

168 FERC ¶ 61,192  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick and Bernard L. McNamee.

Tallgrass Interstate Gas Transmission, LLC

Docket Nos. RP19-423-000  
RP19-423-001

ORDER ESTABLISHING SETTLEMENT JUDGE PROCEDURES

(Issued September 24, 2019)

1. On December 6, 2018, in Docket No. RP19-423-000, Tallgrass Interstate Gas Transmission, LLC (Tallgrass) filed the One-time Report on the Rate Effect of the Tax Cuts and Jobs Act,<sup>1</sup> designated as FERC Form No. 501-G, as required by section 260.402 of the Commission's regulations.<sup>2</sup> On May 1, 2019, in Docket No. RP19-423-001, Tallgrass filed a prepackaged settlement (Settlement) and related *pro forma* tariff records pursuant to Rule 207(a)(5) of the Commission's regulations.<sup>3</sup> According to Tallgrass, the Settlement provides for immediate rate relief and rate certainty with a 12.1 percent reduction in recourse rates, effective June 1, 2019, and a rate moratorium for all Settling/Non-Contesting Participants through May 31, 2023,<sup>4</sup> as well as a number of other benefits. Tallgrass states that the Settlement satisfies the mandatory filing requirement under its prior settlement and resolves the matters in Tallgrass' FERC Form No. 501-G proceeding. Tallgrass states that the current status of one of its shippers, NorthWestern Corporation (NorthWestern), for purposes of the Settlement, is that of a

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<sup>1</sup> An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (Tax Cuts and Jobs Act).

<sup>2</sup> *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, Order No. 849, 164 FERC ¶ 61,031 (2018) (adding 18 C.F.R. § 260.402 (2019)), *order on reh'g*, Order No. 849-A, 167 FERC ¶ 61,051 (2019).

<sup>3</sup> 18 C.F.R. § 385.207(a)(5) (2019).

<sup>4</sup> These shippers are identified in Appendix D of the Settlement.

Contesting Party.<sup>5</sup> As discussed below, we appoint a Settlement Judge to preside over further negotiations intended to achieve an uncontested settlement.

### **I. Background**

2. On November 2, 2016, the Commission approved a settlement of Tallgrass' Natural Gas Act (NGA) section 4 general rate case in Docket Nos. RP16-137-000 and RP16-137-001 (RP16-137 Settlement).<sup>6</sup> The RP16-137 Settlement contained a rate moratorium and, pursuant to Article II, required Tallgrass to file a new rate case on May 1, 2019, unless Tallgrass filed a pre-filing settlement on or before that date.<sup>7</sup>

3. On July 18, 2018, the Commission issued Order No. 849,<sup>8</sup> a final rule adopting procedures for determining which jurisdictional natural gas pipelines may be collecting unjust and unreasonable rates in light of: (1) the income tax reductions provided by the Tax Cuts and Jobs Act; and (2) the Commission's Revised Policy Statement<sup>9</sup> and Opinion No. 511-C<sup>10</sup> establishing a policy that master limited partnerships may not recover an income tax allowance in response to the decision of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *United Airlines, Inc.*<sup>11</sup> Order No. 849 required all interstate natural gas pipeline companies with cost-based stated rates to file a FERC Form No. 501-G containing an abbreviated cost and revenue study using data in the pipelines' 2017 FERC Form Nos. 2 and 2-A. Order No. 849 provided four options each interstate natural gas pipeline may choose from to address the changes to the pipeline's revenue requirement as a result of certain income tax reductions: (1) a limited rate reduction filing pursuant to section 4 of the NGA

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<sup>5</sup> See Tallgrass' July 12, 2019 response to Staff Data Request No. 2.

<sup>6</sup> *Tallgrass Interstate Gas Transmission, LLC*, 157 FERC ¶ 61,082 (2016).

<sup>7</sup> See RP16-137 Settlement, Explanatory Statement, Article II, at 6.

<sup>8</sup> Order No. 849, 164 FERC ¶ 61,031.

<sup>9</sup> *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, Revised Policy Statement, 162 FERC ¶ 61,227, *order on reh'g*, 164 FERC ¶ 61,030 (2018).

<sup>10</sup> *SFPP, L.P.*, Opinion No. 511-C, 162 FERC ¶ 61,228, at P 9 (2018).

<sup>11</sup> *United Airlines, Inc. v. FERC*, 827 F.3d 122 (D.C. Cir. 2016). For purposes of this order, the Revised Policy Statement, *United Airlines, Inc.*, and Opinion No. 511-C will collectively be referred to as "*United Airlines Issuances*."

(Option 1); (2) a commitment to file a general NGA section 4 rate case or prepackaged settlement in the near future (Option 2); (3) an explanation why no rate change is needed (Option 3); and (4) no action (other than filing a report) (Option 4).

4. On December 6, 2018, Tallgrass submitted its FERC Form No. 501-G in Docket No. RP19-423-000 consistent with the reporting requirements of Order No. 849. In its FERC Form No. 501-G, Tallgrass stated that it is not a separate income taxpaying entity. Therefore, its FERC Form No. 501-G eliminated both its tax allowance and its Accumulated Deferred Income Taxes (ADIT) consistent with the *United Airlines* Issuances. The FERC Form No. 501-G shows an indicated cost-of-service reduction of 10.2 percent. The FERC Form No. 501-G also shows that Tallgrass' Total Estimated Return on Equity (ROE) would be 17.7 percent<sup>12</sup> after adjustment to reflect the *United Airlines* Issuances.

5. Tallgrass elected to file under Option 3 (statement explaining why no adjustment is needed) and submitted an Addendum in support of its contention that no rate reduction is necessary. Tallgrass' Addendum contains various adjustments related to a corporate restructuring. Among other things, Tallgrass stated that, as a result of the corporate restructuring, it is indirectly owned by private equity owners and an entity that is taxed as a C-Corporation.<sup>13</sup> Tallgrass also included capital structure adjustments. As a result of these changes, the Addendum calculates a Total Estimated ROE of 13.1 percent. Tallgrass requested that the Commission recognize and honor the terms of the RP16-137 Settlement by not initiating an NGA section 5 proceeding in light of both the rate moratorium and the requirement for Tallgrass to file a new NGA section 4 rate case on May 1, 2019.

6. On December 18, 2018, the Kansas Corporation Commission (KCC) filed a protest and the Public Service Company of Colorado (PSCo) filed adverse comments regarding Tallgrass' FERC Form No. 501-G. KCC submits that Tallgrass' ROE of 17.7 percent shown in its FERC Form No. 501-G warrants the Commission's attention and that the 13.1 percent ROE in Tallgrass' Addendum is still too high. PSCo submits that Tallgrass may be over-recovering its cost-of-service, and that the RP16-137 Settlement rate moratorium would not have prohibited Tallgrass from reducing rates through a limited NGA section 4 filing prior to the expiration of the moratorium.

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<sup>12</sup> Tallgrass' FERC Form No. 501-G, page 3, line 26, column D.

<sup>13</sup> Tallgrass states that Tallgrass Energy, LP, an entity that is taxed as a C-Corporation, now owns 55.64 percent of Tallgrass' parent company, Tallgrass Equity, LLC, with the remaining 44.36 percent owned by private equity owners.

## II. Settlement

7. As described above, Article II of the RP16-137 Settlement required Tallgrass to file a new rate case on May 1, 2019, unless Tallgrass filed a qualifying pre-filing settlement. Tallgrass states that the Settlement filed on May 1, 2019, qualifies as such a pre-filing settlement because it: (1) has been filed on or before May 1, 2019; (2) reflects rates that will take effect no later than November 1, 2019; and (3) is supported or unopposed by the Settling/Non-Contesting Participants. Tallgrass asserts that the Settlement eliminates the need for Tallgrass to file a new NGA section 4 general rate case and obviates the need for any further action regarding Tallgrass' FERC Form No. 501-G filing.

8. Tallgrass states that the Settlement is the product of several months of extensive work by Tallgrass and the Settling/Non-Contesting Participants following Tallgrass' filing of its FERC Form No. 501-G,<sup>14</sup> and that through the Settlement, they have successfully resolved the matters that may have been raised in a new NGA section 4 general rate case or in Tallgrass' FERC Form No. 501-G proceeding.<sup>15</sup>

9. Article II of the Settlement sets forth provisions related to the rate moratorium effective June 1, 2019, through May 31, 2023, and the mandatory requirement that Tallgrass file a new NGA section 4 rate case on June 1, 2023. Article III of the Settlement requires all shippers with maximum recourse rate firm contracts with Tallgrass as of May 1, 2019, either to extend their contracts until at least May 31, 2023, or become a Contesting Party. Those shippers are identified in Appendix E of the Settlement. Article III also specifies that shippers that are parties to negotiated rate or discount rate contracts are not required to extend their negotiated rate or discount rate contracts.

10. Article IV of the Settlement sets forth the black box nature of the Settlement rates, including related parameters of depreciation, negative salvage, excess ADIT, various surcharge exceptions, permanent roll-in of certain facility costs,<sup>16</sup> non-electronic flow meter delivery points charges, and odorization practices. Article IV also provides that Tallgrass shall not implement a Cost Recovery Mechanism. Article V of the Settlement

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<sup>14</sup> See Docket No. RP19-423-001, Transmittal Letter at 2.

<sup>15</sup> *Id.* Explanatory Statement at 3.

<sup>16</sup> Approval of the Settlement authorizes the complete and permanent roll-in of the cost of the West Zone facilities, referred to as the Colorado Lateral, into Tallgrass' system rates, as more fully described in Docket No. CP07-430-000 (citing *Kinder Morgan Interstate Gas Transmission LLC*, 122 FERC ¶ 61,154 (2008)).

sets forth Settlement implementation features regarding Settlement Rates and Treatment of Contesting Parties.

11. Article V of the Settlement establishes implementation procedures upon Settlement approval. Among other things, Article V A.1.b provides that, in the event there are Contesting Parties as of the implementation date of the Settlement, the Contesting Parties will be charged the tariff rates in effect as of May 1, 2019 (Non-Settlement Rates).

12. Article VI of the Settlement establishes certain reservations between Tallgrass and the Settling/Non-Contesting Participants. Article VII sets forth the intended Settlement effective date of June 1, 2019, and provisions detailing the consequences of the issuance of an order approving the Settlement: (1) without modification or condition; or (2) subject to any modification or condition in a manner that materially and adversely affects Tallgrass or a Settling/Non-Contesting Participant. Article VII further provides that, if the Settlement is conditioned or modified as a result of Commission action on an application for rehearing or reconsideration, or by a court on appeal, Tallgrass and the Supporting/Non-Contesting Participants shall have the same rights as they respectively would have if the initial order had been conditioned or modified. Article VII, part D, states that:

the standard for review for any such modification proposed by [Tallgrass] or the Supporting/Non-Contesting Participants shall be the “public interest” standard for review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*,<sup>10</sup> *Federal Power Commission v. Sierra Pacific Power Co.*<sup>11</sup> and subsequent cases.<sup>12</sup> The standard of review for any modification to the Settlement requested by a non-settling party or initiated by the Commission acting *sua sponte* will be the ordinary just and reasonable standard.<sup>13</sup>

<sup>10</sup> *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

<sup>11</sup> *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

<sup>12</sup> See, e.g., *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 558 U.S. 165 (2010).

<sup>13</sup> See *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Washington*, 554 U.S. 527, 534-35 (2008).

13. Article VIII of the Settlement sets forth the request of Tallgrass and the Supporting/Non-Contesting Participants for Commission approval of the Settlement without further conditions.

### **III. Notice, Interventions and Responsive Pleadings**

14. Public notice of Tallgrass' FERC Form No. 501-G filing was issued on December 7, 2018. Public notice of Tallgrass' Settlement was issued on May 6, 2019. Interventions and protests on each filing were due as provided in section 154.210 of the Commission's regulations.<sup>17</sup> Pursuant to Rule 214, all timely motions to intervene and any unopposed motions to intervene filed out-of-time before the issuance date of this order are granted.<sup>18</sup> Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. As discussed above, PSCo submitted adverse comments and KCC submitted a protest to Tallgrass' FERC Form No. 501-G filing. On May 13, 2019, NorthWestern filed adverse comments in Tallgrass' Settlement proceeding (NorthWestern's Comments). On May 20, 2019, Tallgrass filed reply comments (Tallgrass' Reply Comments). On August 14, 2019, NorthWestern filed supplemental comments (NorthWestern's Supplemental Comments).

15. NorthWestern did not file a motion to intervene in response to the public notice of Tallgrass' FERC Form No. 501-G filing. However, on May 13, 2019, it filed a motion to intervene in response to the public notice of Tallgrass' Settlement filing in Docket No. RP19-423-001. In its reply comments, Tallgrass contends that the Commission should reject NorthWestern's motion to intervene as late, because that motion was not filed until well after the December 18, 2018 deadline for motions to intervene in Tallgrass' FERC Form No. 501-G proceeding in Docket No. RP19-423-000. However, the Commission's notice of Tallgrass' Settlement filing in Docket No. RP19-423-001 expressly permitted motions to intervene with respect to the Settlement filing on or before May 19, 2019. NorthWestern filed its motion to intervene by that deadline and demonstrated an interest in the outcome of the Settlement proceeding. Accordingly, we grant NorthWestern's timely motion to intervene in Docket No. RP19-423-001.

### **IV. NorthWestern's Comments**

16. NorthWestern asserts that it should be a Settling/Non-Contesting Participant in the Settlement. Based on Article III, Part C of the Settlement, which states "Shippers that are parties to negotiated rate or discount rate contracts are not required to extend their negotiated rate or discount rate contracts." NorthWestern asserts that its existing two contracts with Tallgrass are negotiated rate agreements, and thus are exempted from the

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<sup>17</sup> 18 C.F.R. § 154.210 (2019).

<sup>18</sup> *Id.* § 385.214.

Settlement's requirement to extend maximum recourse rate contracts. However, according to NorthWestern, Tallgrass claims that those existing contracts with NorthWestern are not negotiated contracts.

17. NorthWestern describes its two contracts for a total capacity of approximately 57,500 Dekatherms (Dth) per day of firm service with Tallgrass, which are identified in Appendix E of the Settlement, as follows: (1) Rate Schedule FT Agreement No. 553772 for 45,378 Dth per day, extending through June 30, 2020, which is incorporated into a "Firm Transportation Discount Rate Agreement" dated November 27, 2017, with 39,331 Dth per day, or 87 percent of the capacity, at negotiated rates that are lower than the maximum rates; and (2) Rate Schedule NNS, Agreement No. 3002, for 12,553 Dth per day, extending through June 30, 2020, which is incorporated into a "No Notice Negotiated Rate Agreement," dated May 18, 2009, with 9,600 Dth per day, or 76 percent of the capacity, at negotiated rates that are lower than the maximum rates.

18. NorthWestern asks the Commission to find that, because its two contracts with Tallgrass are "negotiated rate or discount rate contracts" that need not be extended by the terms of the Settlement, NorthWestern is a Settling/Non-Contesting Participant in the Settlement. In addition, NorthWestern disputes its having Contesting Party status based on the applicability of Article V of the Settlement, which defines a Contesting Party as "an entity listed in Appendix E hereto [that] does not execute a required extension of their maximum recourse rate firm contract as set forth in Article III."

19. NorthWestern also asserts that Tallgrass has not demonstrated that its maximum rates are just and reasonable, indicating that "the Commission must make an independent finding supported by substantial evidence on the record as a whole that the proposal will establish just and reasonable rates."<sup>19</sup> Noting that Tallgrass' existing maximum rates were established by a black box settlement in Docket No. RP16-137, which required Tallgrass to restate its rates and file an NGA section 4 rate case or a pre-filing settlement by May 1, 2019, NorthWestern asserts that the Settlement must make a showing supported by substantial evidence on the record that the proposal will establish just and reasonable rates. NorthWestern contends that Tallgrass failed to do this, as evidenced by applying a Non-Settlement Rate to NorthWestern that is 12.1 percent higher than the rate applied to Supporting/Non-Contesting Parties.

20. NorthWestern also states that Tallgrass' FERC Form 501-G, filed on December 6, 2018, shows that Tallgrass is substantially overearning under its existing rates and that, given its federal corporate income tax savings, Tallgrass should reduce its cost-of-service

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<sup>19</sup> NorthWestern's Comments at 5 (citing *Equitrans, L.P.*, 104 FERC ¶ 61,008, at P 27 (2003) (internal quotations omitted), *reh'g denied*, 106 FERC ¶ 61,013 (2004), *affirmed*, *Brooklyn Union Gas Co. v. FERC*, 409 F. 3d 404 (D.C. Cir. 2005)).

(and by extension its rates) by 10.2 percent, which the Settlement provides only for Supporting/Non-Contesting Participants. Furthermore, NorthWestern notes that the Commission explained that the recourse rate option “would prevent pipelines from exercising market power by assuring that the customer can fall back to cost-based, traditional service if the pipeline unilaterally demands excessive prices or withholds service.”<sup>20</sup> NorthWestern submits that: (1) Tallgrass should have a single recourse rate, that rate being reduced by 12.1 percent via the Settlement; (2) Tallgrass’ FERC Form 501-G proceeding cannot be terminated because Tallgrass has not demonstrated that the maximum rate it would apply to NorthWestern is just and reasonable; and (3) the Settlement does not “successfully resolve[] the matters that may have been raised in a new NGA Section 4 general rate case or in [Tallgrass’ FERC] Form 501-G proceeding,” as claimed by Tallgrass,<sup>21</sup> so long as the current maximum rate is perpetuated and applied to NorthWestern.

21. Finally, NorthWestern asserts that the Settlement unduly discriminates against shippers that do not need existing capacity commitments. NorthWestern states that on June 4, 2018, prior to the pre-filing settlement negotiations, it purchased 13,000 Dth per day from Tallgrass’ affiliate, Trailblazer (Contract No. 950547),<sup>22</sup> to replace the Tallgrass capacity that would expire in 2020. NorthWestern asserts that Contract No. 950547 makes the extension of NorthWestern’s Tallgrass capacity imprudent. As a utility company that serves South Dakota, Nebraska, and Montana, NorthWestern states it cannot extend its two contracts on Tallgrass as required under the Settlement because it does not need the capacity to meet its public service obligations in Nebraska. NorthWestern states that, pursuant to its obligations under Nebraska law, it cannot purchase interstate pipeline capacity its ratepayers do not need.

## V. Tallgrass’ Reply Comments

22. Tallgrass asserts NorthWestern’s comments are factually incorrect and should be rejected. In support, Tallgrass clarifies that NorthWestern: (1) is only required to extend its maximum recourse rate firm contracts, not its negotiated rate or discount rate

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<sup>20</sup> *Id.* at 7 (citing *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Statement of Policy and Request for Comments*, 74 FERC ¶ 61,076 at 61,240, *order on clarification*, 74 FERC ¶ 61,194, *reh’g denied*, 75 FERC ¶ 61,024 (1996)).

<sup>21</sup> *Id.* at 8 (citing Tallgrass Petition at 3).

<sup>22</sup> *Id.* (citing negotiated rate transportation service agreement, effective April 1, 2019, for a term of ten years, accepted via unpublished letter order issued in Docket No. RP19-1000-000 on April 17, 2019).



contracts, to qualify for the Settlement's benefits; and (2) cannot be deemed to be a Settling/Non-Contesting Participant without fulfilling the requirements of the Settlement. Tallgrass states that, in consideration for entering into the Settlement, the contract term of all maximum recourse rate firm contracts on Tallgrass as of May 1, 2019, shall be extended to at least May 31, 2023,<sup>23</sup> and that shippers that are parties to negotiated rate or discount rate contracts are not required to extend their negotiated rate or discount rate contracts.<sup>24</sup> Tallgrass further states that, to qualify as a Settling/Non-Contesting Participant, shippers must execute a contract extension by June 15, 2019, and if a shipper fails to do so, it shall be deemed to be a Contesting Party.<sup>25</sup>

23. Tallgrass states that NorthWestern's claim that Contract Nos. 553772 and 30002 are "negotiated rate or discount contracts,"<sup>26</sup> and are therefore exempt from the Settlement requirement regarding contract extensions, is misleading. Tallgrass asserts that NorthWestern appended only a select portion of Contract Nos. 553772 and 30002 to its comments, and failed to include the portions of those agreements under which it has contracted for capacity at Tallgrass' maximum recourse rate. Tallgrass clarifies that, to be included as a Settling/Non-Contesting Participant in the Settlement, NorthWestern is only required to extend those portions of its contracts at Tallgrass' maximum recourse rate and not, as NorthWestern claims, the entire quantity specified in the agreements. Tallgrass specifies: (1) Contract No. 553772 provides for a maximum daily quantity (MDQ) of 6,047 Dth per day at the maximum recourse rate and 39,331 Dth per day at a discounted rate; and (2) Contract No. 30002 provides for an MDQ of 2,553 Dth per day at the maximum recourse rate and 9,600 Dth per day at a negotiated rate. Tallgrass notes that Appendix E of the Settlement makes it clear that NorthWestern is only required to extend these small portions of capacity at the maximum recourse rate to be a Supporting/Non-Contesting Party under the Settlement.

24. Tallgrass states that the Settlement came about as a result of extensive negotiations between itself and shippers over the course of several months and, specifically, that the Settlement provides for: (1) immediate rate relief and rate certainty with a 12.1 percent reduction in recourse rates for all Supporting/Non-Contesting Participants effective June 1, 2019; (2) contract extensions for the maximum recourse rate firm contracts of the Settling/Non-Contesting Participants through at least May 31, 2023; (3) establishment of a rate moratorium through May 31, 2023; and (4) a requirement that Tallgrass file a new NGA section 4 general rate case on June 1, 2023, provided that Tallgrass has not pre-

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<sup>23</sup> Tallgrass' Reply Comments at 4 (citing Settlement Article III.A.).

<sup>24</sup> *Id.* (citing Settlement Article III.C.).

<sup>25</sup> *Id.* (citing Settlement at Articles III.A. and III.B.).

<sup>26</sup> *Id.* at 5 (citing NorthWestern's Comments at 4).

empted this mandatory filing requirement by filing on or before June 1, 2023 for approval of a new pre-filing settlement.

25. Tallgrass states that by NorthWestern's requesting the Commission to allow it to become a Supporting/Non-Contesting Participant without requiring it to extend its qualifying contracts, NorthWestern is attempting to avail itself of all of the benefits provided under the Settlement without providing value to Tallgrass in return. Tallgrass contends that granting such a request would completely undermine the mutual considerations included in the Settlement, and would be fundamentally unfair to Tallgrass and the Supporting/Non-Contesting Participants who have negotiated for certain benefits in exchange for certain concessions. Tallgrass asserts that the Settlement is an indivisible package that comprehensively addresses matters that may have been raised in the NGA section 4 general rate case that Tallgrass would have filed absent the Settlement, and that no particular issue can be severed from, or modification made to, the Settlement without disturbing the balance of interests represented therein. Tallgrass further asserts that the Commission should, accordingly, reject NorthWestern's attempt to obtain status as a Supporting/Non-Contesting Participants without fulfilling the requirements of the Settlement.

26. Tallgrass states that NorthWestern: (1) erroneously claims that the Settlement is "not in the public interest"<sup>27</sup> because Tallgrass' existing rates are no longer just and reasonable following the impact of the Tax Cuts and Jobs Act; and (2) argues that to approve the Settlement, the Commission must find that the rates applicable to NorthWestern as a Contesting Party will continue to be just and reasonable. Tallgrass asserts that NorthWestern misstates the proper standard of review and that because this is a pre-packaged settlement in lieu of a rate filing, the proper course of action is to approve the Settlement as providing rates that are "fair and reasonable and in the public interest," for those fulfilling its terms, and to sever NorthWestern.<sup>28</sup> Tallgrass notes that, under this course of action, NorthWestern will retain the ability to seek a determination of whether Tallgrass' rates are just and reasonable by filing a complaint under section 5 of the NGA.

## **VI. Data Request**

27. On July 2, 2019, Commission staff issued a data request, which sought to establish: (1) what, if any, efforts may have taken place between Tallgrass and NorthWestern to resolve their dispute; and (2) NorthWestern's current status for purposes

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<sup>27</sup> *Id.* at 8 (citing NorthWestern's Comments at 2, 5).

<sup>28</sup> *Id.* at 8 (citing *Tennessee Gas Pipeline Co.*, 143 FERC ¶ 61,196 at P 273 (severing sole party protesting pre-filed settlement and approving settlement as "fair and reasonable and in the public interest"); *Discovery Gas*, 122 FERC ¶ 61,099, at P 26 (2008); and *Trailblazer Pipeline Co.*, 106 FERC ¶ 61,034, at P 19 (2004)).

of the Settlement. On July 12, 2019, Tallgrass responded that NorthWestern did not execute and return the maximum recourse rate contract extensions as required by the Settlement by June 15, 2019, and that Tallgrass is no longer in any active discussions with NorthWestern to resolve the dispute. Tallgrass stated that NorthWestern's current status for purposes of the Settlement was therefore that of a Contesting Party.

## **VII. NorthWestern's Supplemental Comments**

28. NorthWestern states that negotiations referred to by Tallgrass in its response to the data request have culminated in NorthWestern's agreeing to extend its two contracts, but not precisely as prescribed in Tallgrass' Reply Comments, in which Tallgrass stated "Appendix E [of the Settlement] lists the MDQ associated with the maximum recourse rate contracts that must be extended, and specifically indicates that NorthWestern only must extend the 6,047 Dth per day of capacity under Contract No. 553772 and the 2,553 Dth per day of capacity under Contract No. 30002 through at least May 31, 2023 to enjoy the Settlement's significant benefits."<sup>29</sup> NorthWestern states that one week prior to filing its supplemental comments, Tallgrass produced executable contract extensions<sup>30</sup> for NorthWestern's Rate Schedule FT Agreement No. 553772 and Rate Schedule NNS Agreement No. 30002 through June 30, 2026, in two capacity tranches: (1) the first tranche, for 12,000 Dth per day ends June 30, 2021; and (2) the second tranche for 3,500 Dth per day ends June 30, 2026.

29. NorthWestern states that: (1) the agreed-to tranches do not match exactly the dictates of Tallgrass' Settlement but do match NorthWestern's system requirements; (2) it has met Tallgrass in the aggregate more than half way, "as far as it can go and be obedient to its retail rate regulator in Nebraska"; and (3) Tallgrass refuses to sell the quantities under these contract extensions at the proper Settlement rate and, instead, wants to charge the higher existing maximum rate. NorthWestern asserts that: (1) Tallgrass is trying to collect excess monopoly rents by compelling a customer to purchase more service than it needs under a settlement; (2) even though the disputed quantities are small, purchasing them for no purpose risks the cost of that capacity being disallowed by state regulators; and (3) the real value of the Settlement to Tallgrass is to remove its obligation to file a new rate case and to obviate the need for Commission action on its FERC Form No. 501-G filing that demonstrated excessive rates.

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<sup>29</sup> *Id.* at 6.

<sup>30</sup> NorthWestern asserts that, as evidenced by its receipt last week of executable contract amendments/extensions produced by Tallgrass, Tallgrass' July 12, 2019 response to the data request was in error by indicating it "...was no longer in any active discussions with NorthWestern."

NorthWestern states that it will extend its contracts but that it cannot abide by the discriminatory requirement to purchase capacity that it does not need.

30. NorthWestern reiterates that Tallgrass' existing rates are no longer just and reasonable, as shown in Tallgrass' FERC Form No. 501-G filing, and states that: (1) acceptance of the Settlement without modification would require NorthWestern to pay rates that are 12.1 percent higher than the rates charged to the non-contesting parties; (2) the Settlement proposal to treat two groups of shippers differently is unduly discriminatory; (3) there is no cost basis to support the discrimination as is usually the case;<sup>31</sup> and (4) Tallgrass should not be allowed to charge two sets of maximum rates simultaneously.

31. NorthWestern, acknowledging Tallgrass' observation that NorthWestern is only 3.5 percent of the total contracted maximum rate capacity on Tallgrass,<sup>32</sup> states that the Supporting/Non-Contesting Participants representing 96.5 percent of the total contracted maximum rate firm capacity presumably agreed to Article III of the Settlement because those customers needed the capacity. NorthWestern asserts that Article III is a type of "cram down" provision that the Commission frowns upon,<sup>33</sup> and that, if the Commission accepts Article III of the Settlement as filed, NorthWestern will pay a 12 percent premium on its maximum rate contracts because it declined to purchase capacity that it did not need. Further, NorthWestern claims it is not similarly situated to the other maximum rate shippers because it alone does not require the capacity that Article III of the Settlement attempts to force it to purchase. NorthWestern contends that, rather than it being severed from the Settlement, Article III of the Settlement should be found contrary to the public interest and Tallgrass should be compelled to offer a single set of maximum rates to all shippers at the Settlement rate levels.

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<sup>31</sup> NorthWestern's Supplemental Comments at 4 (citing Opinion No. 507-A, *Transcontinental Gas Pipe Line Corp.*, 139 FERC ¶ 61,002 (2012)) (FERC has a policy of permitting rate differentials between "foundation" shippers who commit to purchase capacity on a new project before it is built and shippers that sign up for service later).

<sup>32</sup> See Tallgrass' Reply Comments at 4, n.11.

<sup>33</sup> NorthWestern's Supplemental Comments at 5 (citing *ANR Pipeline Co.*, 59 FERC ¶ 61,347, at 62,260 (1992)).

## VIII. Discussion

32. The Commission may approve a contested settlement under any one of the four approaches for assessing contested settlements discussed in *Trailblazer*.<sup>34</sup> The four approaches are the following: (1) render a binding merits decision on each contested issue if there is an adequate record on the case (i.e., *Trailblazer I*); (2) approve the settlement over the objections of the contesting party if the Commission finds that the overall settlement as a package is just and reasonable (i.e., *Trailblazer II*); (3) approve the contested settlement over the contesting party's objections if it is found that the contesting party's interests are sufficiently attenuated and that the settlement can be found to be fair and reasonable (i.e., *Trailblazer III*); and (4) approve the settlement as to the consenting and unopposed parties, while severing the contesting parties to allow them to litigate the issues raised (i.e., *Trailblazer IV*).

33. We find that the Settlement cannot be approved under the first three *Trailblazer* approaches. The record does not contain substantial evidence that would permit the Commission to make a merits decision as to the justness and reasonableness of the Settlement under *Trailblazer I*. We also cannot find that the overall Settlement as a package is just and reasonable under *Trailblazer II*, because it is conceivable, though not certain, that NorthWestern might find itself in a better position if it litigates the issues and prevails on all counts.<sup>35</sup> Finally, we cannot find that its interests are so attenuated as to permit approval of the Settlement under *Trailblazer III*, because NorthWestern is a customer of Tallgrass.

34. Under the *Trailblazer IV* approach, however, we may approve a contested settlement by severing the contesting party, which is appropriate where the benefits of the settlement support finding that the settlement is fair, reasonable, and in the public interest as to the Supporting/Non-Contesting Participants, and where severing a contesting party, and permitting it to litigate the issues set for hearing, will protect its interests. Based on our examination of the Settlement and the comments on the Settlement it appears that the Settlement provides benefits to Settling/Non-Contesting Participants, including rate relief in the form of a 12.1 percent reduction in some recourse rates, effective June 1, 2019. However, NorthWestern's Supplemental Comments indicate that Tallgrass and NorthWestern recently have made progress toward resolving their dispute, such that severing NorthWestern under the *Trailblazer IV* approach appears premature at this time.

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<sup>34</sup> *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,342-45 (1998).

<sup>35</sup> *Id.* at 62,342-3. *Great Lakes Gas Transmission Limited Partnership*, 153 FERC ¶ 61,053, at P 58 (2015).

35. We therefore direct the Chief Administrative Law Judge to appoint a settlement judge, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure,<sup>36</sup> to give the parties an opportunity to resolve the remaining issues in this proceeding through settlement. If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.<sup>37</sup> The focus of the settlement discussions should be on achieving a unanimous settlement. If, however, notwithstanding good faith settlement discussions, the parties are unable to reach agreement, the settlement judge is directed to require the parties to identify the issues that must be resolved by the Commission.

36. Tallgrass has requested expedited action to approve the Settlement, indicating it would reduce any period of uncertainty in the marketplace regarding the rate and other issues that are the subject of the Settlement. Because Tallgrass has requested expedited action on its Settlement offer, the settlement judge is directed to report to the Chief Judge and the Commission within thirty (30) days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or report to the Commission that the participants have been unable to achieve a unanimous settlement.

The Commission orders:

(A) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2019), the Chief Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(B) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the

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<sup>36</sup> 18 C.F.R. § 385.603 (2019).

<sup>37</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

parties with additional time to continue their settlement discussions, if appropriate, or inform the Commission that the participants have been unable to achieve a unanimous settlement. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.