

135 FERC ¶ 61,152
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Petal Gas Storage, L.L.C.

Docket No. CP01-69-009

ORDER APPROVING, AS MODIFIED, UNCONTESTED SETTLEMENT

(Issued May 19, 2011)

1. In this order, the Commission approves, as modified, an uncontested settlement of issues concerning the initial recourse rates of Petal Gas Storage, L.L.C. (Petal) for its firm and interruptible transportation services. Those issues were remanded to the Commission by the United States Court of Appeals for the District of Columbia Circuit in *Petal Gas Storage, L.L.C. v. FERC*.¹ According to Petal, the proposed settlement resolves all issues in this remanded proceeding. For the reasons expressed below, the Commission approves the Settlement, as modified, as fair and reasonable and in the public interest. This approval is subject to Petal modifying the Settlement to remove any provision that purports to bind the Commission or non-settling third parties to the more rigorous application of the just and reasonable standard of review for future challenges to the Settlement. That more rigorous application is often characterized as the *Mobile-Sierra* “public interest” standard.²

Background

2. On January 23, 2001, Petal, an existing natural gas storage company, filed an application pursuant to section 7(c) of the Natural Gas Act (NGA) for authority to construct and operate 59 miles of pipeline and compression and appurtenant facilities in

¹ 496 F.3d 695 (D.C. Cir. 2007).

² *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*). As the Supreme Court has found, the NGA’s “just and reasonable” standard is the only statutory standard of review. *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Washington*, 554 U.S. 527, 545 (2008) (*Morgan Stanley*).

Mississippi. While the Commission approved Petal's request for a certificate, it rejected Petal's proposal to include a 15 percent return on equity (ROE) in its initial rates. Instead, the Commission required Petal to use a 12.48 percent ROE. Petal appealed the Commission's rulings on the ROE issue. The D.C. Circuit vacated and remanded the Commission's orders, holding that the Commission had not justified the proxy group used to determine Petal's ROE or its decision to place Petal at the median of the proxy group range of returns.

3. On remand, the Commission determined that, due to the passage of time and changed circumstances on Petal, the parties should be given an opportunity to settle the issues pending before the Commission. Therefore, on April 18, 2008, the Commission issued an "Order on Remand Establishing Settlement Procedures," referring the outstanding issues in this matter to a settlement judge.³

4. On August 21, 2008, Petal filed, pursuant to Rule 602 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602 (2008), an offer of settlement in the form of a Stipulation and Agreement (Settlement), which resolves the issues in this remanded proceeding. As discussed more fully herein, the Commission approves the Settlement as fair and reasonable and in the public interest.

5. According to the Settlement, Petal will be authorized to place into effect a \$0.003 per dekatherm settlement commodity surcharge for firm and interruptible transportation services provided under Rate Schedules FTS and ITS (Settlement Surcharge). The Settlement Surcharge will be deemed effective July 1, 2002. The Settlement represents that the parties agree to the Settlement Surcharge on a "black box" basis. Petal will be entitled to recover the Settlement Surcharge for the period from July 1, 2002, until the date the *pro forma* tariff sheets are deemed effective (Prior Period). Petal will be authorized to recover Prior Period Settlement Surcharges to the extent it is allowed under the applicable service agreement(s) with its shippers, but only for the commodity volumes actually transported to the applicable shippers in the Prior Period. Petal will be allowed to recover Prior Period Settlement Surcharges through a direct bill method. The Settlement will become effective on the first day of the month following the month in which the Commission: 1) issues a final order (i.e., not subject to rehearing) approving the Settlement without any conditions or modifications unacceptable to Petal or any other "Settling Participants"; and 2) waives Petal's compliance with Commission regulations, to the extent that such waiver is necessary for compliance with the Settlement.

6. Section 2.2 of the Settlement provides that the Settlement and the volumetric surcharge implemented pursuant to the settlement "shall remain in effect until new rates are placed into effect by Petal as a result of the outcome of (a) a general rate change

³ *Petal Gas Storage, L.L.C.*, 123 FERC ¶ 61,059, at P 12 (2008).

application submitted by Petal pursuant to section 4 of the NGA; or (b) a proceeding pursuant to section 5 of the NGA that is initiated by the Commission acting *sua sponte* or by any party.” The Settlement also includes a provision that would impose the *Mobile-Sierra* “public interest” standard of review⁴ on future changes or challenges to the Settlement not only by the settling participants but also by the Commission acting *sua sponte*:

To the extent the Commission considers any change to any then-effective provision(s) of the Settlement, the Settling Participants agree that the standard for review of any such change proposed by a Settling Participant, or by the Commission acting *sua sponte*, shall be the ‘public interest’ standard for review. The standard for review of any change proposed by any other entity shall be the “just and reasonable” standard of the Natural Gas Act.”⁵

7. Pursuant to an August 22, 2008 Order of the Chief Judge, the comment periods specified in Rule 602(f)(2) of the Commission’s Rules of Practice and Procedure,⁶ were shortened such that initial comments on the Settlement were due by September 2, 2008, and reply comments were due by September 5, 2008. Commission Trial Staff filed initial comments supporting the Settlement on September 2, 2008. No other comments were filed. On September 11, 2008, the Settlement Judge certified the Settlement to the Commission as uncontested.⁷

Discussion

8. The Settlement is uncontested and resolves all issues in this proceeding. As discussed below, the Commission finds that the Settlement is fair and reasonable and in the public interest and, therefore, the Commission approves the Settlement pursuant to Rule 602(g), 18 C.F.R. § 385.602(g) (2010), subject to one modification.

9. As noted above, section 3.4 of the Settlement contains a provision that would impose the *Mobile-Sierra* “public interest” standard of review on any future changes to

⁴ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*) (collectively *Mobile-Sierra*).

⁵ Settlement section 3.4.

⁶ 18 C.F.R. § 385.602(f)(2) (2008).

⁷ *Petal Gas Storage, L.L.C.*, 124 FERC ¶ 63,019 (2008) (September 2008 Order).

the Settlement by the Commission acting on its own. That provision raises two issues: (1) how the provision affects the standard to be applied by the Commission in determining whether to approve the Settlement; and (2) whether the Commission should exercise its discretion to approve that provision of the Settlement. For the reasons discussed below, the Commission finds that, in determining whether to approve the Settlement, we should apply the same “fair and reasonable and in the public interest” standard we ordinarily use in acting on uncontested offers of settlement.⁸ In addition, the Commission finds that the Settlement’s *Mobile-Sierra* provision must be modified so as not to impose the public interest standard of review on future changes proposed by the Commission.

A. Initial Standard of Review

10. Under *Mobile-Sierra*, as interpreted by the Supreme Court in *Morgan Stanley*,⁹ the Commission must presume that rates set by contracts that are freely negotiated at arm’s-length between willing buyers and sellers meet the statutory “just and reasonable” standard of review. Recent court decisions have required the Commission to reexamine the issue of when and whether it should approve settlements that propose to impose the *Mobile-Sierra* public interest standard on future challenges to settlements. In *Me. Pub. Utils. Comm’n v. FERC*,¹⁰ the court remanded to the Commission an order approving a contested settlement agreement redesigning the New England market for installed electric generation capacity. That settlement imposed the *Mobile-Sierra* public interest presumption on certain future challenges to the auction results and transition payments. The D.C. Circuit found that applying the public interest standard to challenges by non-settling parties unlawfully deprived those parties of their rights under the Federal Power Act (FPA). The United States Supreme Court reversed the D.C. Circuit, finding that “the *Mobile-Sierra* standard applies to challenges initiated by third parties”¹¹ and thus the Commission must presume that “contract rates freely negotiated between sophisticated parties meet the just and reasonable standard.”¹² However, the Supreme Court remanded to the D.C. Circuit the question of whether the auction results and transition payments purportedly subject to the *Mobile-Sierra* clause are contract rates to which the Commission must apply the public interest presumption, and if not, whether

⁸ 18 C.F.R. § 385.602(g)(3) (2010).

⁹ *Morgan Stanley*, 554 U.S. at 530.

¹⁰ 520 F.3d 464 (D.C. Cir. 2008); 625 F.3d (D.C. Cir. 2010).

¹¹ *NRG Power Mktg v. Me. Pub. Utils. Comm’n*, 130 S.Ct. 693, 700 (2010) (*NRG*) (quoting *Morgan Stanley*, 554 U.S. at 546).

¹² *Id.* at 699.

the Commission has the discretion to approve a provision that applies that standard to future challenges to those results and payments.¹³ The D.C. Circuit then remanded the case to the Commission to explain, among other things, “why, if the auction rates are not contract rates, they are entitled to *Mobile-Sierra* treatment.”¹⁴

11. In its March 2011 Order on remand in *Devon Power*,¹⁵ the Commission held that the settlement rates in that case are not “contract rates” that, under *Mobile-Sierra*, require a presumption that the rates are statutorily just and reasonable. The Commission explained that the rates set by the capacity auctions represent tariff, not contract, rates, which apply to all suppliers and purchasers in the ISO-New England market, not just the settling parties. However, the Commission also concluded that it has the discretion to consider and decide whether future challenges to those rates must nevertheless overcome the more rigorous public interest standard of review.¹⁶ The Commission determined, for various reasons that based on the circumstances of the *Devon Power* proceeding, it was appropriate to exercise that discretion and approve a public interest standard binding not only on the settling parties but also the Commission and third parties.¹⁷

12. We find that Petal’s offer of settlement in this case is not a contract to which the *Mobile-Sierra* presumption applies. Petal’s *pro forma* service agreements include provisions incorporating into each shipper’s service agreement the rates, terms and conditions of the applicable Rate Schedule and the General Terms and Conditions of Petal’s tariff.¹⁸ Thus, the rates agreed to in the Settlement are tariff rates that will be generally applicable to all present and future customers of Petal paying its maximum recourse rates, not just to the Settling Participants.¹⁹

¹³ *Id.* at 701.

¹⁴ *Id.*

¹⁵ *Devon Power LLC*, 134 FERC ¶ 61,208 (2011) (*Devon Power*).

¹⁶ *Id.* P 2.

¹⁷ *Id.* P 18-23.

¹⁸ *See, e.g.*, Article VIII of Petal’s *pro forma* service agreement for firm transportation service under Rate Schedule FTS.

¹⁹ *See High Island Offshore System, LLC*, 135 FERC ¶ 61,105, at P 19 (2011) (*HIOS*).

13. Accordingly, in considering whether to approve the uncontested offer of settlement before us, the *Mobile-Sierra* public interest presumption does not apply. Rather, in determining whether to approve Petal's offer of settlement, including its *Mobile-Sierra* provision, we apply the standard set forth in section 602(g)(3) of our settlement rules for approval of uncontested offers of settlement: "An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest." In this regard, we are required to make an independent judgment as to whether an uncontested settlement satisfies that standard.²⁰

14. In these circumstances, the inclusion in Petal's uncontested settlement of a *Mobile-Sierra* public interest standard does not alter the standard we apply under section 385.602(g)(3) of our regulations in order to determine whether to approve an uncontested settlement. Nor does such a provision alter our responsibility to make an independent judgment as to whether the uncontested settlement satisfies the "fair and reasonable and in the public interest" standard. Therefore, we now turn to a consideration of whether the instant settlement satisfies that standard.

B. Whether to Approve the Settlement, including Its *Mobile Sierra* Provision

15. In this case, Petal and the active parties in this proceeding engaged in extensive negotiations as part of settlement judge procedures to address the concerns of all participants in a fair and equitable manner. The Settlement, which resolves all the remanded issues, represents the culmination of those efforts. Therefore, apart from the Settlement's *Mobile-Sierra* provision discussed below, the Commission finds the Settlement to be fair and reasonable and in the public interest.

16. Consistent with *Devon Power*, the Commission has the discretion to consider and decide whether provisions in uncontested settlements requiring future challenges to a settlement or its rates to overcome the more rigorous "public interest" standard of review are "fair and reasonable and in the public interest."²¹ We find here that inclusion of such a provision in the Settlement is not fair and reasonable and in the public interest insofar as it would purport to bind the Commission acting *sua sponte* to the public interest standard of review for future changes or challenges to the Settlement. The circumstances of the Petal Settlement do not reflect the same type of interests as the settlement approved in *Devon Power* so as to warrant binding the Commission to the higher standard.

²⁰ *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d at 701.

²¹ *Devon Power*, 134 FERC ¶ 61,208 at P 9.

17. We find that the circumstances surrounding Petal's Settlement do not rise to the extraordinary level of those present in *Devon Power*. As we stated in *Devon Power*, if the Commission believes in the context of reviewing settlements that do not constitute "contract rates" that "it is unjust and unreasonable to lock in a more stringent application of the just and reasonable standard, the Commission has the discretion not to impose that more stringent standard of review."²² We exercise that discretion here. There were specific reasons that the Commission allowed the more stringent standard in *Devon Power* that are not present here. Most significantly, in the *Devon Power* situation the issue of price certainty was critical to the Forward Capacity Market's goal of attracting and retaining investors in order to ensure reliability. We have not been made aware of any similarly-compelling concerns in the instant proceeding. The instant Settlement is not intended to correct serious deficiencies in the natural gas market but simply to resolve issues concerning generally applicable pipeline rates. In addition, in this case, unlike *Devon Power*, there are no demonstrable market forces that contributed to the derivation of the Settlement surcharge.

18. Accordingly, absent compelling circumstances, such as we found to exist in *Devon Power*, the Commission will not approve the application of the *Mobile-Sierra* public interest standard of review proposed in section 3.4 of Petal's Settlement to the Commission. While we find it unjust and unreasonable to impose the stricter standard on the Commission, the parties to the Settlement are free to impose such a standard on themselves.

19. While we are requiring the Settlement's *Mobile-Sierra* provision be modified as discussed above, the Commission continues to recognize the role of settlements in providing rate certainty. The Commission has discretion whether to initiate section 5 proceedings, either on its own motion or at the request of others.²³ In deciding whether to exercise that discretion with respect to the instant Settlement or any other settlement, the Commission would take into account the parties' interest in maintaining the Settlement.

20. Lastly, because Petal did not file the Settlement in the eTariff format required by Order No. 714, Petal is required to make a compliance filing through eTariff to ensure

²² *Devon Power*, P 24; see also *HIOS*, 135 FERC ¶ 61,105 at P 24.

²³ *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), *affirmed*, *Ocean States Power v. FERC*, 1996 U.S. App. LEXIS 11096 at *18.

that its electronic tariff data base reflects the Commission's action in this order.²⁴ In its compliance filing, Petal should request in its transmittal letter that the Settlement terms and conditions become effective in accordance with the terms of the Settlement.

The Commission orders:

(A) The settlement filed on April 21, 2008 is approved, subject to Petal 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.

(B) Docket No. CP01-69-009 is terminated.

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

(S E A L)

Kimberly D. Bose,
Secretary.

²⁴ See *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 96 (2008).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Petal Gas Storage, LLC

Docket No. CP01-69-009

(Issued May 19, 2011)

NORRIS, Commissioner, *concurring*:

I concur in the outcome of this order, which conditionally approves an uncontested settlement of issues concerning the initial recourse rates of Petal Gas Storage, LLC (Petal) for its firm and interruptible transportation services, subject to Petal revising the Settlement so as not to impose the “public interest” standard of review on future changes proposed by the Commission and non-settling third parties. I agree that the recourse rates agreed to in the Settlement are generally applicable tariff provisions, 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 rates in the Settlement.³

For these reasons, I respectfully concur.

John R. Norris, Commissioner

¹ *Petal Gas Storage, LLC*, 135 FERC ¶ 61,152, at P 12 (2011).

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

³ *Petal*, 135 FERC ¶ 61,152, at P 16-18. 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 section 5 proceedings, the Commission “would take into account the parties’ interest in maintaining the Settlement.” *Id.* P 19; *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).