



# FERC's Filing Procedures for Settlements

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[Updated to reflect Chief ALJ 10/13/2017 Notice]



Energy Bar Association Webinar



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# Objectives

- **FERC's Changing Filing Requirements**
  - How we got here
  - Resources
- **Rule 602 Settlements**
- **Pre-Arranged Filings**
- **Concluding Observations**

## Disclaimer:

The views expressed in this presentation are those of the presenters, and do not necessarily reflect the views of the Federal Energy Regulatory Commission, its Chairman, any individual Commissioner, or other members of its Staff. 18 C.F.R. § 388.104(a)



# FERC's Filing Procedures

## How we got here

- **Filing Procedures have changed over time – for example:**
  - Regulations required:
    - Filing 14 copies plus an original in paper format
    - Fix paper size – 8 ½ x 11 inches
    - Minimum font size
  - FERC's business processes have evolved:
    - Receiving paper filings and manually distributing the copies throughout the Commission
    - Manually archiving paper filings into “Central Files”, subsequently replaced by manually scanning paper filings into precursors of eLibrary
    - FERC's organization has changed, e.g.: OPPr>OPR>OMTR>OEMR<sup>2</sup>
  - Technology has evolved
    - Typewriters>Wang>desktops>laptops
    - Media – paper>floppies>CDs>various internet protocols



# FERC's Filing Procedures

## How we got here

- **Commission has slowly adopted new information technology, new structures and new procedures to utilize technology**
  - Late 1980's staff started to request data and rate designs in Lotus 1-2-3, Quattro or dBase format
  - Order No. 582 (1995) required NGA open access tariffs in both paper and electronic format (FASTR)
  - Commission orders made available electronically (CIPS)



# FERC's Filing Procedures

## How we got here

- **Order No. 703, Filing Via the Internet (2007) – Water shed**
  - Start of the Commission's fully integrated filing procedures
    - eFiling – the gateway for the public to make filings with the Commission
    - Commission's internal systems –
      - Docketing
      - eLibrary – accepts many different native file formats including spreadsheets
      - Case tracking
      - Distribution
      - Notice
    - eService and eSubscription
  - Order No. 703 left paper filing procedures in place
    - Regulations still REQUIRED tariff filings to be in paper
    - “Integrated” still required some manual processes



# FERC's Filing Procedures

## How we got here

- **Order No. 714 (2008; eff. April 2010)**
  - REQUIRED tariff filings to be filed only in electronic format
  - Residual Order No. 703 manual steps in the tariff filing process mostly eliminated
  - Non-regulated entities may still file in paper
  - Commission authorized OSEC to issue instructions pertaining to electronic file and electronic document formats:
    - “Issue instructions pertaining to allowable electronic file and document formats, the filing of complex documents, whether paper copies are required, and procedural guidelines for submissions via the Internet, on electronic media or via other electronic means.” 18 C.F.R. 375.302(z)
    - Permits OSEC to update many electronic filing requirements to match changing technology



# FERC's Filing Procedures Resources

## ■ OSEC's Instructions

- Dozens of Instructions for different filings and "Forms"  
Generally:
  - Regulated Entities: must file in electronic format
  - All other parties: either paper or electronic format; electronic format preferred
- When new or revised instructions are issued, they are
  - Noticed in a specific docket:  
e.g.:
    - RM07-16 for eFiling instructions
    - RM01-5 for eTariff instructions;
  - Posted on the Commission's web site

## ■ Staff guidance \*

- [www.FERC.GOV](http://www.FERC.GOV):
  - Documents and Filings tab
  - eTariff tab –
    - Commission Notices and Orders
    - Instructive orders
    - Collection of FAQs
  - Industries tab
- [FERCOnline@ferc.gov](mailto:FERCOnline@ferc.gov)
- Call Staff

## ■ Third Parties \*\*

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# FERC's Filing Procedures Resources (cont'd)

## ■ OSEC's Instructions - example

- *Filing Guide/Qualified Documents List* – Specific filing guidance by regulation
  - Generally: Parts 35, 154, 284, 300 and 341 filings MUST be file in eTariff format

### PART 154: RATE SCHEDULES AND TARIFFS

154.7	NGA / 4	Tariff Filing or Executed Service Agreement Submission	Yes	Gas	eTariff - mandatory
154.7	NGA / 4	Negotiated Rate/Service Agreements (executed/unexecuted)	Yes	Gas	eTariff - mandatory
154.8	NGA / 4	Informal Submission of Proposed Tariff for Staff Review	Yes	Gas	Report/Form - No Dkt. No
154.111	NGA / 4	Form No. 549B: Index of Customers. Instructions: <a href="http://www.ferc.gov/docs-filing/forms.asp#549b">http://www.ferc.gov/docs-filing/forms.asp#549b</a>	Yes	Gas	Report/Form - No Dkt. No Index of Customers
154.202	NGA / 4	Filings to Initiate a New Rate Schedule	Yes	Gas	eTariff - mandatory
154.203	NGA / 4	Compliance Filings	Yes	Gas	eTariff - mandatory



# Questions?



# Settlement Filing Procedures

- **Two general categories of settlements are filed with the Commission – different filing procedures**

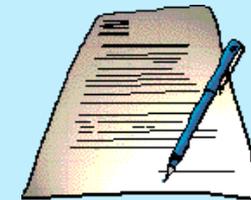
## Rule 602 Settlements

- Settlements of issues in an established proceeding before the Commission
  - Referred to as Rule 602 Settlements



## Pre-Arranged or Pre-Agreed Filings

- Settlements of issues between parties that are **not** before the Commission but need to be filed with the Commission
  - Sometimes informally referred to as Pre-Arranged or Pre-Agreed Filings





# Rule 602 Settlements Definition

- **§ 385.602 (Rule 602): This section applies to written offers of settlement filed in any proceeding:**
  - Set for hearing under Part 385, Subpart E;
  - Before settlement judge; and/or
  - Alternative dispute resolution (Rule 604).
  
- **“Offer of settlement” includes any written proposal to modify or amend an offer of settlement**
  - Modifications restart Rule 602 comment period



# Rule 602 Settlements Required Documents (pg 1 of 2)

- **Transmittal Letter**
  - Addressed to the Secretary
  - State to whom the Secretary should direct the Settlement
    - Presiding Officer
    - Commission
  - Summarize requested actions
    - Motions
    - Waivers
    - Interim Rates
  - List of documents
    - Whether public, CEII or Privileged (388.112/.113)
  - Contact information
    - eRegistered
    - On the Commission's service list



# Rule 602 Settlements Required Documents (pg 2 of 2)

- **Stipulation and Agreement**

- Settlement offer
- Explanatory statement
- Copies of or references to any additional documents
  - References to documents in eLibrary should include Accession Number.
- If necessary, actual Tariff Records consistent with Order No. 714 requirements
  - Limit filing of actual Tariff Records to Motions to Accept Interim Rates
  - Recommend to file actual Tariff Records in a subsequent Settlement compliance filing

- **Other documents, e.g.:**

- Motions
- Waivers
- List of consenting parties
- As required by Presiding Officer's instructions



# Rule 602 Settlements Filing Procedures

## ■ If a Part 35, 154, 284 or 341 Proceeding:

- Chief ALJ instruction and OSEC [Notice](#) 12/1/2016: File in eTariff format
  - Effective January 3, 2017
  - Use Settlement specific Type of Filing Codes (ToFC)
  - Associate with the original eTariff Filing Identifier (Filing ID)
    - OSEC will assign a new sub-docket to the Settlement filing (e.g.: -001)
      - No need to re-intervene – existing service list applies to all sub-dockets
      - Once a docket number is given to a Filing ID, continue to use that Filing ID in subsequent eTariff filings' Associated Filing ID to prevent the proliferation of docket numbers
    - If no Associated Filing ID, OSEC will issue a new root Docket No. (-000)
      - Complaint proceedings usually do not have an Associated Filing ID
      - Parties advised to intervene as a new service list is started in the new root docket (See *Electronic Tariff Filings*, 130 FERC ¶ 61,047, at P 16 (2010))
    - **NOTE:** The Settlement ToFC provides that the new sub- or new root docket is before the presiding officer – there will **NOT** be a Commission order “consolidating” or assigning the sub- or new root docket to the underlying proceeding



# Rule 602 Settlements Filing Procedures

## If a Part 35, 154, 284 or 341 Proceeding: (con't)

- For proceedings with multiple dockets, put the non-Associated Filing ID docket numbers in the Filing Title (the Associated Filing ID's provides the lead docket number)
  - See *Electronic Tariff Filings*, 130 FERC ¶ 61,047 (2010) for discussion



# Rule 602 Settlements Filing Procedures

- **File Settlement, all supporting documents and Tariff Records**
  - in a single filing, and
  - only once
    - Duplicative and/or piecemeal filings create confusion
    - Questions as to whether multiple filings' documents are truly identical
    - Questions as to scope of Rule 602 filed comments and responses
  - Exceptions
    - Settlement requires actual interim rate tariff records in multiple eTariff regulated entities' or Tariff Identifier data bases – **Note**: the secondary filings need only contain the Settlement's Transmittal Letter and actual tariff records.
    - Settlement's scope covers multiple and/or non-consolidated proceedings



# Rule 602 Settlements Comments and Reply Comments

- **Rule 602 provides for comments not later than 20 days, and reply comments not later than 30 days after the date of filing.**
  - Rule 2007 applies (385.2007(a)(2)):
    - “The last day of any time period is included in the time period, unless it is a Saturday, Sunday, day on which the Commission closes due to adverse conditions and does not reopen prior to its official close of business, part-day holiday that affects the Commission, or legal public holiday ..., in which case the period does not end until the close of the Commission business of the next [business] day ...”
      - The 20th and 30th days are independent of each other.
  - Settlements are not subject to an OSEC Notice requirement
    - But due to eFiling’s automated systems, OSEC’s Combined Notice may incorrectly include a Settlement filing with standard tariff filing notice time lines.
    - Such incorrect OSEC Notices cause considerable confusion for all
    - Bring incorrect OSEC Notices to OSEC’s attention by email [FERCOnline@ferc.gov](mailto:FERCOnline@ferc.gov)
  - File Comments and Reply Comments in the Settlement’s sub-docket



# Rule 602 Settlements Interim Rates

- File **separately** actual Tariff Records only when the Settlement provides for interim rates to go into effect before Commission approval of the Settlement [Chief ALJ 10/13/2017 Notice]
  - Interim rate Tariff Records filings are not subject to separate Notice requirements. They are considered to be part of the Settlement and are subject to the Rule 602 comment periods.
  - Motions to Accept Interim Rates are not subject to a Commission action date.
  - OSEC directs Motions to Accept Interim Rates to OEMR.
  - OEMR may
    - If the proposed interim rates are lower than the effective rates, refer the Motion to the Chief Administrative Law Judge (375.307(a)(1)(iv) and (a)(7)(v));
    - Accept the Interim Rates by Delegated Letter Order (375.307(a)(1)(i) and (a)(7)(i)); or
    - Take other action as appropriate.



# Rule 602 Settlements Supplements and Amendments

- **Keep Supplements and Amendments in the same docket**
  - Use a the Settlement ToFC, and associate with the Settlement filing's Filing Identifier
  - New Rule 602 comment period



# Rule 602 Settlements Filing Procedures – Resources

- **Regulations**
- **OSEC guides and instructions**
- **Staff's [www.ferc.gov](http://www.ferc.gov) posted guidance \*/**
- **Staff \*/**
  - eFiling - [FERCOnline@ferc.gov](mailto:FERCOnline@ferc.gov)
  - eTariff - call appropriate OEMR's Division Directors for current list

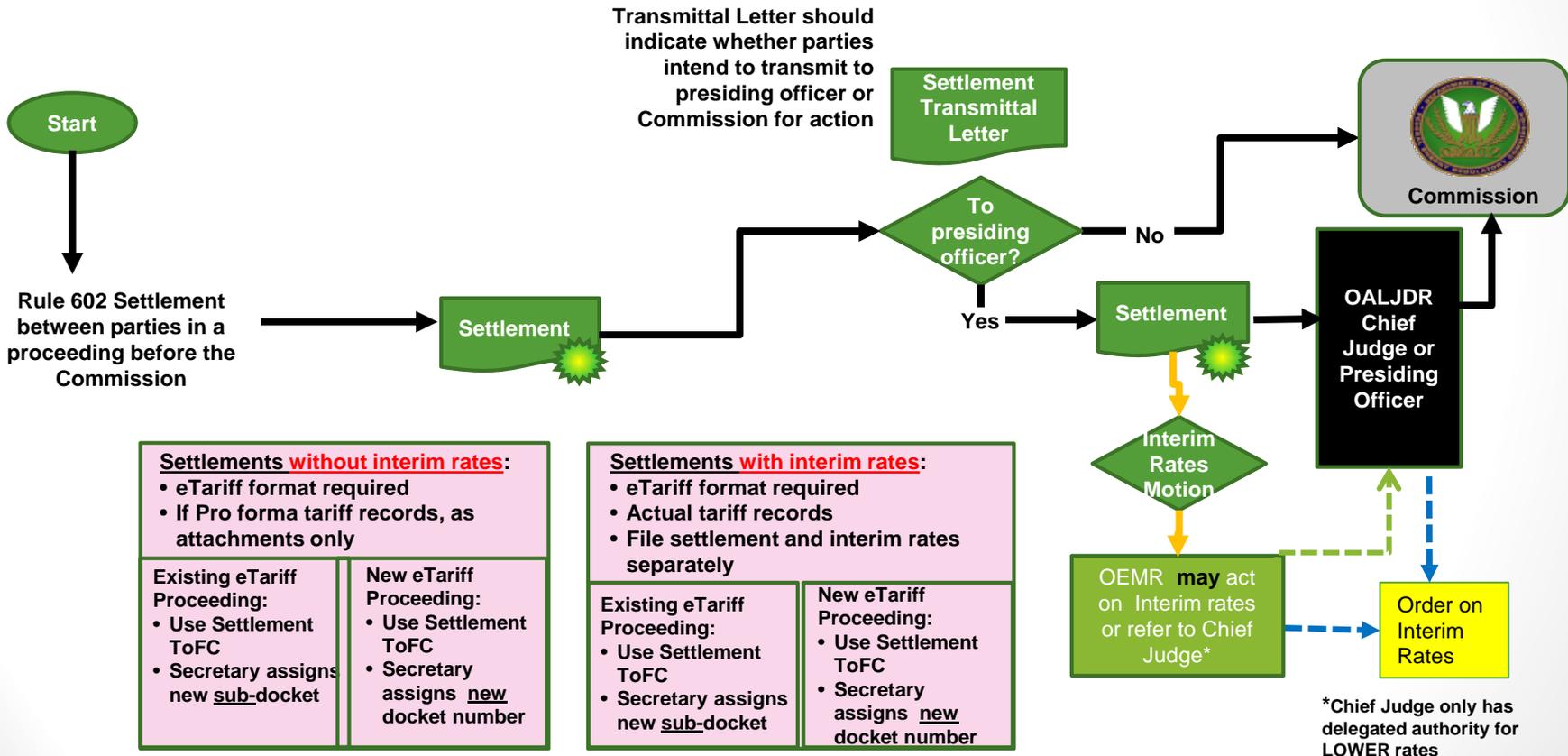
\* Staff guidance does not necessarily reflect the views of the Federal Energy Regulatory Commission, its Chairman, any individual Commissioner, or other members of its Staff. 18 C.F.R. § 388.104(a)



# Settlement Rule 602 Filing Procedures Flow Chart

Parts 35, 154, 284, 300 and 341 Proceedings

As of January, 2017





# Questions?



# Pre-Arranged or Pre-Agreed Filings Definition

- **Does not involve settlement of a pending or open proceeding before the Commission**
- **Regulated entity and interested parties have reached an agreement in advance of filing**
- **There are no Commission regulations that specifically address Pre-Arranged or pre-agreed Filings**
- **All Pre-Arranged or pre-agreed Filings are managed as if they were standard tariff filings (Business Process), such as**
  - No specific ToFC for Pre-Arranged or pre-agreed Filings
  - Standard docketing rules
  - Program standard notice, intervention and comment periods
    - **Rule 602 comment periods do NOT apply**



# Pre-Arranged or Pre-Agreed Filings Pros and Cons

## ■ Pro - reduced regulatory risk

- Lowers risk of protests
- Lowers risk of suspension, Commission-determined different effective date, and refund obligations
- Lowers overall regulatory costs of implementing tariff changes
  - Reduces the tariff filing documentation requirement (“abbreviated filing”)
  - Increases the probability proposed effective date will occur
- Commission has a preference that issues be resolved by consensus
  - Litigated proceedings take considerable amount of time and expense to resolve
  - Significant probability that litigated cases will be appealed to the courts
  - End results of litigated proceedings can be unpredictable for all parties

## ■ Con – the unexpected

- Unexpected protests
  - Abbreviated filing’s supporting documentation may be inadequate to address protests – Commission actions of Suspended or Rejected
  - Reputational risk for not consulting all interested parties
- Unexpected Commission action
  - Filing found to be deficient – actions of Suspended or Rejected
  - Consensus agreement found to be unduly preferential or discriminatory, not just and reasonable, and/or contrary to Commission policy, regulations or applicable statutes – actions of Suspended or Rejected



# Pre-Arranged or Pre-Agreed Filings Business Process

- **Two available Business Processes** (see eTariff Implementation Guide for definitions)
  - Normal/Statutory – filings proposed with a statutory or regulatory action date
  - Compliance – filings with no regulatory action date
- **Choose Business Process on the basis of what is the desired outcome, not on the basis that there is a pre-arranged agreement**
  - Want to place into effect actual Tariff Records with the Commission acting pursuant to a statutory or regulatory action date?
    - Normal/Statutory ToFC with actual Tariff Records
  - Want a pre-approval of the pre-arranged or pre-agreed filing?
    - Compliance ToFC with only Pro Forma Tariff Records (see *Dominion Transmission, Inc.*, 111 FERC ¶ 61,285 (2005)); followed up with a subsequent Compliance filing with actual implementing Tariff Records
- **It is the Regulated Entity's choice as which Business Process to propose, but it is the Commission's decision as to which Business Process is appropriate**



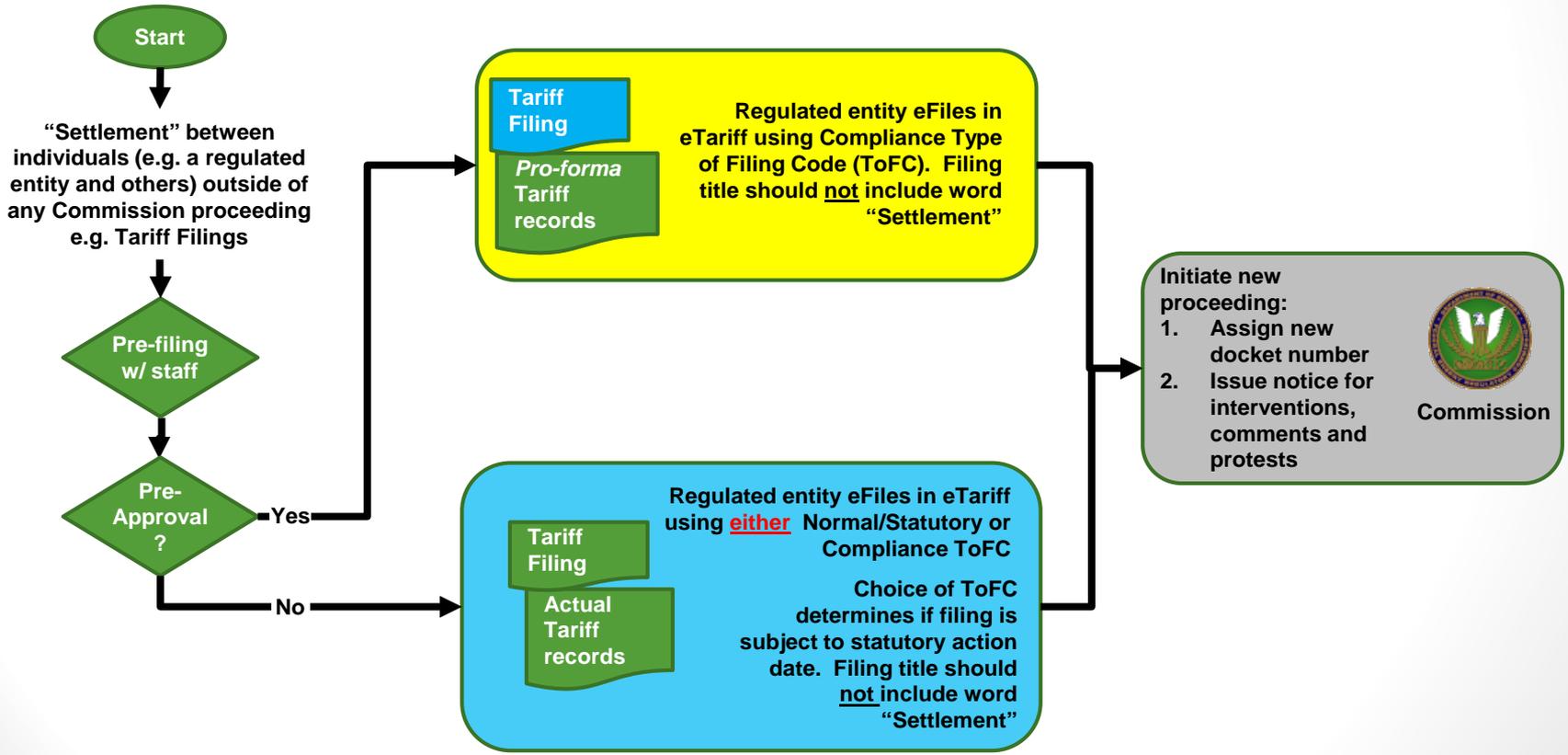
# Pre-Arranged or Pre-Agreed Filings Resources

- **Pre-filing meeting with Staff pursuant to §§ 35.6, 154.8, 341.12 or 388.104**
  - Pre-arranged agreements often include unique proposals, provisions and time lines. Staff can provide suggestions as to documentation, explanation, and tariff construction
  - Disclaimer: Staff guidance does not necessarily reflect the views of the Federal Energy Regulatory Commission, its Chairman, any individual Commissioner, or other members of its Staff. 18 C.F.R. § 388.104(a)
- **Regulations**
- **OSEC guides and instructions**
- **Staff's [www.ferc.gov](http://www.ferc.gov) posted guidance**



# Pre-Arranged or Pre-Agreed Filings Filing Procedures Flow Chart

Parts 35, 154, 284, 300 and 341 Proceedings  
As of January, 2017





# Questions?



# Settlements – Points to Remember

- **All Settlements filed through eTariff are automatically loaded into eLibrary, and become part of the public record.**
- **eTariff filed settlements can only be filed in a single docket number.**
- **All members of the eService and eSubscription lists in that docket number are automatically informed of the filing and provided an Accession Number and hyperlink to the filing by OSEC.**
  - OSEC does not have access to nor provides service to any party on service lists maintained by the presiding officer.



# Settlements – Points to Remember

## Transmittal Letter

- **Clearly identify to whom the Secretary should direct the filing**
- **Identify ALL proceedings, motions, appeals, etc. that are the subject of the Settlement, whether or not part of the proceeding is before the ALJ, including those before the court**
- **Identify all attachments and their security level**
  - If requesting Privileged or CEII treatment for any document, follow §§ 388.112 & 113 instructions
  - If documents or exhibits are included by reference, should include clear citation to the document in eLibrary: e.g.: *Pre-filed Testimony of LDC, Inc., Ex. LDC-5, Docket No. ER16-xxx-000, Accession No. 20161212-xxxx*
- **If requesting comment time-line other than that provided by § 385.602(f), must provide a motion to the presiding officer. Include the motion as part of the filed settlement package.**
- **If interim rates are part of the settlement, the Transmittal Letter must include a motion to place those interim rates into effect, and the proposed effective date.**



# Settlements – Points to Remember

## Settlement

- **Identify ALL items and proceedings, motions, appeals, etc. that are the subject of the Settlement, including those before the court**
  - Clearly identify the items or proceedings: e.g.: *Docket No. ER16-xxx-000, Request for Rehearing of LDC, Inc., Accession No. 20161212-xxxx*
  - Clearly state the disposition of each of item or proceedings: e.g.: withdraw of protest, filing, rehearing or appeal
- **Part 154 settlements of general rate cases**
  - A separate provision providing an agreement as to what values the pipeline should use for the exogenous variables in its NGA section 7 certificate application's initial rate calculation.



# Settlements – Points to Remember

## Settlement (cont'd)

- **If the settlement permits severing of contesting parties**
  - Provisions as to how the tariff will include filed and/or effective rate tariff records and Settlement rate tariff records applicable to contesting and consenting customers
  - Provisions addressing billing of contesting parties pending resolution of reserved issues
  - Provision as to how contesting parties may become consenting parties
- **List and define any reserved issues**
- **Interim Rates**
  - If interim rates are to be charged, there must be tariff records filed in eTariff. If interim rates are part of the Settlement, include the interim Tariff Records as part of ~~the settlement filing~~ **a separate filing**. [Chief ALJ 10/13/2017 Notice]
  - Provisions addressing re-billing of customers in the event the Settlement is not approved
    - Timing?
    - Refunds?



# Settlements – Points to Remember

## Settlement (cont'd)

### ■ Come-back requirements

- Date of come-back filing or effective date
- Does come-back filing date consider the statutory notice period and possibility of full suspension
- Documentation expected as part of the come-back requirement
- Impacts of other activities, filings, etc. on scope of the come-back requirement
- Rights to early come-back

### ■ Formula Rate Settlements

- If the settlement includes exogenous variables to a formula rate (e.g.: ROE, depreciation, PBOPs), it is the regulated entity's responsibility to place those values into its tariff (*ODEC*, 133 FERC ¶ 61,261 (2010))
- If a formula or calculations are the subject of the settlement, the formula should be provided in spreadsheet format.



# Settlements – Points to Remember

## Settlement (cont'd)

### ■ Compliance obligations

- Clearly stated compliance requirements
  - Documentation requirements
  - Formulas/calculations/methodologies
- Timing of compliance obligations
- Responsibilities of each party for compliance obligations
- Rights of each party with respect to any compliance filing

### ■ Tariff Records

- If settlement provides for revised terms and conditions of service and/or rates, revised tariff records likely required. Advisable to file only *pro forma* tariff records as part of settlement
- If settlement provides for revised tariff text/rates, all tariff records within locked-in period may need to be revised in a compliance filing(s)
- Limited exception if:
  - no other pending issues involving the tariff record in the subject proceeding or other proceeding(s), including those on appeal
  - parties agree tariff need not be revised



# Settlements – Points to Remember

## Filing Procedures

- **Use standard eTariff filing precautions and procedures**
- **Use eTariff specific Settlement ToFCs to file settlements**
  - Meta data rules – if a conflict between the eTariff XML data and the document contents, the eTariff XML data rules
  - Correct mistakes with a new Settlement ToFC eTariff filing
  - If a Settlement filing must be withdrawn:
    - Use a Withdrawal ToFC
    - File the replacement eTariff Settlement filing first to ensure the Commission properly receives it before making the Withdrawal filing



# Settlements – Points to Remember

- **If OSEC assigns a new root docket number (-000) to the eTariff filed settlement:**
  - New docket number is part of the presiding officer's proceeding
  - There will NOT be an order consolidating or assigning the new docket number to the underlying proceeding
  - Parties advised (*Electronic Tariff Filings*, 130 FERC ¶ 61,047 (2010))
    - Intervene in the new docket number
    - File comments in both docket numbers
  - OSEC will not change eTariff assigned docket numbers
    - OSEC will not correct regulated entities' eTariff XML mistakes
    - OSEC treats mistakenly assigned new docket number no differently than a correctly assigned docket number –
      - The new docket number is part of the presiding officer's proceeding
    - Presiding officer may require regulated entity to correct mistake and close the new docket number



- **Questions on any Settlement or Pre-arranged filing procedures?**