

157 FERC ¶ 61,136  
FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, DC 20426

November 21, 2016

In Reply Refer To:  
North Carolina Electric Membership  
Corporation, North Carolina Municipal Power  
Agency Number 1, Piedmont Municipal Power  
Agency, City of Concord, NC, and City of  
Kings Mountain, NC v. Duke Energy Carolinas,  
LLC

North Carolina Electric Membership  
Corporation, North Carolina Eastern Municipal  
Power Agency, and Fayetteville Public Works  
Commission v. Duke Energy Progress, LLC  
Docket Nos. EL16-29-000  
EL16-29-001  
EL16-30-000  
EL16-30-001

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

Attention: Gary A. Morgans, Esq.

Dear Mr. Morgans:

1. On August 19, 2016, you filed, on behalf of Duke Energy Carolinas, LLC (Duke Carolinas) and Duke Energy Progress, LLC (Duke Progress), a Settlement Agreement (Settlement). On September 1, 2016, Commission Trial Staff filed comments not opposing the Settlement. On September 8, 2016, North Carolina Electric Membership Corporation filed comments in support of the Settlement. On September 12, 2016, North Carolina Eastern Municipal Power Agency, North Carolina Municipal Power Agency Number 1, and Piedmont Municipal Power Agency filed comments in support of

the Settlement. On September 21, 2016, the Settlement Judge certified the Settlement to the Commission as an uncontested settlement.<sup>1</sup>

2. The Settlement addresses Duke Carolinas' and Duke Progress's transmission formula rates and the return on equity used to calculate their annual transmission revenue requirements.

3. Section 3.9 of the Settlement states 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 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 the 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 appears to provide that the standard of review applicable to modifications to the Settlement 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 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

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<sup>1</sup> *North Carolina Elec. Membership Corp. v. Duke Energy Carolinas, LLC*, 156 FERC ¶ 63,051 (2016).

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*,<sup>2</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 resolves all issues in these proceedings. 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.

7. Duke Carolinas and Duke Progress are directed to file revised tariff sheets in eTariff format<sup>3</sup> within 30 days of the date of this order to reflect the Commission's action in this order.

8. This order terminates Docket Nos. EL16-29-000, EL16-29-001, EL16-30-000, and EL16-30-001.

By direction of the Commission.

Kimberly D. Bose,  
Secretary.

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<sup>2</sup> *New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

<sup>3</sup> *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 96 (2008).