

157 FERC ¶ 61,166  
FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, DC 20426

November 30, 2016

In Reply Refer To:  
Midcontinent Independent System  
Operator, Inc. and  
Consumers Energy Company  
Docket No. ER16-771-000

Consumers Energy Company  
One Energy Plaza  
Jackson, MI 49201

Attn: James D. W. Roush, Esq.

Dear Mr. Roush:

1. On September 2, 2016, you filed, in the above-referenced proceeding, a Settlement Agreement among Consumers Energy Company (Consumers Energy); Michigan Electric Transmission Company, LLC (METC); Michigan Public Power Agency, on behalf of itself and its members (MPPA); Michigan South Central Power Agency, on behalf of itself and one of its members, Union City (MSCPA); and Wolverine Power Supply Cooperative, Inc. (Wolverine) (collectively, the Settling Parties; and METC, MPPA, MSCPA, and Wolverine collectively, the Participating Customers). On September 22, 2016, Commission Trial Staff filed comments in support of the Settlement Agreement. No other comments were filed. On October 5, 2016, the Settlement Judge certified the Settlement Agreement to the Commission as an uncontested settlement.<sup>1</sup>

2. The Settlement Agreement is a “black box” agreement, specifying on an annual basis over a five-year period the phased-in rates applicable to wholesale distribution service to be provided under Wholesale Distribution Service Agreements (WDS Agreements) filed by Consumers Energy and Midcontinent Independent System Operator, Inc. The Settlement Agreement also expressly maintains a pre-existing wholesale distribution service entitlement/allocation for MSCPA on behalf of Union City.

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<sup>1</sup> *Midcontinent Indep. Sys. Operator, Inc.*, 157 FERC ¶ 63,003 (2016).

3. Section 9 of the Settlement Agreement states that:

[u]nless the Settling Parties otherwise agree in writing, any unilateral modification to this Settlement Agreement proposed under either Section 205 or Section 206 of the FPA by one of the Settling Parties 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), as clarified in *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, Wash.*, 554 U.S. 527 (2008) and *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 unilaterally requested by a non-Settling Party or by the Commission *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. If Consumers Energy and an individual Participating Customer or individual Non-Participating Customer mutually agree to file an amendment to only that individual customer’s WDS Agreement, then such filing shall be subject to the “ordinary” application of the just and reasonable standard of review and not the “public interest” application.

4. Because the Settlement Agreement 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. In *New England Power Generators Ass’n, Inc. v. FERC*,<sup>2</sup> however, the

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<sup>2</sup> *New England Power Generators Ass’n, Inc. v. FERC*, 707 F.3d 364, 370-71 (D.C. Cir. 2013).

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 this proceeding.<sup>3</sup> The Settlement Agreement appears to be fair and reasonable and in the public interest, and is hereby approved. The Commission’s approval of this Settlement Agreement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

7. Consumers Energy is directed to file revised tariff records in eTariff format,<sup>4</sup> within 30 days of the date of this order, to reflect the Commission’s action in this order.

8. This letter order terminates Docket No. ER16-771-000.

By direction of the Commission.

Kimberly D. Bose,  
Secretary.

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<sup>3</sup> See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,262 (2016).

<sup>4</sup> *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008).