

153 FERC ¶ 61,140  
FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, DC 20426

November 3, 2015

In Reply Refer To:  
Baltimore Gas and Electric Company  
Pepco Holdings, Inc.  
Potomac Electric Power Company  
Delmarva Power & Light Company  
Atlantic City Electric Company  
Docket Nos. EL13-48-003  
EL15-27-002

Steptoe & Johnson LLP  
1330 Connecticut Ave., NW  
Washington, DC 20036

Attention: Gary A. Morgans

Dear Mr. Morgans:

1. On July 31, 2015, Pepco Holdings, Inc. (Pepco), on behalf of the Settling Parties,<sup>1</sup> filed a Partial Settlement Agreement intended to resolve all outstanding formula rate protocols issues in this proceeding. On August 20, 2015, the Commission's Trial Staff filed comments opposing the Partial Settlement Agreement. On August 31, 2015,

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<sup>1</sup> The Settling Parties are Baltimore Gas and Electric Company (BGE), Pepco Holdings, Inc., Potomac Electric Power Company (Pepco), Delmarva Power & Light Company (Delmarva), Atlantic City Electric Company (Atlantic City) (collectively, Respondents) and Delaware Division of the Public Advocate, Delaware Municipal Electric Corporation, Inc., Delaware Public Service Commission, New Jersey Division of Rate Counsel, Office of the People's Counsel of the District of Columbia and Public Service Commission of the District of Columbia (collectively, Complainants).

Respondents answered Trial Staff's comments. On September 9, 2015, the Settlement Judge certified the Partial Settlement Agreement as uncontested.<sup>2</sup>

2. The Settlement Agreement (at Exhibit A) revises the Definitions, Annual Updates, Annual Review Procedures, Resolution of Challenges, and Changes to Annual Updates provisions of Respondents' PJM Open Access Transmission Tariff Formula Rate Implementation Protocols [PJM OATT, Attachments H-1B (Atlantic City), H-3E (Delmarva), H-9B (Pepco) and H-2B (BGE) at Sections 1 through 5).

3. Article III, section 3.9 of the Settlement Agreement provides that:

Unless the Settling Parties otherwise agree in writing, any modification to the Settlement Agreement proposed by one of the Settling Parties after the Settlement Agreement has become effective in accordance with Section 3.3 shall, as between them, be subject to the "public interest" application of the just and reasonable standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (the *Mobile-Sierra* doctrine), as clarified in *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County, Washington*, 128 S.Ct. 2733, 171 L. Ed. 2d 607 (2008) and refined in *NRG Power Mktg. v. Maine Pub. Utils. Comm'n*, 130 S. Ct. 693, 700 (2010). The standard of review for any modifications to this Settlement Agreement requested by a non-Party or initiated by the Commission acting *sua sponte* will be the most stringent standard permissible under applicable law. See *NRG Power Mktg. v. Maine Pub. Utils. Comm'n*, 130 S. Ct. 693, 700 (2010).

4. Commission Trial Staff's comments oppose the Partial Settlement Agreement on grounds that neither the Respondents' formula rates nor their Form No. 1's contain a line item for Post-Employment Benefits other than Pensions (PBOP). In addition, Trial Staff notes that Respondents have embedded their PBOP expense in Account No. 926 (Employee Pensions and Benefits), without separately breaking out or providing cost support for it. As a result, Trial Staff states that, contrary to the Commission's

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<sup>2</sup> *Del. Div. of the Pub. Advocate v. Baltimore Gas and Elec. Co.*, 152 FERC ¶ 63,024 (2015).

requirement that formula rates be transparent and replicable,<sup>3</sup> there is no way to verify Respondents' PBOP expense.<sup>4</sup>

5. In their answering comments, Respondents committed to include PBOP expense as a line item in their formula rates and to provide appropriate cost support.<sup>5</sup>

6. We will accept Respondents' commitments to include PBOP expense as a line item in the formula rate and to provide appropriate cost support, and hereby direct Respondents to make a compliance filing, within 30 days, to add a separate PBOP expense line item to their formula rates.

7. To implement Respondents' cost support commitment, we will require that Respondents include in their Annual Update a worksheet for the PBOP expense that provides appropriate supporting documentation, so that the calculation is transparent and replicable, consistent with the Commission's standards.<sup>6</sup>

8. Because the Settlement Agreement appears to provide that the standard of review applicable to modifications to the Settlement Agreement proposed by the parties is to be the "public interest" standard of review but appears to provide that the standard of review applicable to modifications to the Settlement Agreement proposed by third parties and the Commission acting *sua sponte* is to be "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 Agreement by a third party or by the Commission acting *sua sponte*.

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<sup>3</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149, at P 83 (2013), *reh'g denied*, 146 FERC ¶ 61,209 (2014).

<sup>4</sup> Commission Trial Staff Comments Opposing Settlement Agreement at 6, 10, filed August 20, 2015.

<sup>5</sup> Answer of Respondents to Commission Trial Staff Comments Opposing Settlement Agreement at 9, n.10, filed August 31, 2015.

<sup>6</sup> *See supra* n.3.

9. The *Mobile-Sierra*<sup>7</sup> “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 Ass’n, Inc. v. FERC*,<sup>8</sup> 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.

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

By direction of the Commission.

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>7</sup> *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).

<sup>8</sup> *New England Power Generators Ass’n, Inc. v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).