

142 FERC ¶ 61,018
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

January 7, 2013

In Reply Refer To:
Puget Sound Energy, Inc.
Docket Nos. ER11-3735-000
ER11-3735-001

Van Ness Feldman, P.C.
1050 Thomas Jefferson St., NW
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Washington, DC 20007

Attn: Gary D. Bachman, Esq.
Attorney for Puget Sound Energy, Inc.

Dear Mr. Bachman:

1. On September 14, 2012, you filed a Settlement Agreement (Settlement) on behalf of Puget Sound Energy, Inc., (PSE) and the settling parties¹ in the above-referenced proceeding.
2. On October 4, 2012, Commission Trial Staff filed comments in support of the Settlement. No adverse or reply comments were filed, and on October 15, 2012, the settlement judge certified the Settlement to the Commission as uncontested.²
3. The Settlement resolves all issues in this proceeding related to PSE's revisions to its Open Access Transmission Tariff (OATT) to update its ancillary service rates under Schedule 3 and Schedule 13, and to provide for differentiated recovery of costs to serve non-dispatchable and dispatchable generators exporting from PSE's Balancing Authority Area. The Settlement appears to be fair and reasonable and in the public interest, and is

¹ The parties to the settlement with PSE are Invenergy Wind North America LLC, American Wind Energy Association, NextEra Energy Resources, LLC, Pacific Gas and Electric Company, Bonneville Power Administration, Public Power Council, Avista Corporation, Powerex Corporation, Large Public Power Council, Public Generating Pool, Northwest and Intermountain Power Producers Coalition, PacifiCorp, Southern California Edison Company, and Portland General Electric Company.

² *Puget Sound Energy Inc.*, 141 FERC ¶ 63,004 (2012).

hereby approved, subject to the modification directed below. Refunds and adjustments shall be made pursuant to the Settlement. The Commission's approval of the Settlement as modified does not constitute approval of, or precedent regarding, any principle or issue involved in this proceeding.

4. Article IX of the Settlement, titled "Standard of Review for Settlement Modification," provides as follows:

The standard of review for any modifications to this Settlement Agreement, whether proposed by a Party, any party with standing under the Federal Power Act § 206, or the Commission acting *sua sponte*, shall be solely the most strict standard set forth in *United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 348 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish, Washington*, 128 S. Ct. 2733, 171 L. Ed. 2d 607 (2008); or *NRG Power Marketing, LLC, et al. v. Maine Public Utilities Commission*, 558 U.S. ___, 130 S.Ct. 693 (2010).

5. As explained below, the Commission will require, as a condition for approval of the Settlement, modification of the provisions of Article IX of the Settlement that seek to bind the Commission and non-settling third parties to the *Mobile-Sierra* "public interest" standard of review.

6. We find that the Settlement does not establish "contract rates,"³ but rather establishes new terms of service under PSE's OATT. For this reason, we find that the *Mobile-Sierra* presumption, as defined by the U.S. Supreme Court,⁴ does not apply to the Commission or to non-parties to the Settlement.

7. 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 on itself or third parties 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.⁵ The Commission has also stated in

³ Cf. *El Paso Elec. Co. and Tucson Elec. Power Co.*, 136 FERC ¶ 61,150, at P 5 (2011); *El Paso Elec. Co.*, 136 FERC ¶ 61,149, at P 6 (2011).

⁴ *Morgan Stanley*, 554 U.S. at 546; *NRG*, 130 S.Ct. at 700.

⁵ See, e.g., *MidAmerican Energy Co.*, 138 FERC ¶ 61,028 (2012) (citing *Devon Power LLC*, 134 FERC ¶ 61,208, *order on reh'g*, 137 FERC ¶ 61,073 (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)).

these orders that it shall not approve imposition of that more rigorous application of the statutory “just and reasonable” standard of review on future changes to settlements sought by the Commission or non-settling third parties, absent compelling circumstances such as were found to exist in *Devon Power*. We find that the circumstances surrounding the Settlement do not satisfy that test, and thus we find it unjust and unreasonable to impose the more rigorous application of the statutory “just and reasonable” standard of review in the instant proceeding with respect to future changes to the Settlement sought by the Commission acting *sua sponte* or at the request of a non-settling third party.

8. While we are requiring the Article IX Settlement provisions 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 206⁶ proceedings, either on its own motion or at the request of others.⁷ In deciding whether to exercise that discretion with respect to the instant Settlement or any other settlement, the Commission will take into account the settling parties’ interest in maintaining the settlement.

9. Within 30 days of the date of this letter order, PSE is directed to make a compliance filing to reflect the Commission’s action in this order. If the parties are unwilling to accept this modification, the Settlement, pursuant to Article X, section 7, shall be null and void. In such circumstance, in lieu of the compliance filing, the parties should inform the Commission of this within 30 days of the date of this letter order.

10. PSE did not file the Settlement in the e-Tariff format required by Order No. 714.⁸ Therefore, PSE is required to make its compliance filing within 30 days in e-Tariff format – Filing Code 80 – to reflect the Commission’s action in this letter order.

⁶ 16 U.S.C. § 824e (2006).

⁷ *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.

⁸ *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008).

11. This letter order terminates Docket Nos. ER11-3735-000 and ER11-3735-001.

By direction of the Commission. Commissioner Norris is concurring with a separate statement attached.

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Puget Sound Energy, Inc.

Docket No. ER11-3735-000
ER11-3735-001

(Issued January 7, 2013)

NORRIS, Commissioner, *concurring*:

I concur in the outcome of this order, which conditionally approves an uncontested settlement (Settlement) that resolves all issues in this proceeding related to Puget Sound Energy's revisions to its Open Access Transmission Tariff to update its ancillary service rates under Schedule 3 and 13 and to provide for differentiated cost recovery to serve non-dispatchable and dispatchable generators exporting from its Balancing Authority Area. The Commission approves the Settlement, subject to it being revised to remove a provision that would bind the Commission and non-settling third parties to the "public interest" standard of review on future changes to the Settlement that they seek. I agree that the Settlement does not establish "contract rates", and that as a result, the public interest presumption does not apply.¹ 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.² 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 third parties.³

For these reasons, I respectfully concur.

John R. Norris, Commissioner

¹*Puget Sound Energy, Inc.*, 142 FERC ¶ 61,018, at P 6 (2012).

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

³*Puget Sound Energy, Inc.*, 142 FERC ¶ 61,018 at P 7. 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 "will take into account the settling parties' interest in maintaining the Settlement." *Id.* P 8; *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).