-to-Point Transmission Service, and ancillary service under OATT Schedule 1 (Formula Rate). Tampa Electric also proposed to: (1) modify the procedures for distribution of imbalance surcharge revenues under ancillary service Schedules 4 and 9; (2) replace the indexes of

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<sup>1</sup> 18 C.F.R. § 385.602 (2012).

<sup>2</sup> Offer of Settlement, Docket No. ER10-1782-003 (March 23, 2012) (Offer of Settlement).

<sup>3</sup> 16 U.S.C. § 824d (2006).

<sup>4</sup> See *Tampa Electric Co.*, 132 FERC ¶ 61,214, at P 1 (2010) (Hearing Order).

transmission service customers in Attachments E and I with references and a link to the Commission's website containing Tampa Electric's Electric Quarterly Report information; and (3) effect non-substantive editorial revisions and clarifications to the OATT.

3. On September 13, 2010, the Commission accepted Tampa Electric's proposed Formula Rate for filing, suspended the filing for a nominal period, and established hearing and settlement judge procedures.<sup>5</sup> The Commission conditionally accepted the remainder of Tampa Electric's proposed changes, subject to compliance, to become effective September 14, 2010.<sup>6</sup>

4. The Settling Parties assert that the Settlement resolves all issues that were set for hearing in this proceeding.<sup>7</sup> On March 29, 2012 the Chief Administrative Law Judge granted the Settling Parties' motion for interim rate relief and authorized the settlement rate on an interim basis effective March 1, 2012.<sup>8</sup> On April 12, 2012, Commission Trial Staff (Trial Staff) filed comments addressing the Settlement. On April 23, 2012, Tampa Electric filed comments in response to Trial Staff. On April 30, 2012, the Settlement Judge certified the Settlement as uncontested despite Trial Staff's arguments that the Commission's approval of the Settlement should be subject to the requirement that Tampa Electric include certain information discussed below in any subsequent application to revise Tampa Electric's Commission-approved depreciation rates.<sup>9</sup>

5. The Settlement includes revised tariff sheets implementing Tampa Electric's Formula Rate under Tampa Electric's OATT Schedule 1.

6. Article V of the Settlement allows Tampa Electric to recover the costs of post-retirement benefits other than pensions (PBOP) in its Formula Rate "on a 'pay-as-you-go' basis rather than in accordance with the Commission's 'Statement of Policy' in *Post-Employment Benefits Other Than Pensions*, 61 FERC ¶ 61,330 (1992), *order denying reh'g and granting clarification in part*, 65 FERC ¶ 61,035 (1993), subject to the Commission's waiver."<sup>10</sup> Consequently, the Settling Parties request waiver of the

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<sup>5</sup> *Id.* PP 40-41.

<sup>6</sup> *Id.* P 2.

<sup>7</sup> Offer of Settlement, Transmittal Letter at 1.

<sup>8</sup> *Tampa Electric Co.*, 138 FERC ¶ 63,021 (2012).

<sup>9</sup> *Tampa Electric Co.*, 139 FERC ¶ 63,005 (2012).

<sup>10</sup> Offer of Settlement, Attachment A: Explanatory Statement at 6.

Commission's PBOP policy, which recognizes as a component of jurisdictional cost-based rates allowances for prudently incurred costs of PBOPs when determined on an accrual basis.<sup>11</sup> The Settling Parties argue that waiver of the Commission's PBOP policy is appropriate because Tampa Electric's creation of external trust funds for PBOP benefits would be detrimental to the financial condition of Tampa Electric and its customers, while providing no benefits to ratepayers.<sup>12</sup> In support of this conclusion, the Settling Parties explain that, in the 2009 test year, the proposed "pay-as-you-go" approach was significantly less costly than the accrual method required by the Commission's PBOP policy.<sup>13</sup> Further, the Settling Parties assert that, in order to maximize income tax deductions, as required by the PBOP policy, Tampa Electric would need to establish four trust funds, each of which would entail initial set-up and maintenance costs.<sup>14</sup> The Settling Parties also explain that medical claims for some retirees would not be eligible for a tax-advantaged trust scenario. Consequently, the Settling Parties contend that these costs would nevertheless have to be recovered directly from Tampa Electric's wholesale customers. In addition, the Settling Parties argue that the costs of maintaining the four trusts necessitated by the Commission's PBOP policy would nearly amount to the value of the PBOP costs themselves. Thus, the Settling Parties conclude that adherence to the PBOP policy would achieve an uneconomic result. Finally, the Settling Parties contend that granting waiver of the Commission's PBOP policy in this case would be consistent with cases in which the Commission has granted such a waiver because the pay-as-you-go method was more cost-effective.<sup>15</sup>

7. Article VIII of the Settlement discusses issues related to future modification of the Settlement. Pursuant to section 8.1 of Article 8, the Settling Parties agree that a moratorium on filings by any of the Settling Parties or the Non-Opposing Parties to

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<sup>11</sup> See *Post-Employment Benefits Other Than Pensions*, 61 FERC ¶ 61,330, at 62,200 (1992), *order denying reh'g and granting clarification in part*, 65 FERC ¶ 61,035 (1993).

<sup>12</sup> Chronister Aff. ¶ 4.

<sup>13</sup> *Id.* ¶ 5 ("Tampa Electric's pay-as-you-go and accrual PBOP amounts as shown on Schedule A-6 of the Formula, were \$9,154,918 . . . and \$12,209,421, respectively.").

<sup>14</sup> *Id.* ¶ 6.

<sup>15</sup> *Id.* ¶ 11 (citing *Eastern Shore Natural Gas Co.*, 81 FERC ¶ 61,013, at 61,086-87 (1997)).

modify the rate of return on equity in Tampa Electric's transmission rates under the OATT shall be in effect for a period of two years.<sup>16</sup> Section 8.3 of Article 8 provides:

[t]he standard of review for any changes to the terms or conditions of this Settlement Agreement during its term shall be the “ordinary” “just and reasonable standard” as clarified in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County, Washington*, 544 U.S. 527 (2008); *provided*, however, that except as provided in Section 8.2<sup>17</sup> of [the Settlement], in the event that any Sponsoring Party or Non-Opposing Party makes a filing to change the allowed [return on equity] prior to the end of the moratorium provided in Section 8.1 of [the Settlement], the filing, if not rejected in accordance with Section 8.1, shall be subject to the “public interest” application of the just and reasonable standard as clarified in the aforementioned *Morgan Stanley* case and refined in *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 130 S. Ct. 693, 700 (2010).<sup>18</sup>

### **Responsive Pleadings**

8. Trial Staff generally supports the Settlement, stating that the Settlement will benefit all parties and resolve all issues set for hearing.<sup>19</sup> In addition, Trial Staff notes that the Settlement includes a request for waiver of the Commission's PBOP policy, and asserts that the Commission has previously granted such waivers in the past.<sup>20</sup>

9. Despite its general support for the Settlement, Trial Staff argues that the Commission should specify what depreciation data Tampa Electric must provide in any future filing to revise Tampa Electric's depreciation rates. Trial Staff also encourages the Commission to condition its approval of the Settlement on Tampa Electric's compliance

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<sup>16</sup> The Settling Parties state that the “Non-Opposing Parties” consist of Reedy Creek Improvement District and Florida Power & Light Company, both of which are parties to this proceeding. Offer of Settlement, Transmittal Letter at 1 & n.3.

<sup>17</sup> Section 8.2 describes an exception to the moratorium established in Section 8.1 and allows Tampa Electric to comply with any Commission order that requires a change to the return on equity in Tampa Electric's OATT transmission rates.

<sup>18</sup> Offer of Settlement, Attachment A: Explanatory Statement at 11 (emphasis in original).

<sup>19</sup> Trial Staff Comments at 7.

<sup>20</sup> *Id.*

with such instructions.<sup>21</sup> Trial Staff points out that the Settlement adopts depreciation rates previously established by the Florida Public Service Commission (Florida Commission), but that Tampa Electric recently petitioned the Florida Commission for approval of new depreciation rates.<sup>22</sup> Trial Staff asserts that Tampa Electric has committed to file with the Commission to seek a change to its wholesale depreciation rates upon the Florida Commission's approval of changes in its retail depreciation rates. Trial Staff argues that any delay between such an approval by the Florida Commission and Tampa Electric's subsequent filing with the Commission could result in a lag between the effectiveness of the depreciation rates approved by the Florida Commission and the approval of those depreciation rates by the Commission. Consequently, Trial Staff argues that the Commission should specify that any future depreciation filing made by Tampa Electric must include a "crosswalk" that explains any adjustments to its book balances and FERC Form No. 1 data for depreciation reserves, depreciation expense and related accumulated deferred income taxes.<sup>23</sup> Trial Staff submits that such a "crosswalk" must demonstrate that the resulting depreciation data are calculated on a basis that is consistent with the Commission's accounting rules and policies as well as the depreciation rates approved by the Commission.<sup>24</sup> Trial Staff posits that such a "crosswalk" will provide needed transparency because without such information, it is unclear whether the appropriate data would be provided by Tampa Electric. Trial Staff explains that it raised similar concerns in relation to a settlement agreement filed by Tampa Electric in Docket No. ER10-2061-000.<sup>25</sup>

10. In response, Tampa Electric asserts that the provisions of the Settlement make clear that Tampa Electric will not change its depreciation rates as reflected in the Formula Rate without first obtaining the Commission's approval. Tampa Electric states that it will endeavor to ensure that the Formula Rate, including all input data, will reflect Commission-accepted depreciation and amortization practices, and that any deviations will be adjusted annually to reflect the Commission-approved depreciation rates in a transparent manner.<sup>26</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 8-9.

<sup>23</sup> *Id.* at 10.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 11-13.

<sup>26</sup> Tampa Electric Reply Comments at 7-8.

11. Tampa Electric also argues that there is no need for the Commission to impose the conditions requested by Trial Staff. Tampa Electric contends that the Commission has ample means to deal with any lag created by the delay between the effectiveness of the depreciation rates approved by the Florida Commission and those approved by the Commission. In particular, Tampa Electric points out that the Commission has authority to suspend proposed rates and to subject such rates to refund. Further, Tampa Electric asserts that the prescriptive conditions recommended by Trial Staff are unnecessary to ensure that Tampa Electric will provide sufficient data to allow the Commission's assessment of Tampa Electric's proposed depreciation rates. Tampa Electric states that the Commission will have the opportunity to fully scrutinize any proposed revisions to Tampa Electric's Formula Rate.<sup>27</sup>

12. Tampa Electric argues that Trial Staff's recommendations are inconsistent with the Commission's responsibilities under section 205 of the FPA. Tampa Electric contends that the Commission has "consistently recognized" that section 205 bestows public utilities with the right to submit rate filings and the corresponding responsibility for the timing and content of such filings.<sup>28</sup> Once proposed tariff revisions have been submitted, Tampa Electric states that the Commission would have the opportunity to review the filing and address any concerns. Tampa Electric thus concludes that the conditions proposed by Trial Staff are unnecessary to protect the public or customer interests.<sup>29</sup> Finally, Tampa Electric argues that issues raised by Trial Staff in Docket No. ER10-2061-000 have no bearing on the current proceeding and that the Commission should reject Trial Staff's proposed constraints on Tampa Electric.

### **Commission Determination**

13. The Settlement resolves all issues that were set for hearing in Docket No. ER10-1782-000.<sup>30</sup> The Settlement appears to be fair and reasonable and in the public interest and is hereby approved. The Commission's approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. The Commission retains the right to investigate the rates, terms and conditions under the

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<sup>27</sup> *Id.* at 8-9.

<sup>28</sup> *Id.* at 10 (citing *Portland General Electric Co.*, 98 FERC ¶ 61,050, at 61,333 n.4 (2002)).

<sup>29</sup> *Id.* 10-11.

<sup>30</sup> See Hearing Order, 132 FERC ¶ 61,214; *Tampa Electric Co.*, 139 FERC ¶ 63,005 at P 1.

just and reasonable and not unduly discriminatory or preferential standard of FPA section 206.<sup>31</sup>

14. Additionally, we grant Tampa Electric's request for waiver of the Commission's PBOP policy for rate purposes.<sup>32</sup> Where a public utility demonstrates that special circumstances justify the recovery of PBOPs in a manner other than that described by the Commission's PBOP policy, a case-specific review is appropriate.<sup>33</sup> Moreover, the Commission has previously waived the requirements of its PBOP policy where a public utility has demonstrated that compliance with the Commission's preferred cost recovery method would not be cost-effective.<sup>34</sup> In this case, the Settling Parties contend that Tampa Electric's compliance with the Commission's PBOP policy would not be cost-effective.<sup>35</sup> Specifically, the Settling Parties state that the projected cost of establishing and maintaining external trust funds in order to adhere to the Commission's PBOP policy would nearly amount to the value of the PBOP costs themselves.<sup>36</sup> Furthermore, the Commission has recently granted waiver of its PBOP policy in favor of a pay-as-you-go method in response to similar assertions that the Commission's PBOP policy would not be cost-effective.<sup>37</sup> Any future changes from the pay-as-you-go method approved herein, however, must be made pursuant to section 205 of the FPA to ensure no over-recovery or error in estimates.

15. With regard to Trial Staff's request that the Commission specify what depreciation data Tampa Electric must provide in any future filing to revise Tampa Electric's depreciation rates and condition approval of the Settlement on Tampa Electric's compliance with such instructions, we find no reason to condition our approval of the Settlement in that manner. The Settlement contains provisions that require Tampa

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<sup>31</sup> 16 U.S.C. § 824e (2006).

<sup>32</sup> We note that because it has been determined that special circumstances make it appropriate to use a different method of allocating PBOPs for rate purposes, Tampa Electric must recognize a regulatory asset or liability for the prudently incurred dollar difference between its pay-as-you-go method and the Commission method for accounting purposes. *See Post-Employment Benefits Other Than Pensions*, 61 FERC at 62,202.

<sup>33</sup> *Id.* ¶ 62,201.

<sup>34</sup> *Eastern Shore Natural Gas Co.*, 81 FERC at 61,086-87.

<sup>35</sup> *Chronister Aff.* ¶ 11.

<sup>36</sup> *Id.* ¶ 10.

<sup>37</sup> *Tampa Electric Co.*, 140 FERC ¶ 61,046 (2012).

Electric to file with the Commission prior to changing its Commission-approved depreciation rates. Tampa Electric has also specifically indicated that it will file with the Commission in the event that the Florida Commission approves any changes to Tampa Electric's retail depreciation rates.<sup>38</sup> Accordingly, the Commission will have the opportunity at that time to review any proposed changes to Tampa Electric's depreciation rates and ensure that such changes are properly supported.<sup>39</sup>

16. The proposed tariff revisions included in Appendix 3 of the Settlement are accepted effective September 14, 2010, as requested.

17. This order terminates Docket Nos. ER10-1782-000 and ER10-1782-003.

The Commission orders:

The Settlement is hereby approved, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>38</sup> See Tampa Electric Reply Comments at 7.

<sup>39</sup> In fact, we note that Tampa Electric recently filed with the Commission to revise its depreciation accrual rates following the Florida Commission's approval of Tampa Electric's 2011 depreciation study, which Commission staff accepted for filing subject to the outcome of this proceeding. See *Tampa Electric Co.*, Docket No. ER12-1867-000, at 1 (June 27, 2012) (delegated letter order).