

157 FERC ¶ 61,034  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, and Colette D. Honorable.

Empire Pipeline, Inc.

Docket No. RP16-300-000

ORDER CONDITIONALLY APPROVING  
UNCONTESTED SETTLEMENT SUBJECT TO MODIFICATION

(Issued October 20, 2016)

1. On January 21, 2016, the Commission instituted an investigation pursuant to section 5 of the Natural Gas Act (NGA) into the justness and reasonableness of the existing rates of Empire Pipeline, Inc. (Empire).<sup>1</sup> The January 21 Order also established hearing procedures related to the investigation and required Empire to file a cost and revenue study. Subsequently, Empire filed a settlement agreement (Settlement), which was certified as uncontested.<sup>2</sup> As discussed below, the Commission conditionally approves the Settlement, subject to Empire modifying the standard of review provision.

**I. Background**

2. On July 22, 2016, as amended on July 26, 2016,<sup>3</sup> pursuant to Rule 602 of the Commission's Rules of Practice and Procedure,<sup>4</sup> Empire filed the Settlement and several related documents,<sup>5</sup> purporting to resolve all issues arising out of this section 5 rate

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<sup>1</sup> *Empire Pipeline, Inc.*, 154 FERC ¶ 61,029 (2016) (January 21 Order).

<sup>2</sup> *Empire Pipeline, Inc.*, 156 FERC ¶ 63,033 (2016).

<sup>3</sup> Empire states that the Addendum clarifies how the Settlement addresses five questions required by the Chief Administrative Law Judge.

<sup>4</sup> 18 C.F.R. § 385.602 (2016).

<sup>5</sup> According to Empire, these related documents include: (1) Appendix A containing a schedule of rates and other tariff revisions, revised rates for a Connector Line and a revised mechanism for determining compressor fuel retention and other gas

(continued ...)

proceeding. Initial comments supporting the Settlement were filed on August 11, 2016 by Talisman Energy USA Inc. and Commission Trial Staff. No other comments were filed. On August 25, 2016, the Presiding Judge certified the Settlement to the Commission as an uncontested settlement.<sup>6</sup>

## II. Settlement

3. The principal terms of the Settlement are as follows: Article I requires Empire to establish reduced rates for its Empire Connector Line (Empire Connector) on an interim basis beginning July 1, 2016, pending approval of the Settlement.<sup>7</sup> The interim rates replace the previously effective Empire Connector reservation rate of \$9.9664 with a rate of \$8.8701 and reduce the associated winter period reservation rate from \$13.3838 to \$12.7729 and the summer period reservation rate from \$7.2063 to \$6.0824. Further, Article I provides that the reduced rates for October 1, 2016 and October 1, 2017 are those rates set forth in the *pro forma* tariff records contained in Appendix A (as redlined in Appendix B). Pursuant to Article I, the Appendix A rates will reduce the then-current Empire Connector reservation rate as follows: (a) effective October 1, 2016, a reduction in the Empire Connector reservation rate to \$7.8735 (the associated October 1, 2016 winter period reservation rate is \$11.3378 and summer period reservation rate is \$5.3990); and (b) effective October 1, 2017, a final reduction in the Empire Connector reservation rate to \$7.38 (the associated October 1, 2017 winter period reservation rate is \$10.6272 and summer period reservation rate is \$5.0606). According to Empire, the Settlement does not modify the reservation rate for the original Empire pipeline which remains at \$5.1827.

4. Finally, Article I provides that the interim Settlement rates remain subject to the condition that Empire receive a satisfactory order on the Settlement. If the Settlement is not approved, Empire is authorized to surcharge or direct bill affected shippers for the difference between the Empire Connector settlement rates and Empire's current rates.

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for transporter's use; (2) Appendix B containing a clean and marked version of tariff sheets; and (3) Appendix C containing the revenue sharing mechanism agreed to as part of the Settlement.

<sup>6</sup> *Empire Pipeline, Inc.*, 156 FERC ¶ 63,033.

<sup>7</sup> On June 9, 2016, in Docket No. RP16-1023-000, Empire filed certain revised tariff records, to become effective on July 1, 2016 on an interim basis. On June 16, 2016, in Docket Nos. RP16-300-003 and RP16-1023-001, the Chief Judge approved the interim rates. *See Empire Pipeline, Inc.*, 155 FERC ¶ 63,026 (2016).

Empire will also impose the surcharge or direct bill reconciliation on affected contesting parties.

5. Article II provides that Empire is required to file a general section 4 rate case on July 1, 2021, if Empire has not filed one prior to that date. Article III contains the revenue sharing mechanism provisions. Specifically, Article III provides that, for the period beginning December 1, 2016, on a prospective basis, Empire is required to refund a portion of transportation revenues, net of applicable exclusions,<sup>8</sup> to all firm customers as provided in Appendix C. Empire is also required to make *pro rata* refunds based on a firm Shipper's maximum daily transportation quantity as provided in Appendix C. Article III states that the first refund period will extend from December 1, 2016 through November 30, 2017 and delineates both the transportation revenue levels and associated sharing percentages.<sup>9</sup> Empire is required to file an annual report of refunds.

6. Article IV contains the depreciation and negative salvage terms. Specifically, this Article provides that the composite depreciation rate to be used for book purposes will be 2.0 percent, including 0.1 percent attributable to negative net salvage, effective July 1, 2016. Empire is required to record negative salvage accruals on its books in a separate subaccount to Account No. 108.

7. Article V provides that Empire will undertake discussions with its shippers regarding improvements to its Electronic Bulletin Board (EBB). Article V explains that, because Empire's EBB is integrated with the EBB of National Fuel Gas Supply Corporation (National Fuel), any revisions to its EBB must be coordinated with National Fuel and its shippers. Pursuant to the terms of Article V, Empire is required to convene two meetings (either in person, via an interactive webcast, or teleconference) during 2017, with the first meeting to be held in January 2017. Thereafter, Empire is required to convene annual EBB meetings for the duration of the Settlement.

8. Article VI requires Empire to modify section 23 of the General Terms and Conditions in Part 7 of its FERC NGA Gas Tariff under the terms set forth in the *pro forma* revised tariff records in Appendix A (as redlined in Appendix B). Revised section 23 requires Empire to track its compressor fuel and retention of other gas for transporter's use on an annual basis, with the right to make out-of-cycle adjustments.

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<sup>8</sup> Article III provides that the exclusions set forth in Appendix C include, among other things, annual charge adjustment and revenues associated with Empire's lease of National Fuel Gas Supply Corporation capacity, as well as any revenues from expansion projects not currently in service.

<sup>9</sup> See Settlement at 6.

Empire is required to make the first filing under revised section 23 to be effective April 1, 2017.

9. Article VII provides that the terms of the Settlement are not severable and that if it is contested by any party or materially modified or conditioned by a Commission order, in whole or in part, the Settlement will be deemed withdrawn.

10. Article VIII provides that the Settlement is effective July 1, 2016. Article VIII further provides that, within 30 days of a Commission order approving the Settlement, without modification or condition, which is no longer subject to rehearing, Empire is required to file the revised tariff records in Appendix A and Appendix B, as applicable, to become effective on the dates set forth and that the Commission will grant any necessary waivers to permit the tariff records to become effective on those dates. Finally, Article VIII provides that the Settlement will terminate on the date rates are made effective under an NGA section 4 general rate filing by Empire or the effective date of rates established by the Commission under section 5 of the NGA.

11. Article IX provides for the reservation of certain rights. Article X provides that

[o]nce approved by the Commission, the standard of review for any proposed modifications to the provisions of [the Settlement] by the Commission acting *sua sponte* or the parties and/or their affiliates in these proceedings acting unanimously, will be the just and reasonable standard as described in *El Paso Natural Gas Co.*, 99 FERC ¶ 61,244 (2002). The standard of review for any proposed modifications to the provisions of the [Settlement] at the request of one or more but less than all parties and/or their affiliates in these proceedings *or any other person* [emphasis added] will be the “public interest” standard for 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”). See also *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733 (2008); *NRG Power Marketing, LLC v. Maine Public Util. Comm’n*, 130 S. Ct. 693 (2010).

### **III. Discussion**

12. As noted above, Article X states that the standard of review for any proposed modifications to the Settlement at the request of “any other person” will be the “public interest” standard of review. Because the Settlement appears to invoke the *Mobile-Sierra* “public interest” presumption with respect to third parties, we will analyze the applicability here of that more rigorous application of the just and reasonable standard.

13. 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*,<sup>10</sup> 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.

14. The Settlement implements a change in section 23 of the General Terms and Conditions in Part 7 of Empire’s FERC NGA Gas Tariff. Therefore, the Settlement does not embody contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption.

15. As we have stated, in the context of reviewing settlements that do not involve “contract rates,” the Commission has discretion as to whether to approve a request to impose on itself or third parties the more rigorous application of the statutory “just and reasonable” standard of review that is often characterized as the *Mobile-Sierra* “public interest” standard of review.<sup>11</sup> The Commission also stated in these orders that it will not approve imposition of that more rigorous application of the statutory “just and reasonable” standard of review on future changes to an agreement sought by the Commission or non-settling third parties, absent compelling circumstances such as were found to exist in *Devon Power*. We find that the circumstances presented here do not satisfy that test. Thus, we find it unjust and unreasonable to impose the more rigorous application of the statutory “just and reasonable” standard of review in the instant proceeding with respect to future changes to the Settlement sought by the Commission acting *sua sponte*, or at the request of a non-settling third party.

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<sup>10</sup> *New England Power Generators Ass’n, Inc. v. FERC*, 707 F.3d 364, 370-71 (D.C. Cir. 2013).

<sup>11</sup> See, e.g., *MidAmerican Energy Co.*, 138 FERC ¶ 61,028, at P 7 (2012) (citing *Devon Power LLC*, 134 FERC ¶ 61,208, *order on reh’g*, 137 FERC ¶ 61,073 (2011) (*Devon Power*), *aff’d*, *New England Power Generators Ass’n, Inc. v. FERC*, 707 F.3d 364; *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 (2011); *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105, at P 24 (2011)).

16. With the exception of the issue discussed above, the Settlement appears to be fair and reasonable and in the public interest.<sup>12</sup> As such, the Settlement is conditionally approved, subject to Empire filing, within 30 days of the date of this order, a revised settlement agreement reflecting a revision to the standard of review provision that applies to third parties. Within 30 days of the date of this order, consistent with Article VIII of the Settlement, Empire is directed to submit a compliance filing through the eTariff portal to ensure that its electronic tariff data base reflects the Commission's actions in this proceeding.<sup>13</sup>

The Commission orders:

(A) The Settlement is conditionally approved, subject to further modification, as discussed in the body of this order.

(B) Empire is directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

(C) Consistent with Article VIII of the Settlement, Empire is required to file the tariff records contained in Appendix A and Appendix B, as applicable, to become effective on the dates set forth therein.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>12</sup> Likewise, with the exception of the issue discussed above, the Commission's approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

<sup>13</sup> See *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 96 (2008).