

135 FERC ¶ 61,153
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.

Southern LNG Company, LLC

Docket No. RP10-829-000

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 proposed tariff gas quality and interchangeability standards for Southern LNG Company, LLC (Southern LNG) for its firm and interruptible transportation services. According to Southern LNG, the settlement resolves all outstanding issues in the instant proceeding.¹ 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 Southern LNG 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 statutory “just and reasonable” standard of review for future changes to the Settlement. That more rigorous application is often characterized as the *Mobile-Sierra* “public interest” standard.²

Background

2. On June 7, 2010, Southern LNG Company, LLC (Southern LNG) filed a proposed tariff sheet³ pursuant to section 4 of the Natural Gas Act (NGA) to revise the gas quality

¹ *Southern LNG Company LLC*, Offer of Settlement dated December 20, 2010, Docket No. RP10-829-000.

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*).

³ Southern LNG Company, LLC, FERC Gas Tariff, Original Volume No. 1, First

(continued)

and interchangeability standards in section 3 of the General Terms and Conditions (GT&C) of its tariff. Southern LNG proposed an effective date of August 1, 2010. On July 28, 2010, the Commission accepted and suspended the proposed tariff sheet, to be effective January 1, 2011, or an earlier date set by a subsequent Commission order, subject to conditions and the outcome of a technical conference.⁴ Commission Staff convened a technical conference on September 14, 2010 to address issues raised by Southern LNG's filing. At the conclusion of the technical conference, the parties agreed to develop and submit to the Commission a list of issues requiring Commission resolution. Southern LNG submitted to the Commission the list of contested issues on October 13, 2010.

3. On December 20, 2010, Southern LNG submitted a Stipulation and Agreement of Settlement (Settlement) pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.⁵ The Commission granted Southern LNG's request for a shortened comment period, making initial comments due on December 23, 2010 and reply comments due on December 27, 2010.

4. The main provisions of the Settlement may be summarized as follows:

5. Article I states that the Settlement resolves all issues between Consenting Parties involving the matters raised in Docket No. RP10-829-000. The Article also states that, upon the effective date of the Settlement, as defined in Article V (Settlement Effective Date), the proceeding is terminated with prejudice.

6. Article II states that the Consenting Parties agree to support or not oppose the implementation of the revised section 3 of Southern LNG's GT&C set forth in Exhibit 2 to the Settlement that, among other things, establishes: (1) a maximum Wobbe number limit of 1396; (2) a maximum gross heating value (GHV) limit of 1100 Btu/scf, subject to the limitation that the Wobbe number multiplied by 1.667, plus the GHV, of any LNG in its gaseous state after taking into account all gaseous constituents including any nitrogen to be delivered into facilities downstream of the Elba Island Terminal, shall not be greater than 3412 (Formula); (3) a maximum nitrogen limit of 2.0 percent; (4) a carbon dioxide limit of 1.0 percent; and (5) an oxygen limit of 0.2 percent (Agreed Specifications). Article II also states that no later than 20 days following the Settlement Effective Date,

Revised Sheet No. 42.

⁴ *Southern LNG Company, L.L.C.*, 132 FERC ¶ 61,076 (2010) (July 28, 2010 Order).

⁵ On December 20, 2010, Southern LNG filed two errata to the Settlement.

Southern LNG shall file with the Commission to modify its tariff to include the tariff language set forth in Exhibit 2 and shall request that the filing become effective on the first day of the first month following the expiration of 30 days from the date of the tariff filing. Article II further provides that no Consenting Party shall propose or support any proposal to remove the Formula until South Carolina Electric & Gas Company (SCE&G) has provided written notice that the two Conditions Precedent set forth in Article III have been satisfied.

7. Article III sets forth the Conditions Precedent that must be satisfied for the Formula to become inapplicable and explains and clarifies the “Validation of Gas Quality Limits” protocol (Exhibit 4 to the Settlement) that describes the two areas of assessment in which SCE&G must engage, at its sole expense and as soon as reasonably practicable after the Settlement Effective Date, to determine whether the Conditions Precedent are satisfied. The Article states that the two areas of assessment are: (1) Appliance Performance Analysis, including laboratory testing of 15 appliances from SCE&G’s local distribution system to measure the impacts to those appliances after operating using a variety of gas compositions specified in the Validation of Gas Quality Limits protocol, and (2) System Monitoring, to identify safety-related or appliance performance incidents on its system when Triggering Gas (i.e., gas within a designated composition range where $3397 \leq \text{Wobbe} \times 1.677 + \text{GHV} \leq 3412$) is recorded by the Aiken Chromatograph on Southern Natural Gas Company’s (SNG) pipeline system.

8. Article III states that as of the Settlement Effective Date, SCE&G shall be prepared to engage in System Monitoring at any time that the Aiken Chromatograph records Triggering Gas, and sets forth the procedures that SCE&G will follow to determine whether the second condition precedent is satisfied.

9. Article IV sets forth the obligation of Southern LNG to provide SCE&G with data from SNG’s Aiken Chromatograph and to provide notice when Triggering Gas is first recorded on a Gas Day by the Aiken Chromatograph and notice again when Triggering Gas ceases to be recorded. Article IV requires that Southern LNG make reasonable efforts to notify SCE&G when an LNG shipment is received or the Elba Island Terminal is expected to send out gas that will result in Triggering Gas being recorded by the Aiken Chromatograph.

10. Article V establishes the date on which the Settlement will become effective and provides that the Settlement shall terminate 15 years after the Settlement Effective Date. The Article also provides that Southern LNG may file to remove the Formula from its tariff after the two Conditions Precedent described in Article III are satisfied.

11. Article VI sets forth the effect of the Settlement. The Article states that no Consenting Party will be deemed to have approved any principle relating to gas quality or interchangeability underlying any of the gas quality specifications established by the Settlement, and the Settlement has no precedential value. The Article states that the

standard of review for modifications to the Settlement is the *Mobile-Sierra* “public interest” standard of review and shall apply whether the change is proposed by a Consenting Party, a non-party, or by the Commission acting *sua sponte*. Article VI also provides that unless the Settlement becomes effective, all discussions regarding the Settlement are privileged and inadmissible in evidence, and that no Consenting Party waives any claim or right with respect to matters not expressly provided for in the Settlement.

12. Article VII sets forth representations and warranties of the Consenting Parties.

13. Article VIII sets forth miscellaneous provisions of the Settlement.

14. Initial comments to the Settlement were filed by Southern LNG, South Carolina Electric & Gas Company (SCE&G), Shell NA LNG LLC (Shell), and Alabama Municipal Distributors Group, Austell Gas System, Municipal Gas Authority of Georgia, and the Southeast Alabama Gas District. These comments either supported or did not oppose the Settlement. No reply comments were filed.

Discussion

15. 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.

16. As noted above, Section 6.2 of the Settlement contains a provision that would impose the *Mobile-Sierra* “public interest” standard of review on any future changes to the Settlement, regardless of who proposed the change. 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.⁶ 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 and non-settling parties.

⁶ 18 C.F.R. § 385.602(g)(3) (2010).

A. Initial Standard of Review of Settlement

17. Under *Mobile-Sierra*, as interpreted by the Supreme Court in *Morgan Stanley*,⁷ 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*,⁸ 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"⁹ and thus the Commission must presume that "contract rates freely negotiated between sophisticated parties meet the just and reasonable standard."¹⁰ 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 the Commission has the discretion to approve a provision that applies that standard to future challenges to those results and payments.¹¹ 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."¹²

⁷ *Morgan Stanley*, 554 U.S. at 530.

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

⁹ *NRG Power Mktg v. Me. Pub. Utils. Comm'n*, 130 S.Ct. 693, 700 (2010) (*NRG*) (quoting *Morgan Stanley*, 554 U.S. at 546).

¹⁰ *Id.* at 699.

¹¹ *Id.* at 701.

¹² *Id.*

18. In its March 2011 Order on remand in *Devon Power*,¹³ 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.¹⁴ 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.¹⁵

19. We find that Southern LNG’s offer of settlement in this case is not a contract to which the *Mobile-Sierra* presumption applies. Southern LNG’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 GT&C of Southern LNG’s tariff. Thus, the revised gas quality and interchangeability standards in GT&C section 3 agreed to in the Settlement are tariff provisions that will be generally applicable to all present and future customers of Southern LNG, not just to the Settling Participants.¹⁶

20. 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 Southern LNG’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.¹⁷

¹³ *Devon Power LLC*, 134 FERC ¶ 61,208 (2011) (*Devon Power*).

¹⁴ *Id.* P 2.

¹⁵ *Id.* P 18-23.

¹⁶ See *High Island Offshore System, LLC*, 135 FERC ¶ 61,105 (2011) (*HIOS*) at P 19.

¹⁷ *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 701 (D.C. Cir. 2007).

21. In these circumstances, the inclusion in Southern LNG'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

22. In this case, the pipeline and the active participants in the proceeding engaged in extensive discussions and negotiations to address the concerns of all participants in a fair and mutually acceptable manner. The Settlement, which resolves all the complicated and intricate gas quality and interchangeability issues in this proceeding, represents the culmination of those efforts and the Commission finds that resolution fair and reasonable and in the public interest. 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.

23. 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."¹⁸ 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 and non-settling third parties to the public interest standard of review for future changes or challenges to the Settlement. The circumstances of the Southern LNG Settlement do not reflect the same type of interests as the settlement approved in *Devon Power* so as to warrant binding the Commission and non-settling third parties to the higher standard.

24. We find that the circumstances surrounding Southern LNG'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."¹⁹ We exercise that discretion here. There were specific reasons that the Commission allowed the more stringent standard in

¹⁸ *Devon Power*, 134 FERC ¶ 61,208 at P 9.

¹⁹ *Id.* P 24. See also *HIOS*, 135 FERC ¶ 61,105 at P 24.

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 natural gas quality and interchangeability tariff issues of general applicability. In addition, in this case, unlike *Devon Power*, there are no demonstrable market forces that contributed to the derivation of the Settlement provisions.

25. 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 6.2 of Southern LNG's Settlement to the Commission or non-settling third parties. While we find it unjust and unreasonable to impose the stricter standard on the Commission and on non-settling third parties, the parties to the Settlement are free to impose such a standard on themselves.

26. 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.²⁰ 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.

27. Because Southern LNG has made its baseline electronic tariff filing pursuant to Order No. 714, but did not file the settlement in the eTariff format required by Order No. 714, it is required to make a compliance filing through eTariff to ensure that its electronic tariff provisions reflect the Commission action in this order.²¹ In its compliance filing, Southern LNG should request in its transmittal letter that the settlement terms and conditions become effective January 1, 2011, consistent with the July 28 Order.

²⁰ *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.

²¹ *See Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 96 (2008).

The Commission orders:

(A) The settlement filed on December 20, 2010 is approved, subject to Southern LNG 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. RP10-829-000 is terminated.

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

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southern LNG Company, LLC

Docket No. RP10-829-000

(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 proposed gas quality and interchangeability standards in Southern LNG Company, LLC's (Southern LNG) tariff for firm and interruptible transportation services, subject to Southern LNG revising the Settlement so as not to impose the "public interest" standard of review on future changes proposed by the Commission and non-settling parties. I agree that the gas quality and interchangeability standards 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 *Southern LNG Company, LLC*, 135 FERC ¶ 61,153 at P 19-21 (2011).

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

³ *Southern LNG*, 135 FERC ¶ 61,153 at P 23-25. 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 26; *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).