

155 FERC ¶ 61,196
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

May 20, 2016

In Reply Refer To:
Duke Energy Carolinas, LLC
Duke Energy Florida, LLC
Docket No. ER15-1712-000

Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

Atten: Gary A. Morgans, Esq.
Attorney for Duke Energy Carolinas LLC and Duke Energy Florida LLC

Dear Mr. Morgans:

1. On January 29, 2016, Duke Energy Florida, LLC, (Duke) on behalf of the Settling Parties,¹ filed a Settlement Agreement to resolve all outstanding issues in this proceeding concerning its formula rate for calculating Post-Retirement Benefits Other Than Pensions (PBOP). On February 28, 2016, the Commission's Trial Staff filed comments supporting the Settlement and requesting that the Commission direct Duke to implement an edit to its formula rate.² No other comments were filed. On March 2, 2016, the Settlement Judge certified the Settlement Agreement as uncontested.³

2. The Settlement Agreement proposes to revise Duke's formula rate template, which is located in Schedule 10-A of its Joint Open Access Transmission Tariff.⁴ Specifically,

¹ The Settling Parties include Duke and Seminole Electric Cooperative.

² Trial Staff February 18, 2016 Comments at 4-6 (Trial Staff Comments).

³ *Duke Energy Carolinas, LLC*, 154 FERC ¶ 63,018 (2016).

⁴ Duke Energy Corporation, Progress Energy, Inc., Duke Energy Carolinas, Duke See Energy Florida and Duke Energy Progress have a Joint Open Access Transmission Tariff. Duke Energy Carolinas, LLC, Tariff, Rate Schedules, and Service Agreements,

(continued ...)

Article II, section 2.1 adds to the formula rate template a line item “*specifying the annual value of [Duke’s] PBOP expense.*”⁵ To implement this requirement in the Joint OATT, Duke proposes to add to Exhibit DEF-6 (List of Inputs to FERC Form 1) a new section titled “Other Information,” and a line item under that section titled “Postemployment Benefits Other than Pension (PBOP) expense included in FERC Account 926.”⁶ In addition, section 2.1 provides that Note S, located in the explanatory notes section of the formula rate, will require Duke to provide certain documents supporting how it derived its annual PBOP expenses. Also, section 2.1 provides that within 30 days following the effective date of the settlement, Duke shall submit the tariff records in a compliance filing, to be effective January 1, 2014.

3. Article III, 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. 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 Mktg., LLC v. Maine Pub. Utils. Comm’n*, 558 U.S. at 174-75.

Tariff Volume No. 4, Schedule 10-A, Network Integration Transmission Service, FCP Zone 10.0.0 (Joint OATT).

⁵ Duke January 29, 2016 Offer of Settlement at § 2.1 (Settlement Agreement) (emphasis added).

⁶ *Id.*, Attachment 3, Ex. DEF-6 at 1.

4. Trial Staff supports the Settlement Agreement; however, it asserts that the Commission should direct Duke to add the PBOP expense line item to another part of its formula rate. Specifically, Trial Staff asserts that Duke should add the PBOP line item as a subset to the Total Administrative and General expenses section, which is located on page 3 of Exhibit DEF-2 (Development of Revenue Requirements).⁷ While Trial Staff states that it “understands that this line item is intended to specify the annual value of [Duke’s] PBOP expense,”⁸ it argues that including a line for PBOP expense in the aforementioned location (i.e., subset of Administrative and General expenses) is consistent with Commission precedent.⁹

5. We find that Duke’s proposed tariff revision to the “List of Inputs” does not demonstrate that it meets the Settlement Agreement requirement to add a line item that specifies the annual value of its PBOP expense. Specifically, unlike the other line items in the List of Inputs, Duke does not provide the FERC Form-1 references, such as page, row, and column, for the new PBOP line item.¹⁰ Given this inconsistency, it is unclear as to whether Duke will state the value of the PBOP expense account under the other columns on the form (i.e., Beginning Balance and Ending Balance). To resolve this issue, provide adequate transparency, and align with the other tariff changes proposed in the Settlement Agreement, we agree with Trial Staff’s suggestion. As mentioned above, Trial Staff suggests that the PBOP expense line item should be added as a subset to the Total Administrative and General expense section, located on Page 3 of Exhibit DEF-2, at Line 5.¹¹ This part of the formula rate is an appropriate location to specify Duke’s PBOP expense because Line 5 specifically refers to Note S, which, as revised pursuant to the Settlement Agreement, states that Duke will provide the amount of PBOP expense

⁷ Trial Staff Comments at 4-5.

⁸ *Id.* at 3.

⁹ *Id.* at 4-5 (citing *Balt. Gas and Elec. Co.*, 153 FERC ¶ 61,140, at P 6 (2015), *compliance denied*, *PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,060, at P 5 (2016)). Subsequently, the Commission accepted Baltimore Gas and Electric’s compliance filing in a Delegated Letter Order issued on March 28, 2016, in Docket No. ER16-456-001.

¹⁰ Settlement Agreement, Attachment 3, Ex. DEF-6 at 1.

¹¹ *See supra* P 4.

included in the Total Administrative and General expenses stated in DEF-2.¹² Therefore, we direct Duke to submit, within 30 days of the date of this order, a compliance filing to add a line item for PBOP expense below the Total Administrative and General expense section that appears on line 5 of the Development of Revenue Requirements in the formula rate, located on Page 3 of Exhibit DEF-2.

6. In addition, we direct Duke to submit, during the formula rate annual update process, a complete copy of its annual actuarial valuation report supporting the derivation of its annual PBOP expense and a worksheet and narrative that detail how it derived the annual PBOP expense as described in the revised Note S in the formula rate template.

7. As to Article III of the Settlement Agreement, because the Settlement Agreement provides 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*.

8. The *Mobile-Sierra*¹³ “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*,¹⁴ however, the D.C. Circuit determined that the Commission is legally authorized to impose a more

¹² We also note that, unlike the List of Inputs form, the format of the Development of Revenue Requirements form (Exhibit DEF-2) allows Duke to reference supporting documents for the PBOP expense line item. Settlement Agreement, Attachment 3, Ex. DEF-2 at 3.

¹³ *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) (*Mobile-Sierra*).

¹⁴ 707 F.3d 364, 370-371 (D.C. Cir. 2013).

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. 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.

10. Finally, the Settlement Agreement was not filed in the eTariff format as required by Order No. 714.¹⁵ In the compliance filing directed above to be submitted within 30 days, Duke is required to use the eTariff format.

By direction of the Commission.

Kimberly D. Bose,
Secretary.

¹⁵ See *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Reg. ¶ 31,276 (2008).