

154 FERC ¶ 61,125  
FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, DC 20426

February 23, 2016

In Reply Refer To:  
Delaware Division of the Public  
Advocate v. Baltimore Gas and  
Electric Company  
Docket Nos. EL13-48-001  
EL15-27-000  
EL15-27-001

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

Attention: Gary A. Morgans

Dear Mr. Morgans:

1. On November 6, 2015, Pepco Holdings, Inc., filed on behalf of the Settling Parties<sup>1</sup> a second partial settlement (Settlement Agreement) that resolves the remaining rate of return on equity (ROE) issue in this consolidated complaint proceeding.<sup>2</sup> On

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<sup>1</sup> The Settling Parties are the Respondents (Baltimore Gas and Electric Company (BGE), Pepco Holdings, Inc., Potomac Electric Power Company (PEPCo), Delmarva Power & Light Company (Delmarva) and Atlantic City Electric Company (Atlantic City)) and Complainants (Delaware Division of the Public Advocate, Delaware Municipal Electric Corporation, Inc., Delaware Public Service Commission, Maryland Office of People's Counsel, Maryland Public Service Commission, New Jersey Board of Public Utilities, 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) in this consolidated complaint proceeding.

<sup>2</sup> The Settling Parties filed their first partial settlement, which resolved all formula rate protocols issues, on July 31, 2015. The Commission accepted the first partial

(continued...)

November 24, 2015, the Commission's Trial Staff filed comments supporting the Settlement Agreement. On December 7, 2015, Respondents filed reply comments which, with Trial Staff's authorization, clarified Trial Staff's summary of the refund and interest provisions contained in Section 2.2 of the Settlement Agreement. On December 16, 2015, the Presiding Judge certified the Settlement Agreement as uncontested.<sup>3</sup>

Section 2.3 of the Settlement Agreement provides that the base ROE contained in Respondents' formula rates will be 10.0 percent. In addition, it specifies that the Settlement Agreement does not alter any ROE incentives that the Commission has previously approved. Further, Section 2.3 subjects the 10.0 percent base ROE and existing incentives to a moratorium period in which no Settling Party may file to change them under section 205 or 206 of the Federal Power Act<sup>4</sup> before June 1, 2018.

2. Section 2.4 permits Respondents to make filings under section 205 during the moratorium period (which, pursuant to section 2.3, runs to May 31, 2018), provided that they do not alter the 10.0 percent base ROE. Respondents may, however, seek project-specific ROE incentives for a new projects, provided that the total ROE (10.0 percent base ROE plus 50 basis-point adder for RTO participation and any new ROE incentive the Commission grants) does not exceed the top end of the zone of reasonableness established by the Commission in the project-specific incentive ROE proceeding.

3. Section 3.9 of the Settlement Agreement provides that:

Unless the Settling Parties otherwise agree in writing, any modification to this 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 Service 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 Utility District No. 1 of Snohomish County, Washington*, 554 U.S.

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settlement agreement on November 3, 2015, subject to a compliance filing (*see Del. Div. of the Pub. Advocate v. Baltimore Gas and Elec. Co.*, 153 FERC ¶ 61,140 (2015)) that the Commission subsequently rejected on January 29, 2016 and directed Respondents to refile within 30 days (*see PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,060 (2016)).

<sup>3</sup> *Del. Div. of the Pub. Advocate v. Baltimore Gas and Elec. Co.*, 153 FERC ¶ 63,025 (2015).

<sup>4</sup> 16 U.S.C. § 824d, 824e (2012).

527 (2008) and refined in *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 558 U.S. 165, 174-75 (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 Marketing, LLC v. Maine Public Utilities Commission*, 558 U.S. 165, 174-75 (2010).

4. 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*.

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.<sup>5</sup> In *New England Power Generators Association v. FERC*,<sup>6</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.

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

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<sup>5</sup> *Panhandle Eastern Pipe Line Co.*, 143 FERC ¶ 61,041, at P 84 (2013); *Entergy Arkansas, Inc.*, 143 FERC ¶ 61,299, at P 92 (2013).

<sup>6</sup> *New England Power Generators Ass’n, Inc. v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

7. The Settlement Agreement was not filed in eTariff format as required by Order No. 714.<sup>7</sup> Therefore, within 30 days of the date of this order, Respondents shall make a compliance filing in eTariff format, to ensure the requisite electronic tariff databases reflect the Commission's action in this order.<sup>8</sup>

8. This letter order terminates Docket Nos. EL13-48-001, EL15-27-000, and EL15-27-001.

By direction of the Commission.

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>7</sup> *Electronic Tariff Filings*, Order No. 714, FERC Stats & Regs. ¶ 31,276 (2008).

<sup>8</sup> *Id.*