

157 FERC ¶ 61,181  
FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, DC 20426

December 5, 2016

In Reply Refer To:  
PJM Interconnection, L.L.C.  
Transource West Virginia, LLC  
Docket No. ER15-2114-000

Van Ness Feldman LLP  
1050 Thomas Jefferson Street, NW  
Washington, DC 20007

Attention: Douglas W. Smith, Esq.

Dear Mr. Smith:

1. On January 8, 2016, you filed, in the above-referenced proceeding, a Settlement among Transource West Virginia, LLC (Transource West Virginia); Old Dominion Electric Cooperative (ODEC); and Midcontinent MCN LLC (Midcontinent) (collectively, Settling Parties). On February 2, 2016, Commission Trial Staff (Trial Staff) filed comments opposing the Settlement, in part. On February 12, 2016, Transource West Virginia filed reply comments. No other comments were filed. On March 29, 2016, the Settlement Judge certified the Settlement to the Commission as contested, noting, however, that the Settlement is uncontested among the Settling Parties.<sup>1</sup>
2. This proceeding involves a filing for incentive rates as well as for the establishment of formula rate protocols. The Commission accepted the incentive rates and set the remainder of the filing for hearing. The Settlement addresses Transource West Virginia's base return on equity (ROE) and depreciation rates and makes other clarifying revisions to its formula rate template.
3. Trial Staff opposes the Settlement, in part, because it adopts a base ROE of 10 percent for Transource West Virginia, which Trial Staff argues is unjust and unreasonable. Trial Staff states that, under its discounted cash flow (DCF) analysis, the

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<sup>1</sup> *PJM Interconnection, LLC*, 154 FERC ¶ 63,025, at P 44 (2016).

appropriate ROE for Transource West Virginia should be 8.89 percent. Furthermore, Trial Staff contends that the Settlement fails to establish a maximum ROE no higher than the top of the range of reasonableness.<sup>2</sup> Based on the foregoing, Trial Staff states that genuine issues of material fact exist concerning the appropriate base ROE. Trial Staff also argues that its opposition to the ROE is compelling and should be given considerable weight, as it is the only entity representing the public interest.<sup>3</sup> Trial Staff does not otherwise oppose the Settlement.

4. In its reply comments, Transource West Virginia argues that the parties agreed on the 10 percent base ROE, it is not excessive, and it is lower than the ROE recently approved by the Commission in other proceedings.<sup>4</sup> Transource West Virginia states that, notwithstanding Trial Staff's objections to the ROE, the Commission should approve the Settlement as in the public interest.

5. The Settlement provides that

[u]nless the Settling Parties otherwise agree in writing, the standard of review for any modification to this Settlement proposed by one of the Settling Parties after the Settlement has become effective in accordance with Article IV shall be 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*, 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-Settling Party or initiated by the Commission acting *sua sponte* will be the ordinary just and reasonable standard of review. See *Morgan Stanley Capital Group, Inc.*, 554 U.S. 527.<sup>5</sup>

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<sup>2</sup> Trial Staff Opposition at 14.

<sup>3</sup> *Id.* at 17.

<sup>4</sup> Transource West Virginia Reply at 10-11.

<sup>5</sup> Settlement at Art. VI.

6. Commission policy favors settlements, as they provide parties with certainty, reduce litigation costs, and permit parties to reach reasonable compromise in resolving difficult issues.<sup>6</sup> In evaluating a proposed settlement, the Commission recognizes the importance of comments submitted by our Trial Staff, which represents the public interest in settlement and hearing proceedings.

7. However, the Commission has an independent responsibility to consider the public interest, particularly the interests of customers, in reviewing the filings before us. In this case, the question presented is whether the public interest will be served by approving a settlement, even where that settlement is contested by Trial Staff.<sup>7</sup> Consistent with this responsibility, our regulations concerning settlements give the Commission broad discretion as to the weight that we give comments filed by Trial Staff, regardless of whether those comments are considered to render the settlement contested.<sup>8</sup> The Commission may approve a settlement contested by Trial Staff, even if Trial Staff raises material issues of fact, when the Commission finds, under its standards for approving uncontested settlements, that the settlement is fair and reasonable and in the public interest.<sup>9</sup>

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<sup>6</sup> See *State of Maine*, 91 FERC ¶ 61,213, at 61,772 (2000) (“our strong support of settlements militates in favor of giving these parties certainty, and letting them receive the full benefits of their bargain”); *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 122 FERC ¶ 61,009, at P 13 (2008) (“the Commission strongly favors settlements, particularly in cases that are highly contested and complex.”); *Montana Power Co.*, 77 FERC ¶ 61,110, at 61,434 (1996) (“the Commission strongly favors settlements, which provide the opportunity to eliminate the need for more lengthy proceedings if the parties reach an agreement on the issues that is compatible with the public interest”).

<sup>7</sup> *High Island Offshore Sys, L.L.C.*, 110 FERC ¶ 61,043, at P 30 (2005).

<sup>8</sup> *Id.* P 26.

<sup>9</sup> *Id.* PP 28-29; 18 C.F.R. § 385.602(g)(3) (2016) (providing that uncontested settlements may be approved if fair and reasonable and in the public interest); 18 C.F.R. § 385.602(h)(1)(i) (providing for merits decisions only for settlements contested by a party).

8. Based on our consideration of the record, we find the Transource West Virginia Settlement is fair and reasonable and in the public interest and therefore approve it. First, we note that ODEC, the only customer participating in this proceeding,<sup>10</sup> supports the Settlement, even with the objections raised by Trial Staff.<sup>11</sup> Second, the Settlement reaches compromises on issues other than the ROE issue raised by Trial Staff, and we note that rejecting the Settlement due to one component – the ROE – would upset the agreement reached by the Settling Parties on other issues.<sup>12</sup> Third, the base ROE is a rate reduction from the rate originally proposed by Transource West Virginia and is consistent with ROEs approved by the Commission in other recent uncontested settlements.<sup>13</sup> We therefore are not persuaded that rejecting the Settlement is in the public interest.

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<sup>10</sup> We disagree with assertions that ODEC's support for the Settlement should be discounted because the record does not quantify ODEC's share of the Thorofare Project's costs or describe ODEC's participation in the AEP Zone. ODEC is a customer of AEP's Appalachian Power Company (APC) and will pay a proportional share of the costs of the Thorofare Project and potentially other Transource West Virginia projects in the future. *See Old Dominion Elec. Coop.*, 151 FERC ¶ 63,002, at P 46 & n.42 (2015) (ODEC receives transmission service in the AEP East Zone); PJM Tariff, Schedule 12, Appendix A – 17, AEP East Operating Companies (4.1.0) (AEP East Operating Companies include APC, and AEP East Operating Companies pay 100% cost of the Thorofare Project). We also note that other customers in the AEP Zone had the opportunity to intervene and contest Transource West Virginia's filing, but elected not to.

<sup>11</sup> *Cf. Duke Energy Ohio, Inc.*, 144 FERC ¶ 61,217 (2013) (settling parties receive special consideration and, therefore, may not represent the interests of all customers); *PJM Interconnection, L.L.C.*, 144 FERC ¶ 61,207 (2013) (same), *reh'g denied*, 154 FERC ¶ 61,217 (2016); *High Island Offshore Sys., L.L.C.*, 110 FERC ¶ 61,043 (2005) (same).

<sup>12</sup> *See* Settlement at Article VII, ¶ 7 (providing that the terms and conditions of the Settlement are expressly contingent upon approval without material modification or condition).

<sup>13</sup> *See TransourceKansas, LLC*, 156 FERC ¶ 61,018 (2016) (approved by the Commission on July 7, 2016 with a base ROE 9.80 percent) (*TransourceKansas*); *ATX Southwest, LLC*, 155 FERC ¶ 61,143 (2016) (approved by the Commission on May 6, 2016 with a base ROE of 9.90 percent) (*ATX*); *Kanstar Transmission, LLC*, 155 FERC ¶ 61,098 (2016) (approved by the Commission on April 26, 2016 with a base ROE of 9.80 percent).

9. Even if the Commission applied our *Trailblazer*<sup>14</sup> standard for contested settlements to this proceeding, we find the Settlement should be approved. Specifically, *Trailblazer* provides four approaches to reviewing contested settlements.<sup>15</sup> The approach most relevant to this proceeding is the second approach which provides that, even if some individual aspects of a settlement may be problematic, the Commission may still approve a contested settlement as a package if the overall result of that settlement is just and reasonable.<sup>16</sup> We find such a result here, for the reasons stated above. With respect to our reliance on the Settlement's reduction from 10.5 percent to 10 percent in the base ROE that Transource West Virginia initially proposed in this proceeding, we also note that, although Trial Staff supports its calculation of a base ROE of 8.89 percent, Trial Staff's DCF analysis would not go unchallenged by the parties during litigation. A contested hearing might not produce an ROE appreciably lower than 10 percent and could produce one even higher than the Settlement's base ROE. Moreover, the Settlement includes a rate moratorium providing customers with rate certainty for the

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<sup>14</sup> See *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,082 (1998) (*Trailblazer I*); *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,341 (*Trailblazer II*), order on reh'g, 87 FERC ¶ 61,110 (*Trailblazer III*), aff'd, 88 FERC ¶ 61,168; see also *Pub. Utils. Comm'n of Cal. v. El Paso Natural Gas Co.*, 105 FERC ¶ 61,201, at P 44 (2003), reh'g denied, 106 FERC ¶ 61,315 (2004)).

<sup>15</sup> The four approaches laid out in *Trailblazer* are: (1) the Commission renders a binding merits decision on each contested issue, (2) the Commission approves the settlement based on a finding that the overall settlement as a package is just and reasonable, (3) the Commission determines that the benefits of the settlement outweigh the nature of the objections and the interests of the contesting party are too attenuated, and (4) the Commission approves the settlement as uncontested for the consenting parties, and severs the contesting parties to allow them to litigate the issues raised. See *Trailblazer II*, 85 FERC ¶ 61,345 at 62,342-45.

<sup>16</sup> Under this approach, the Commission need not render a merits decision on whether each element of the settlement package is just and reasonable, so long as the overall package falls within a broad ambit of various rates which may be just and reasonable. The Commission clarified that this approach focuses on the end result of the overall settlement, and involves a balancing of the benefits of the settlement against the costs and potential effect of continued litigation. See *id.* at 62,342-46.

future,<sup>17</sup> such that full litigation and the development of a hearing record may not produce rates and terms and conditions more beneficial to customers than the Settlement.

10. The Commission does not require, and we do not believe it is necessary as a matter of Commission policy to expect, that any settlement establishing a base ROE must specify a maximum ROE or include a zone of reasonableness to be deemed fair and reasonable and in the public interest.<sup>18</sup> We are concerned that such an expectation could undermine parties' ability to settle ROE disputes, thereby consigning parties to litigate issues that might otherwise be resolved without the time and expense of a full hearing. Moreover, if Transource West Virginia were to seek any additional incentive adders in a future filing under sections 205 or 219 of the Federal Power Act, Transource West Virginia would bear the burden to establish both that such incentive is warranted and that its total ROE, inclusive of all incentive adders, is just and reasonable. This requirement provides further protection against any claim that this Settlement increases uncertainty because it does not specify a maximum ROE or include a zone of reasonableness.

11. For these reasons, full litigation may not produce rates and terms and conditions more beneficial to customers than the Settlement. All parties participated in the settlement negotiations,<sup>19</sup> and the support by ODEC, which pays Transource West Virginia's transmission rates, indicates that the Settlement provides benefits to customers.<sup>20</sup> The Settlement resolves all issues in dispute among the parties to this proceeding and is hereby approved.

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<sup>17</sup> The moratorium prevents the Settling Parties from seeking to modify the base ROE until September 5, 2018. *See* Settlement at Article III, § B.

<sup>18</sup> *See, e.g., Transource Kansas*, 156 FERC ¶ 61,018 (approving an ROE settlement without a zone of reasonableness); *ATX*, 155 FERC ¶ 61,143 (same); *Del. Div. of the Pub. Advocate v. Baltimore Gas and Elec. Co.*, 154 FERC ¶ 61,125 (2016) (same); *Golden Spread Elec. Coop.*, 153 FERC ¶ 61,103 (2015) (same); *PJM Interconnection, LLC*, 152 FERC ¶ 63,020 (2015) (same); *Seminole Elec. Coop. v. Fla. Power Corp.*, 153 FERC ¶ 61,182 (2015) (same).

<sup>19</sup> *See* Transource West Virginia Settlement at 5. Settlement conferences were held before Judge Cintron on September 29, 2015, October 28, 2015, and December 2, 2015. Transource West Virginia states that representatives of Transource West Virginia, ODEC, Midcontinent, and Trial Staff attended the settlement conferences.

<sup>20</sup> Transource West Virginia Reply at 17-18. Transource West Virginia asserts that ODEC, as a PJM transmission customer in the AEP zone, will pay a proportional share of the costs associated with the Thorofare Project.

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12. Transource West Virginia, in conjunction with PJM, is directed to file revised tariff provisions in eTariff format,<sup>21</sup> within 30 days of the date of issuance of this order, to reflect the Commission's action in this order.

13. This letter order terminates Docket No. ER15-2114-000.

By direction of the Commission. Commissioner Honorable is dissenting with a separate statement attached.

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>21</sup> *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008).

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, LLC  
Transource West Virginia, LLC

Docket No. ER15-2114-000

(Issued December 5, 2016)

HONORABLE, Commissioner, *dissenting*:

In today's order, the Commission approves the Offer of Settlement (Settlement) among Transource West Virginia, LLC (Transource West Virginia), Old Dominion Electric Cooperative (ODEC), and Midcontinent MCN LLC (collectively, Settling Parties). I respectfully disagree with the Commission's decision and would reject this Settlement because it has not been shown to be fair and reasonable and in the public interest.

The Commission has stated that considerable weight should be given to Commission Trial Staff's (Trial Staff) objections to settlements, especially when Trial Staff is the lone participant representing the ultimate consumer. In *Ohio Power*, the Commission stated:

Our decision should in no way indicate that settlements automatically will be approved if staff is the only participant to object....There might well be a situation where a utility's customers agree to a settlement's terms but those customers' interests and the interests of the ultimate consumers are not necessarily the same. One could envision a case where the Commission staff is the only participant to represent the interests of the ultimate consumer. In that situation, the Commission would likely give greater weight to the staff's objections and might find that a proposed settlement is not in the public interest.<sup>1</sup>

This Settlement is the situation envisioned by the Commission in *Ohio Power*.

Based on the record in this proceeding, I am unable to conclude that the Settling Parties represent all aspects of the public interest and accordingly, I believe greater weight should be given to Trial Staff's objections to the Settlement. Relying upon Transource West Virginia's reply comments, today's order concludes that because ODEC will pay a 'proportional share' of the Thorofare Project, consumer interests have been

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<sup>1</sup> *Ohio Power Co.*, 23 FERC ¶ 61,236, at 61,497-98 (1983) (Ohio Power).

considered in this Settlement and that consumers will benefit. However, the record does not quantify ODEC's proportional share of the costs associated with the Thorofare Project or describe ODEC's participation in the AEP Zone.<sup>2</sup> Further, PJM documentation states that ODEC is associated with the APS, DOM, and DPL Zones, but not the AEP Zone.<sup>3</sup> Based on this record, I am unable to conclude that ODEC will, in fact, be allocated any costs for the Thorofare Project. Accordingly, given Trial Staff is the only participant to represent the interests of the ultimate consumer - which is part of their representation of the broader public interest - greater weight should be given to Trial Staff's objections to this Settlement.<sup>4</sup>

In its comments opposing the Settlement, Trial Staff demonstrates that genuine issues of material fact remain concerning Transource West Virginia's ROE. Therefore, Trial Staff opposes the ROE and seeks a determination on a hearing record as to the appropriate base and maximum ROE. Trial Staff's Discounted Cash Flow (DCF) analysis arrived at several potential just and reasonable placements for Transource West Virginia's base ROE. However, each of the potential base ROE placements calculated by Trial Staff is below the base ROE in the Settlement approved in today's order.<sup>5</sup> As Trial Staff points out, while a settlement involving representation of the interests for the ultimate consumer might be sufficient to assuage these concerns, that is not the case here.<sup>6</sup>

Today's order approves the Settlement on the grounds that it provides for a base ROE lower than the ROE initially proposed in this proceeding. Given the circumstances of this proceeding, I am concerned that weighing this comparison so heavily sends the

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<sup>2</sup> See Transource West Virginia Reply Comments at p. 17

<sup>3</sup> See <https://www.pjm.com/~media/markets-ops/dsr/elrs-edc-zones-and-states.ashx> at line 43.

<sup>4</sup> Trial Staff Initial Comments at p. 18. See also *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C. Cir. 1990) (stating that the public interest that the Commission must protect always includes the interest of consumers).

<sup>5</sup> Trial Staff Initial Comments at 15. Trial Staff asserts that "[b]ecause Transource West Virginia is a single utility, the base ROE should be set at 8.89 percent, the median of the range of reasonableness resulting from Mr. Keyton's analysis." Trial Staff also calculated base ROE values for the Midpoint (8.78 percent), the 75<sup>th</sup> percentile (9.48 percent), and the middle of the upper half (9.81 percent).

<sup>6</sup> *Id.* at 7.

wrong message to market participants. Furthermore, approval of the Settlement on these grounds ignores market conditions and financial information.

As a consideration going forward, it is important to note that this Settlement does not specify a maximum ROE or zone of reasonableness. Although we have approved settlements previously without these safeguards, the Commission has a statutory obligation to ensure all rates it approves are just and reasonable, inclusive of any incentives. In applying this mandate the Commission caps total ROE - or base ROE plus ROE incentive adders - at the top of the zone of reasonableness.<sup>7</sup> By failing to specify a maximum ROE in their settlement, Transource West Virginia has increased uncertainty in the event they decide to seek additional ROE incentives, and we do so as well with our approval. Any future requests will have to be assessed while keeping this critical consumer protection requirement in mind.

I recognize the administrative efficiency and reduced litigation expenses that result from settling disputes, and that participants should be encouraged to resolve their disputes through settlement. However, when the Commission approves a settlement, the Commission relies in part on the fact that the interests of the active parties in the case are generally similar to the interests of the inactive parties and consumers.<sup>8</sup> Here, that is not the case. Trial Staff has demonstrated the unique factors associated with this settlement and presented evidence showing that the base ROE may be unjust and unreasonable. In weighing Trial Staff's concerns with the deference contemplated in *Ohio Power*, I believe the Settlement approved by the Commission today should be rejected.

Accordingly, I respectfully dissent.

  
Colette D. Honorable  
Commissioner

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<sup>7</sup> See *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 at PP 2, 93, and 278 (2006), *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, *order on reh'g*, 119 FERC ¶ 61,062 (2007).

<sup>8</sup> See e.g., *High Island Offshore System, L.L.C.*, 110 FERC ¶ 61043, at P 33 (2005).

Document Content(s)

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