

137 FERC ¶ 61,081  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

South Carolina Electric & Gas Company

Docket Nos. ER10-516-000  
ER10-855-000  
ER10-1268-000

ORDER APPROVING UNCONTESTED SETTLEMENT, AS MODIFIED

(Issued October 21, 2011)

1. On May 12, 2011, South Carolina Electric & Gas Company (SCE&G) submitted a settlement agreement and revised tariff sheets resulting from negotiations among itself and Central Electric Power Cooperative, Inc., North Carolina Electric Membership Corporation, the City of Orangeburg, South Carolina, and the Town of Winnsboro, South Carolina (collectively, the Settling Parties). SCE&G states that this uncontested settlement (Settlement) resolves all the issues that were set for hearing in the above-captioned dockets.<sup>1</sup>

2. On June 3, 2011,<sup>2</sup> the Administrative Law Judge certified the Settlement as uncontested despite comments submitted by Commission Trial Staff (Trial Staff) that raise concerns about the Settlement. Trial Staff states that, through the Settlement, SCE&G is attempting to implement a populated transmission incentive return on equity (ROE) placeholder without prior Commission authorization. It also asserts that the formula rate includes, in Appendix A, Attachment 4, and Attachment 7, references to an ROE transmission incentive adder that the Commission has not authorized. To address

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<sup>1</sup> The issues resolved in this Settlement were set for hearing in three orders: *South Carolina Electric & Gas Company*, 132 FERC ¶ 61,043 (2010); *South Carolina Elec. & Gas Co.*, 131 FERC ¶ 61,113 (2010); *South Carolina Elec. & Gas Co.*, 130 FERC ¶ 61,149 (2010).

<sup>2</sup> *South Carolina Elec. & Gas Co.*, 135 FERC ¶ 63,021 (2011).

its concerns Trial Staff asks the Commission to direct SCE&G to remove Attachment 4, Attachment 7, and lines 166 through 171 and line 174 on page 4 of Appendix A.<sup>3</sup>

3. As Trial Staff observes, SCE&G must submit a filing with and receive prior authorization from the Commission before including transmission rate incentives in its formula rate. We have examined Trial Staff's objections to specific provisions of the Settlement, and we find that the explicit statements already included in Appendix A and Attachment 4 are sufficient to address Trial Staff's concerns. Specifically, Appendix A and Attachment 4 both state that projects and incentives included as inputs on Attachment 7 must be authorized by the Commission as the result of one or more appropriate filings. We therefore deny Trial Staff's request to direct SCE&G to remove specific provisions.

4. The Settlement addresses all issues in the above-captioned proceedings that were set for hearing. Consequently, the Settlement, as modified below, appears to be fair and reasonable and in the public interest, and is hereby approved, subject to the following modification.

5. With regard to the standard of review, paragraph 21 of the Settlement provides that:

[u]nless all of the Parties otherwise agree in writing, any modifications to [sections 5(f), 5(j), 5(k), and 5(l)] of the Settlement Agreement after the Settlement Agreement has been approved by the Commission 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 Serv. 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 Util. Dist. No. 1 of Snohomish County, Washington*, 128 S.Ct 2733, 171 L.Ed. 2d 607 (2008) and refined in *NRG Power Mktg. v. Maine Pub. Utils. Comm'n*, 130 S.Ct 693, 700 (2010).

This provision would impose the *Mobile-Sierra* "public interest" standard of review on any future changes to the Settlement regardless of who proposes the change. Because the Settlement provisions to which this standard would apply pertain entirely to SCE&G's open access transmission tariff and service provided thereunder, we find that the *Mobile-Sierra* presumption, as defined by the U.S. Supreme Court,<sup>4</sup> does not apply to the

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<sup>3</sup> Trial Staff June 7, 2011 Comments at 24.

<sup>4</sup> *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 546 (2008); *NRG Power Mktg. v. Me. Pub. Utils. Comm'n*, 130 S.Ct. 693, 700 (2010).

Settlement. As we have stated in several recent orders, in the context of reviewing settlements that do not involve “contract rates,” the Commission has discretion as to whether to approve a request to impose the more rigorous application of the statutory “just and reasonable” standard of review that is often characterized as the *Mobile-Sierra* “public interest” standard of review.<sup>5</sup> The Commission has also stated in those orders that we will not approve imposition of that more rigorous application of the “just and reasonable” standard of review to future changes to settlements sought by the Commission or non-settling third parties, absent compelling circumstances such as we found to exist in *Devon Power*. We find that the circumstances surrounding SCE&G’s Settlement do not satisfy that test, and thus we find it unjust and unreasonable to impose the more rigorous application of the “just and reasonable” standard of review in the instant proceeding with respect to future changes to the Settlement sought by the Commission or non-settling parties.

6. While we are requiring the Settlement’s standard of review provision to be modified as discussed above, the Commission continues to recognize the role of settlements in providing rate certainty. The Commission has discretion to initiate Federal Power Act section 206<sup>6</sup> proceedings, either on its own motion or at the request of others.<sup>7</sup> In deciding whether to exercise that discretion with respect to the instant Settlement or any other settlement, the Commission would take into account the Settling Parties’ interest in maintaining the Settlement.

7. The Commission’s approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. This order terminates Docket Nos. ER10-516-000, ER10-855-000, and ER10-1268-000.

8. Lastly, because SCE&G did not file the Settlement in the eTariff format required by Order No. 714, SCE&G is required to make a compliance filing through eTariff to

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<sup>5</sup> See, e.g., *Devon Power LLC*, 134 FERC ¶ 61,208 (2011) (*Devon Power*). See also *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 (2011); *Southern LNG LLC*, 135 FERC ¶ 61,153, at P 24 (2011); *Petal Gas Storage LLC*, 135 FERC ¶ 61,152, at P 17 (2011); *High Island Offshore System, LLC*, 135 FERC ¶ 61,105, at P 24 (2011).

<sup>6</sup> 16 U.S.C. § 824e (2006).

<sup>7</sup> *General Motors Corp v. FERC*, 613 F.2d 939, 944 (D.C. Cir. 1979); *Southern Union Gas Co.*, 840 F.2d 964, 968 (D.C. Cir. 1988); see also *Iroquois Gas Transmission System*, 69 FERC ¶ 61,165, at 61,631 (1994); *JMC Power Projects v. Tennessee Gas Pipeline*, 69 FERC ¶ 61,162 (1994), *reh’g denied*, 70 FERC ¶ 61,168, at 61,528 (1995); *aff’d*, *Ocean States Power v. FERC*, 1996 U.S. App. LEXIS 11096 at \*18.

ensure that its electronic tariff data base reflects the Commission's action in this order.<sup>8</sup> In its compliance filing, SCE&G should request that the Settlement terms and conditions become effective in accordance with the terms of the Settlement.

The Commission orders:

The Settlement filed on May 12, 2011 is hereby approved, subject to SCE&G making a compliance filing within 15 days of the issuance of this order to modify the Settlement as directed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.  
Commissioner Norris concurring with a separate statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>8</sup> See *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 96 (2008).

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NORRIS, Commissioner, *concurring*:

I concur in the outcome of this order, which conditionally approves a settlement of various formula rate matters under South Carolina Electric & Gas Company's (SCE&G) open access transmission tariff, subject to SCE&G revising the Settlement so as not to impose the "public interest" standard of review on future changes proposed by the Commission and non-settling parties. I agree that the provisions of the Settlement to which the public interest standard of review would apply pertain entirely to SCE&G's open access transmission tariff and service provided thereunder, and that as a result, the public interest presumption does not apply.<sup>1</sup> For the reasons I expressed in my partial dissent in *Devon Power LLC*, however, I disagree that the Commission can or should exercise its discretion to extend the public interest standard of review to non-contract rates, terms and conditions.<sup>2</sup> Therefore, I disagree with the analysis in this order of whether the Commission should permit the application of the public interest standard to future changes to the Settlement sought by the Commission or non-settling parties.<sup>3</sup>

For these reasons, I respectfully concur.

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John R. Norris, Commissioner

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<sup>1</sup> *South Carolina Electric & Gas Co.*, 137 FERC ¶ 61,081 at P 5 (2011)

<sup>2</sup> *Devon Power LLC*, 134 FERC ¶ 61,208 (2011), *Norris, dissenting in part*.

<sup>3</sup> *South Carolina*, 137 FERC ¶ 61,081 at P 5. I note that I agree with the statement in this order that the Commission "continues to recognize the role of settlements in providing rate certainty," and that when deciding whether to exercise its discretion to initiate Federal Power Act section 206 proceedings, the Commission "would take into account the parties' interest in maintaining the Settlement." *Id.* P 6; *see also Devon Power LLC, Norris, dissenting in part* at 5-6 (noting the Commission's responsibility to take into account the need for certainty and stability and to respect settlements under the usual "just and reasonable" standard).