

168 FERC ¶ 61,219
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

WBI Energy Transmission, Inc.

Docket No. RP19-165-004

ORDER APPROVING SETTLEMENT

(Issued September 30, 2019)

1. On June 28, 2019, pursuant to Rule 602 of the Commission's Rules of Practice and Procedure,¹ WBI Energy Transmission, Inc. (WBI Energy) filed an Uncontested Stipulation and Agreement of Settlement and related Appendix (Settlement) to address the issues set for hearing in Docket No. RP19-165-000, et al., concerning, among other things, a general rate case proceeding and WBI Energy's obligations under Order No. 849. On July 15, 2019, Commission Trial Staff filed comments supporting the filed Settlement. On August 15, 2019, the Settlement Judge certified the Settlement to the Commission, as uncontested.² The Commission approves WBI Energy's Settlement as proposed.

I. Background and Proposal

2. On July 18, 2018, the Commission issued Order No. 849, the 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 Act³ and (2) the Commission's Revised Policy Statement⁴ and

¹ 18 C.F.R. § 385.602 (2019).

² *WBI Energy Transmission, Inc.*, 168 FERC ¶ 63,013 (2019).

³ 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).

⁴ *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).

Opinion No. 511-C,⁵ which the Commission issued in response to *United Airlines, Inc. v. FERC* and which established a policy that master limited partnerships may not recover an income tax allowance.⁶ 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 (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).

3. On October 31, 2013, WBI Energy filed revised tariff records pursuant to section 4 of the Natural Gas Act (NGA) to implement a general rate increase in Docket No. RP14-118-000. Settlement rates in that proceeding took effect on May 1, 2014, pursuant to an offer of settlement and stipulation and agreement that was approved by the Commission on August 11, 2014 (2014 Settlement).⁷

4. According to Article VIII, Comeback Provision, of the 2014 Settlement, WBI Energy was required to submit for filing proposed new rates to be effective, assuming a five-month suspension period in the instance of a proposed rate increase, no later than May 1, 2019. On October 31, 2018, as amended November 2, 2018, WBI Energy filed a general NGA section 4 rate case and revised tariff records.

5. As a result of WBI Energy's October 31, 2018 rate case filing (as amended), WBI Energy was exempt from the requirement to file FERC Form No. 501-G to justify its revenue requirement as a result of certain income tax reductions.⁸

⁵ *SFPP, L.P.*, Opinion No. 511-C, 162 FERC ¶ 61,228, at P 9 (2018).

⁶ 827 F.3d 122 (D.C. Cir. 2016).

⁷ *WBI Energy Transmission, Inc.*, 148 FERC ¶ 61,115 (2014).

⁸ *WBI Energy Transmission, Inc.*, 165 FERC ¶ 61,192, at P 21 (2018); *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, Order No. 849, 164 FERC ¶ 61,031 at P 159 (2018) (adopting 18 C.F.R. § 260.402), *reh'g denied*, Order No. 849-A, 167 FERC ¶ 61,051 (2019).

6. On November 30, 2018, the Commission issued an order accepting and suspending the proposed tariff records to become effective May 1, 2019, subject to refund and the outcome of hearing procedures.⁹ On April 30, 2019, WBI Energy filed a motion to place the rates from its October 31, 2018 filing into effect May 1, 2019, subject to adjustments related to costs associated with facilities not in service as of the end of the test period (Motion Rates).

7. On May 20, 2019, WBI Energy, Commission Trial Staff, and all active parties reached a settlement-in-principle with regard to all issues set for hearing in this proceeding. On May 28, 2019, WBI Energy filed an unopposed motion to implement interim settlement rates in lieu of the Motion Rates. On May 30, 2019, Chief Administrative Law Judge Carmen A. Cintron accepted the interim settlement rates effective May 1, 2019.

8. On June 28, 2019, WBI Energy filed the Settlement to resolve all issues set for hearing in Docket Nos. RP19-165-000 and RP19-165-001. The Settlement adopts the interim settlement rates as the final settlement rates and states that they have been designed on a “black box” basis. WBI Energy states that the Settlement is the result of extensive settlement discussions and reflects the parties’ agreement to resolve all issues set for hearing. The pertinent provisions of the Settlement are as follows.

9. Article III of the Settlement states that other than the depreciation and negative salvage rates, the calculation of excess accumulated deferred income taxes (ADIT), and the associated annual amortization amount, the settlement does not identify any basis for any component of cost of service.

10. Article IV sets forth the applicable depreciation and negative salvage rates.

11. Article V reflects the calculation of excess ADIT in the amount of \$33,164,281, the amortization of which will start concurrent with the effectiveness of new rates in this case on May 1, 2019, and an annual amortization amount of \$1,441,925 based on a 23-year amortization period.

12. Article VI explains that WBI Energy is required to make a filing that proposes new rates to be effective no later than August 1, 2024, and that WBI Energy will not file a Modernization or Capital, Environmental and Safety Cost Recovery Mechanism prior to the filing of a new general NGA section 4 rate case or in the event an NGA section 5 investigation is initiated. Further, WBI Energy will not file a new general NGA section 4 rate case, nor shall any of the intervenors in this case initiate an NGA

⁹ *WBI Energy Transmission, Inc.*, 165 FERC ¶ 61,192.

section 5 complaint, for a period of two years, with such two-year period commencing on May 1, 2019.

13. Article VII provides the conditions applicable to Settling and Contesting Parties. Article VIII provides that there shall be no refunds because the final settlement rates are the same as the interim settlement rates that took effect on May 1, 2019. Article IX governs conditions precedent to the Settlement's effectiveness.

14. Article X describes the privileged nature of the Settlement and states that, "[t]o the extent the Commission considers any changes to the provisions of this Settlement during the term of this Settlement, the standard of review for such changes shall be the most stringent standard permissible under applicable law." Article X also provides that nothing in the Settlement shall be deemed to create a settled practice or to affect or shift the burden of proof on any issue in any proceeding.

II. Discussion

15. Because the Settlement appears to provide that the standard of review applicable to modifications to the Settlement proposed by third parties and the Commission acting *sua sponte* is to be "the most stringent standard permissible under applicable law," we clarify the framework that would apply if the Commission were required to determine the standard of review in a later challenge to the Settlement by a third party or the Commission acting *sua sponte*.

16. 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*,¹⁰ 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.

¹⁰ *New England Power Generators Ass'n v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

17. The Settlement resolves all issues in dispute in this proceeding. The Settlement appears to be fair and reasonable and in the public interest, and is hereby approved. The Settlement is uncontested and provides a reduction in WBI Energy's firm and interruptible rates. The Commission's approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

The Commission orders:

WBI Energy's Settlement is hereby approved, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.