167 FERC ¶ 61,273
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

June 28, 2019

In Reply Refer To:
Alabama Power Company
Docket No. ER19-1427-000

Balch & Bingham LLP
1710 Sixth Avenue North
P.O. Box 306
Birmingham, AL 35201-2015

Attention: Lyle D. Larson

Dear Mr. Larson:

1. On March 25, 2019, Southern Company Services, Inc. (Southern Company Services), for itself and on behalf of both its respondent affiliates, Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company (Southern Companies), and the complainants Alabama Municipal Electric Authority (AMEA) and Cooperative Energy (collectively, the Settling Parties), jointly submitted a Settlement Agreement (Settlement) that resolves all issues set for hearing in this proceeding.[1]

2. On April 15, 2019, Commission Trial Staff filed comments that do not oppose the Settlement or its acceptance by the Commission. Also on April 15, 2019, the Mississippi Public Service Commission (Mississippi Commission) filed comments stating that it does not oppose the Settlement, but also stating that the Settlement should not constitute precedent for any purpose, including as an input to a risk-premium analysis in another proceeding. On April 23, 2019, the Settling Parties filed a Joint Limited Answer to the Mississippi Commission, concurring with the Mississippi Commission and noting that

[1] The following intervenors were parties to the proceeding and do not oppose the Settlement but are not signatories: Mississippi Public Service Commission, Mississippi Public Utilities Staff, Georgia Transmission Corporation, and PowerSouth Energy Cooperative, Inc.

the Settlement contains specific language regarding its non-precedential nature.[2] No other comments were filed. On May 15, 2019, the Settlement Judge certified the Settlement as uncontested.[3] Some key terms of the Settlement are as follows.

3. Article 2.2 of the Settlement reduces the base return on equity (ROE) in the Southern Company Open Access Transmission Tariff (OATT) formula rate from 11.25 percent to 10.60 percent, effective May 10, 2018, the refund effective date set by the Commission.[4]

4. Article 2.4 of the Settlement imposes a five-year moratorium on Southern Companies, or any affiliate, making a filing under section 205 of the Federal Power Act (FPA)[5] to amend its OATT rate, except for ministerial or compliance changes necessary to conform with any Commission requirement or mandate, including but not limited to, revisions to address Accumulated Deferred Income Tax (ADIT). It also bars, for five years, filings under section 206 of the FPA[6] by Southern Companies, AMEA, Cooperative Energy, or any affiliate, to reduce the ROE in Southern Companies' OATT formula rate.

5. Article 2.4.1 provides that nothing in the Settlement precludes the Commission from initiating a section 206 investigation of the formula rate or its 10.6 percent ROE, either on its own motion or in response to a section 206 complaint. It likewise provides that the Settlement moratorium does not affect Southern Companies' obligation to comply with existing or future regulations, including 18 C.F.R. § 35.24 (Tax Normalization for Public Utilities), and that Southern Companies agree that they will need to make a section 205 filing to address the impact of the federal tax rate reductions that became effective January 1, 2018, including the flow-back of excess ADIT to ratepayers.

---

[2] Article 6.4 states: "... [N]o element of this Settlement shall constitute precedent…."

[3] *Ala. Mun. Elec. Auth. v. Ala. Power Co.*, 167 FERC ¶ 63,021 (2019).

[4] *Ala. Mun. Elec. Auth. v. Ala. Power Co.*, 164 FERC ¶ 61,167, at P (E) (2018).

[5] 16 U.S.C. § 824d (2012).

[6] 16 U.S.C. § 824e.

6. Article 7.1 establishes the following standard of review:

> Unless the Settling Parties otherwise agree in writing, any modification to this Settlement proposed by one of the Settling Parties after this Settlement has become effective, as between them, 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, Washington*, 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 modification to this Settlement requested by a non-party to this Settlement or initiated by the Commission acting on its own motion 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 175-75.

7. Because the Settlement appears to provide that the standard of review applicable to modifications to the Settlement 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 by a third party or by the Commission acting *sua sponte*.

8. 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 Association v. FERC*,[7] however, the 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.

[7] *New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 370-71 (D.C. Cir. 2013).

9. The Settlement appears to be fair and reasonable and in the public interest, and is hereby approved. The Commission's approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

10. Southern Company Services is directed to file revised tariff records in eTariff format,[8] within 30 days of the date of this order, to ensure the requisite electronic tariff databases reflect the Commission's action in this order.

11. This letter order terminates Docket Nos. ER19-1427-000 and EL18-147-000.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[8] *See Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008) (cross-referenced at 124 FERC ¶ 61,270).