

152 FERC ¶ 61,173
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

September 1, 2015

In Reply Refer To:
Consolidated Edison Company
of New York, Inc.
Docket No. TX14-1-000

Latham & Watkins LLP
555 Eleventh Street NW, Suite 1000
Washington, DC 20004

Attn.: Natasha Gianvecchio, Esq.
Attorney for Cogen Technologies Linden Venture, L.P.

Dear Ms. Gianvecchio:

1. On May 11, 2015, pursuant to Rule 602 of the Commission's Rules of Practice and Procedure,¹ you filed a Settlement Agreement (Settlement) in the above-captioned proceeding on behalf of Cogen Technologies Linden Venture, L.P. (Linden) and Consolidated Edison Company of New York, Inc. (Con Edison) (collectively, Settling Parties), which the parties negotiated with the assistance of a Commission alternative dispute resolution neutral.
2. On June 1, 2015, Public Service Electric and Gas Company (PSEG), PSEG Power LLC, and PSEG Energy Resources & Trade LLC (collectively, PSEG Companies) filed comments protesting the Settlement. On June 10, 2015, the Settling Parties filed a joint motion requesting a 30-day extension of time to respond to the PSEG Companies' comments. On July 10, 2015, the PSEG Companies filed a notice of withdrawal of their June 1, 2015 comments, thus rendering the Settlement uncontested.
3. In the Settlement, the Settling Parties agree that, during construction-related outages, Linden Units 1-5 will transmit electric energy to the PJM Interconnection, L.L.C. (PJM) transmission system via the Linden VFT, LLC (Linden VFT) transmission facility pursuant to protocols approved by both PJM and the New York Independent System Operator, Inc. (NYISO).² (In contrast, during normal operations, electric energy

¹ 18 C.F.R. § 385.602 (2015).

² Settlement, §§ 2.3(f) and 2.4(c).

generated by Linden Units 1-5 is transmitted to the Con Edison transmission system in NYISO.) In addition, in section 2.3(e) of the Settlement, the Settling Parties request that the Commission confirm that no activities contemplated by the Settlement, including the reverse flow configuration agreed to in sections 2.3(f) and 2.4(c) of the Settlement, alter the facts upon which the Commission relied in granting Linden's existing waivers of certain requirements under Order Nos. 888³, 889⁴, 890⁵, and the Standards of Conduct requirements of Part 358 of the Commission's regulations,⁶ or adversely impact Linden's and Linden VFT's current method of conducting business under the Shared Facilities Agreement, which was approved by the Commission by delegated letter order.⁷ The Commission finds that the proposal for power to flow unidirectionally from the Linden generators to PJM, contemplated by the Settlement, does not constitute grounds for revoking the waivers.⁸

³ Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000, *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁴ *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,049, *reh'g denied*, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

⁵ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

⁶ *Cogen Technologies Linden Venture, L.P.*, 127 FERC ¶ 61,181 (2009).

⁷ *Cogen Technologies Linden Venture, L.P.*, Docket No. ER14-622-000 (February 4, 2014) (delegated letter order).

⁸ We note that Linden and Linden VFT are in the best position to determine the impact, if any, of the Settlement on Linden and Linden VFT's relationship pursuant to the Shared Facilities Agreement and therefore we will not opine.

4. Finally, the Settlement provides that:

Absent prior written agreement of the Parties, the standard of review for changes to the rates, terms or conditions of service of this Agreement proposed by a Party shall be the “public interest” standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) and *Federal Power Comm’n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956), as clarified in *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish*, 554 U.S. 527 (2008), and refined in *NRG Power Marketing v. Maine Pub. Utils. Comm’n*, 558 U.S. 165 (2010).⁹

and also provides that:

The standard of review for any modifications to this Agreement proposed by any non-party to this Agreement, including any modifications resulting from the Commission acting *sua sponte*, will be the most stringent standard permitted by law.¹⁰

5. Because the Settlement provides that the standard of review for changes to the Settlement by any non-party to the agreement is “the most stringent standard permissible under applicable law,” we clarify the framework that would apply if the Commission were required to determine the standard of review in a later challenge to the Settlement.

6. 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*,¹¹ however, the 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.

⁹ Settlement, § 9.17.1.

¹⁰ *Id.*, § 9.17.3.

¹¹ *New England Power Generators Ass’n, Inc. v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

7. The Settlement resolves all issues in dispute in this proceeding. The Settlement appears to be fair and reasonable and in the public interest, and is hereby approved. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings.

8. As agreed to in the Settlement, Con Edison will withdraw its currently pending Application for Interconnection Order in this proceeding.

9. This letter order terminates Docket No. TX14-1-000.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.