

167 FERC ¶ 61,034
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

April 18, 2019

In Reply Refer To:
Duke Energy Carolinas, LLC
Duke Energy Progress, LLC
Docket No. ER17-1357-002

Ms. Heather M. Horne
Duke Energy Corporation
325 7th Street, NW
Suite 300
Washington, DC 20004

Attn: Heather M. Horne, Esq.
Associate General Counsel

Dear Ms. Horne:

1. On December 13, 2018, in the above-referenced proceeding, Duke Energy Carolinas, LLC, on behalf of itself and Duke Energy Progress, LLC (collectively, Duke), filed a Settlement Agreement among Duke and the Fayetteville Public Works Commission, the North Carolina Electric Membership Corporation, the North Carolina Eastern Municipal Power Agency, the North Carolina Municipal Power Agency Number 1, and the Piedmont Municipal Power Agency (collectively, the Settling Parties).
2. On January 2, 2019, Commission Trial Staff filed comments in support of the Settlement Agreement. No other comments were filed. On March 7, 2019, the Settlement Judge certified the Settlement Agreement to the Commission as an uncontested settlement.¹
3. The Settlement Agreement addresses proposed amendments to Duke's Joint Open Access Transmission Tariff.

¹ *Duke Energy Carolinas, LLC*, 166 FERC ¶ 63,024 (2019).

4. Article VI, Section 6.1 of the Settlement Agreement articulates the standard of review. It states that

[t]he standard of review for any modifications to the Settlement Agreement or to the tariff changes agreed to as part of this Settlement Agreement requested by a non-Party or initiated by the Commission acting *sua sponte* will be the most stringent standard permissible under applicable law. See *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). This more stringent standard of review shall not apply to filings made after the Real Power Loss Factor Moratorium Period ends. Such filings made after the Real Power Loss Factor Moratorium Period ends shall be subject to review under the just and reasonable standard set forth in FPA Sections 205 and 206.

5. Because the Settlement appears to provide that the standard of review applicable to modifications to the Settlement Agreement proposed by third parties and the Commission acting *sua sponte* is to be “the most stringent standard permissible under applicable law” until the Real Power Loss Factor Moratorium Period ends, the Commission clarifies the framework that would apply if the Commission were required to determine the standard of review applicable during this period in a later challenge to the Settlement Agreement by a third party or by the Commission acting *sua sponte*.

6. The *Mobile-Sierra* “public interest” presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In order to justify a *Mobile-Sierra* presumption, the agreement must encompass one of the two following factors: (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.² In *New England Power Generators Association v.*

² *Panhandle Eastern Pipe Line Co., LP*, 143 FERC ¶ 61,041, at P 84 (2013); *Entergy Arkansas, Inc.*, 143 FERC ¶ 61,299, at P 92 (2013).

FERC,³ 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. The Settlement Agreement resolves all issues in dispute in these proceedings.⁴ The Settlement Agreement appears to be fair and reasonable and in the public interest, and is therefore approved. The Commission’s approval of this Settlement Agreement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings.

8. Duke is directed to make a compliance filing with revised tariff records in eTariff format,⁵ within 30 days of this order, to reflect the Commission’s action in this order.

9. This letter order terminates Docket Nos. ER17-1357-001 and ER17-1357-002.

By direction of the Commission. Commissioner McNamee is not participating.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³ *New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

⁴ *See Duke Energy Carolinas, LLC*, 160 FERC ¶ 61,122 (2017).

⁵ *See Electronic Tariff Filings*, Order No. 714, 124 FERC ¶ 61,270 (2008).