

144 FERC ¶ 61,243
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

September 27, 2013

In Reply Refer To:
Interstate Power and Light Company
ITC Midwest LLC
Docket Nos. ER11-2715-000
ER11-2715-001
ER11-2715-003
Resale Power Group of Iowa and WPPI
Energy v. ITC Midwest LLC and
Interstate Power and Light Company
Docket Nos. EL10-68-000
EL10-68-001
Resale Power Group of Iowa
WPPI Energy
Docket No. EL09-71-001

Van Ness Feldman P.C.
Attention: David P. Yaffe, Esq.
1050 Thomas Jefferson Street, NW
Washington, DC 20007

Dear Counsel:

1. On February 1, 2012, you filed, in the above-referenced proceedings, a Stipulation and Agreement (Settlement Agreement) and attachments¹ on behalf of Resale Power

¹ The attachments to the Settlement Agreement include an Amended and Restated Operating and Transmission Agreement (O&T Agreement) and a Coordination Agreement with ITC Midwest LLC (ITC Midwest), Interstate Power and Light Company (IPL), and Central Iowa Power Cooperative (CIPCO). We note that, on February 3, 2012, IPL and ITC Midwest filed the O&T Agreement in Docket No. ER11-2715-004. On February 1, 2012, Midwest Independent Transmission System Operator, Inc. (MISO) filed the Coordination Agreement in Docket No. ER12-971-000. The Commission will act on these agreements in those proceedings. Additionally, we note that, effective

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Group of Iowa, Inc. (RPGI), WPPI Energy (WPPI), ITC Midwest, IPL, MISO, and CIPCO (Settling Parties). On February 21, 2012, Commission Trial Staff² and CIPCO filed comments supporting the Settlement Agreement. No other comments were filed. On March 23, 2012, the Settlement Judge certified the Settlement Agreement to the Commission as an uncontested settlement.

2. The Settlement Agreement addresses compensation for the use of CIPCO transmission facilities by MISO and by RPGI and WPPI. Section 3.6 of the Settlement Agreement states that, in conjunction with the concurrently executed Mutual Release,³ the Settlement Agreement resolves any and all claims raised by a party against another party or any other party in any pleading filed in Docket Nos. EL10-68-000 and ER11-2715-000, *et al.*, the Iowa State Court Action,⁴ and the Petition for Declaratory Order proceeding in Docket No. EL09-71-000,⁵ including, without limitation, any and all claims CIPCO may assert for use of its transmission facilities, past, present, and future as against RPGI, WPPI, and the RPGI and WPPI members that (i) currently purchase capacity and energy from RPGI or WPPI; and (ii) that have been named defendants in the Iowa State Court Action (collectively, the RPGI/WPPI Entities),⁶ and MISO as the

April 26, 2013, MISO changed its name from “Midwest Independent Transmission System Operator, Inc.” to “Midcontinent Independent System Operator, Inc.”

² Commission Trial Staff filed amended comments on February 23, 2012.

³ The Mutual Release was included in the filing for informational purposes.

⁴ The Iowa State Court Action involves CIPCO’s efforts to collect charges from RPGI, various named RPGI members, and MISO for the alleged unauthorized use of CIPCO-owned transmission facilities.

⁵ The Petition for Declaratory Order Proceeding involves requests for rehearing of the Commission order denying the RPGI and WPPI Petition for a Declaratory Order seeking a determination that RPGI and WPPI could not be charged any more than the rates prescribed in MISO’s filed open access transmission tariff (MISO Tariff) for the network service provided by MISO.

⁶ The Settlement Agreement states that the RPGI/WPPI Entities include the following entities named in the Iowa State Court Action: (1) Afton, Iowa; (2) Amana Society Service Co.; (3) Anita, Iowa; (4) Anita Municipal Utilities; (5) Coggon, Iowa; (6) Coggon Municipal Light Plant; (7) Dysart, Iowa; (8) Farmers Electric Cooperative; (9) Grand Junction, Iowa; (10) Grand Junction Municipal Light Plant; (11) Hopkinton, Iowa; (12) Hopkinton Municipal Utility; (13) LaPorte City, Iowa; (14) LaPorte City

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transmission provider to the RPGI/WPPI Entities; and also resolves any claims that the RPGI/WPPI Entities and MISO may assert against any party related to such matters.

3. Section 3.7.3 of the Settlement Agreement states that the parties will jointly file and support this Settlement Agreement with the Commission, including retention of the carved-out grandfathered status of the Amended and Restated Operating and Transmission Agreement.

4. Pursuant to the Settlement Agreement, the standard of review for any modifications to the Settlement Agreement, other than amendments agreed to by all parties, whether proposed by a party, any party with standing under the section 206 of the Federal Power Act, or the Commission acting *sua sponte*, shall be solely the most strict standard set forth in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), as clarified in *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County, Washington*, 554 U.S. 527 (2008) and refined in *NRG Power Mktg. v. Maine Pub. Utils. Comm'n*, 130 S. Ct. 693, 700 (2010). Because the Settlement Agreement appears to invoke the *Mobile-Sierra* “public interest” presumption with respect to third parties and the Commission acting *sua sponte*, we will analyze the applicability here of that more rigorous application of the just and reasonable standard.

5. The *Mobile-Sierra* “public interest” presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either: (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm’s length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption. In *New England Power Generators Association v. FERC*,⁷ however, the

Utilities; (15) Long Grove, Iowa; (16) Maquoketa, Iowa; (17) New London, Iowa; (18) New London Municipal Utilities; (19) Ogden, Iowa; (20) Ogden Municipal Utilities; (21) Preston, Iowa; (22) Stanhope, Iowa; (23) State Center, Iowa; (24) Story City, Iowa; (25) Story City Municipal Utilities; (26) Strawberry Point, Iowa; (27) Strawberry Point Utilities; (28) Tipton, Iowa; (29) Traer, Iowa; (30) Traer Municipal Utilities; (31) Vinton, Iowa; (32) Vinton Municipal Electric Utility; and (33) West Liberty, Iowa.

⁷ *New England Power Generators Ass’n, Inc. v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

D.C. Circuit determined that the Commission is legally authorized to impose a more rigorous application of the statutory “just and reasonable” standard of review on future changes to agreements that fall within the second category described above.

6. The Settlement Agreement concerns the O&T Agreement and the Coordination Agreement. The Commission finds that the O&T Agreement involves contract rates to which, pursuant to the Settlement Agreement, the *Mobile-Sierra* presumption applies with respect to modifications proposed by the Settling Parties, third parties and the Commission acting *sua sponte*. We note that the O&T Agreement rate provisions only apply to ITC Midwest, IPL, and CIPCO. In addition, we note that the O&T Agreement is a carved-out grandfathered agreement under Attachment P of the MISO Tariff.⁸ These circumstances distinguish the Settlement Agreement in this case, with respect to the O&T Agreement, from the settlements in other cases, such as *High Island Offshore System, LLC*,⁹ which the Commission held did not establish contract rates to which the *Mobile-Sierra* presumption applied. The settlements in those cases involved the pipelines’ generally applicable rate schedules for its open access transportation services.

7. However, we find that the *Mobile-Sierra* “public interest” presumption does not apply to the Coordination Agreement. We also find that, with respect to the Coordination Agreement, it is inappropriate to apply that more rigorous application of the just and reasonable standard with respect to the Commission acting *sua sponte* and third parties. Therefore, we approve the Settlement Agreement subject to modification of its provision that seeks to bind the Commission and third parties to the *Mobile-Sierra* “public interest” standard of review with respect to the Coordination Agreement.

⁸ See *Iowa Elec. Light and Power Co.*, Docket No. ER94-247-000 (Aug. 11, 1994) (delegated letter order); *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,236, App. B (2004), *order on reh’g*, 111 FERC ¶ 61,042, *order on reh’g*, 112 FERC ¶ 61,311 (2005), *aff’d sub nom. Wisconsin Public Power Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007) (identifying O&T Agreement as a grandfathered agreement under MISO Tariff). See also *El Paso Elec. Co. and Tucson Elec. Power Co.*, 136 FERC ¶ 61,150, at P 5 (2011); *El Paso Elec. Co.*, 136 FERC ¶ 61,149, at P 6 (2011) (finding rates from bilateral transmission service agreement that is not under an open access transmission tariff and are not generally applicable are contract rates).

⁹ 135 FERC ¶ 61,105 (2011); see also *Panhandle Eastern Pipe Line Co.*, 143 FERC ¶ 61,041 (2013); *Southern LNG Co.*, 135 FERC ¶ 61,153 (2011); *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 (2011).

8. The Coordination Agreement embodies rates, terms, or conditions that are generally applicable. The Coordination Agreement, among other things, requires any entity, on a prospective basis, requiring use of CIPCO's transmission facilities to pay a charge for such use. MISO will administer the provisions of the Coordination Agreement and make the independent determination as to whether CIPCO transmission facilities are used for purposes of transmission service under the MISO Tariff. For these reasons, we find that the Coordination Agreement does not embody "contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption."

9. As we have stated recently, 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 on itself or third parties the more rigorous application of the statutory "just and reasonable" standard of review that is often characterized as the *Mobile-Sierra* "public interest" standard of review.¹⁰ The Commission also stated in these orders that it will not approve imposition of that more rigorous application of the statutory "just and reasonable" standard of review on future changes to an agreement sought by the Commission or non-settling third parties, absent compelling circumstances such as were found to exist in *Devon Power*. We find that the circumstances presented here do not satisfy that test. Thus, we find it unjust and unreasonable to impose the more rigorous application of the statutory "just and reasonable" standard of review in the instant proceeding with respect to future changes to the Settlement Agreement with respect to the Coordination Agreement sought by the Commission acting *sua sponte* or at the request of a non-settling third party.

10. The Settlement Agreement resolves all issues in dispute in these proceedings. With the exception of the issue discussed above, the Settlement Agreement appears to be fair and reasonable and in the public interest.¹¹ As such, the Settlement Agreement is conditionally approved subject to the Settling Parties filing, within 30 days of the date of

¹⁰ See, e.g., *MidAmerican Energy Co.*, 138 FERC ¶ 61,028, at P 7 (2012) (citing *Devon Power LLC*, 134 FERC ¶ 61,208, *order on reh'g*, 137 FERC ¶ 61,073 (2011) (*Devon Power*), *aff'd*, *New England Power Generators Ass'n v. FERC*, 707 F.3d 364 (D.C. Cir. 2013); *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 (2011); *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105, at P 24 (2011)).

¹¹ Likewise, with the exception of the issue discussed above, the Commission's approval of the Settlement Agreement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

this order, a revised Settlement Agreement reflecting a revision to the standard of review provision that applies to the Coordination Agreement.

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

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ITC Midwest LLC

Docket Nos. ER11-2715-000
ER11-2715-001
ER11-2715-003

Resale Power Group of Iowa and WPPI Energy v.
ITC Midwest LLC and Interstate Power and Light
Company

Docket Nos. EL10-68-000
EL10-68-001

Resale Power Group of Iowa
WPPI Energy

Docket No. EL09-71-001

(Issued September 27, 2013)

NORRIS, Commissioner, *concurring*:

I concur in the outcome of this order, which conditionally approves the Settlement Agreement between Resale Power Group of Iowa, Inc., WPPI Energy, ITC Midwest, IPL, MISO, and CIPCO that concerns the O&T Agreement and the Coordination Agreement. The Commission approves the Settlement conditioned upon the Settling Parties filing a revised settlement that changes the standard of review provision that applies to the Coordination Agreement to no longer bind the Commission and third parties to the *Mobile-Sierra* public interest standard of review. I agree with the order that the Coordination Agreement that is a subject of the Settlement is not the kind of contract rate to which the public interest presumption would apply. However, while the D.C. Circuit has determined that the Commission may exercise discretion under the Federal Power Act to apply the public interest standard where the *Mobile-Sierra* presumption does not apply,¹ I continue to disagree, as a policy matter, that the Commission should exercise such discretion.²

¹ *New England Power Generators Ass'n, Inc. v. FERC*, No. 11-1422, at 10-12 (D.C. Cir Feb. 15, 2013).

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

I believe the Commission can exercise its respect for rate certainty and stability and recognize the value of settlements, while protecting the rights of third parties and without sacrificing a future Commission's ability to review rates that may no longer be just and reasonable due to a change in circumstances. 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 Coordination Agreement.

For these reasons, I respectfully concur.

John R. Norris, Commissioner