

169 FERC ¶ 61,002
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

East Tennessee Natural Gas, LLC

Docket No. RP19-63-001

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued October 1, 2019)

1. On May 23, 2019, in the above-referenced proceeding,¹ East Tennessee Natural Gas, LLC (East Tennessee) filed a Stipulation and Agreement (Settlement) and related *pro forma* tariff records pursuant to Rule 602 of the Commission's regulations.² East Tennessee states that the Settlement resolves all issues in a rate investigation established pursuant to section 5 of the Natural Gas Act (NGA) as discussed more fully below. We approve East Tennessee's Settlement as proposed.

I. Background and FERC Form No. 501-G Proceeding

2. On July 18, 2018, the Commission issued Order No. 849,³ a final rule adopting procedures for determining which jurisdictional natural gas pipelines may be collecting

¹ East Tennessee's FERC Form No. 501-G and its limited NGA section 4 rate reduction filing were assigned Docket Nos. RP19-63-000 and RP19-64-000, respectively. The Commission issued an order addressing both of these filings but only established hearing procedures pursuant to section 5 of the NGA in Docket No. RP19-63-000. *See East Tennessee Natural Gas, LLC*, 165 FERC ¶ 61,198, at ordering para. (B) (2018) (November 30 Order). Nevertheless, the Commission indicated that protesters of the limited section 4 rate reduction filing in Docket No. RP19-64-000 could pursue those issues in the NGA section 5 proceeding. *Id.* at P 21. The Chief Administrative Law Judge designated a Presiding Judge for both Docket Nos. RP19-63-000 and RP19-64-000.

² 18 C.F.R. § 385.602 (2019).

³ *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, Order No. 849, 164 FERC ¶ 61,031 (2018), *order on reh'g*, Order No. 849-A, 167 FERC ¶ 61,051 (2019).

unjust and unreasonable rates in light of: (1) the income tax reductions provided by the Tax Cuts and Jobs Act; and (2) the Commission's Revised Policy Statement⁴ and Opinion No. 511-C⁵ establishing a policy that Master Limited Partnerships (MLPs) may not recover an income tax allowance in response to the decision of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *United Airlines*.⁶ Order No. 849 required all interstate natural gas companies with cost-based stated rates to file a FERC Form No. 501-G informational filing containing an abbreviated cost and revenue study using data in the pipelines' 2017 FERC Form Nos. 2 and 2-A. Order No. 849 also provided four options that each interstate natural gas pipeline may choose from to address the changes to the pipeline's revenue requirement as a result of the income tax reductions: (1) a limited NGA section 4 rate reduction filing (Option 1); (2) a commitment to file a general NGA section 4 rate case or a 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 the FERC Form No. 501-G) (Option 4).

3. On October 11, 2018, consistent with the reporting requirements of Order No. 849, East Tennessee submitted its FERC Form No. 501-G and an adjusted FERC Form No. 501-G in an Addendum in Docket No. RP19-63-000. East Tennessee concurrently filed a limited NGA section 4 rate reduction in Docket No. RP19-64-000 pursuant to Option 1. East Tennessee stated that it filed its FERC Form No. 501-G as an MLP which it stated is consistent with its current ownership structure and the ownership structure in effect at the end of 2017. Accordingly, the FERC Form No. 501-G automatically eliminated federal and state income taxes and accumulated deferred income taxes (ADIT) from East Tennessee's cost of service. East Tennessee's FERC Form No. 501-G showed an indicated cost-of-service reduction of 1.0 percent, or approximately \$1.4 million, after adjustment to reflect the Tax Cuts and Jobs Act and *United Airlines* Issuances. The FERC Form No. 501-G also showed that East Tennessee's Total Estimated ROE after eliminating a tax allowance and ADIT from its cost of service would be 19.1 percent based on 2017 financial data. The Total Estimated ROE would be 18.7 percent after reducing its rates to reflect the indicated cost-of-service reduction. East Tennessee's

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).

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

⁶ *United Airlines, Inc. v. FERC*, 827 F.3d 122 (D.C. Cir. 2016). For purposes of this order, the Revised Policy Statement, *United Airlines*, and Opinion No. 511-C will collectively be referred to as "*United Airlines* Issuances."

limited NGA section 4 rate reduction filing proposed to reduce its rates by 1.0 percent, as reflected in its FERC Form No. 501-G, effective December 1, 2018.

4. In its November 30 Order, the Commission accepted East Tennessee's limited NGA section 4 rate reduction filing, without suspension, effective December 1, 2018.⁷ In addition, the Commission determined that, after reviewing East Tennessee's FERC Form No. 501-G, the Addendum to the FERC Form No. 501-G, comments filed by the public, and publicly available information on file with the Commission, East Tennessee's rates following the rate reduction may be unjust and unreasonable. The Commission therefore initiated an investigation to examine the justness and reasonableness of East Tennessee's rates pursuant to section 5 of the NGA, set the matter for hearing procedures, and directed East Tennessee to file a cost and revenue study within 75 days.⁸

II. Settlement

5. On May 23, 2019, East Tennessee filed the instant Settlement. On June 12, 2019, Commission Trial Staff, East Tennessee and several other parties⁹ filed comments in support of the Settlement. No other comments were filed. On August 8, 2019, the Presiding Judge certified the Settlement to the Commission as an uncontested settlement.¹⁰

6. East Tennessee states that the Settlement is an integrated and comprehensive settlement of all the issues set for hearing in this proceeding. The pertinent provisions of the Settlement are as follows. Section 1.1 of the Settlement provides that the effective date for rates established by the Settlement is January 1, 2019.¹¹

7. Section 1.2 states that the Settlement rates are set forth in the *pro forma* tariff records included in the Settlement.¹²

⁷ November Order, 165 FERC ¶ 61,198 at ordering para. (A).

⁸ *Id.* P 24 & ordering paras. (B), (E).

⁹ These parties include: Public Service Company of North Carolina, Incorporated; Piedmont Natural Gas Company, Inc.; Duke Energy Carolinas, LLC; Duke Energy Progress, LLC; Atmos Energy Corporation; and the East Tennessee Group.

¹⁰ *East Tennessee Natural Gas, LLC*, 168 FERC ¶ 63,009 (2019).

¹¹ Settlement at 3 (Art. I, § 1.2(A)).

¹² Trial Staff calculates that the Settlement reflects a three percent reduction in East Tennessee's current rates. *See* Trial Staff Comments at 6.

8. Section 1.3 defines a Moratorium Period prohibiting East Tennessee from making any filing under section 4 of the NGA that would result in new rates ultimately becoming effective before July 1, 2020. Section 1.3 also requires East Tennessee to file a new general NGA section 4 rate case by June 30, 2020, provided no NGA section 5 proceeding has been initiated.

9. Section 1.5 clarifies that the Settlement does not change East Tennessee's currently effective depreciation and amortization rates, as reflected in Schedule 3 to the Settlement.

10. Section 2.3 requires East Tennessee to make a subsequent compliance filing, identical to the *pro forma* tariff records included as Schedule 2 to the Settlement, within 15 days of the Settlement Effective Date,¹³ and to request an effective date of January 1, 2019.

11. Section 4.5 of the Settlement provides that

[t]he standard of review for changes to the Settlement on behalf of any Party is the 'public interest' standard. The standard of review for changes to this Settlement proposed by any person other than a Party or the Commission acting *sua sponte* shall be the most stringent standard permissible under applicable law.

III. Discussion

12. We find that the Settlement appears to be fair and reasonable and in the public interest. By the terms of the Settlement, all issues set for hearing relating to Order No. 849, the impact of the Tax Cuts and Jobs Act on East Tennessee's rates, and East Tennessee's FERC Form No. 501-G are resolved.¹⁴ The Settlement is uncontested and provides a decrease in East Tennessee's monthly transportation rates that benefits East Tennessee's customers. Accordingly, we approve the Settlement. The

¹³ East Tennessee defines the Settlement Effective Date as the first day of the first calendar month following the date on which East Tennessee receives an Acceptable Order from the Commission.

¹⁴ Although the Settlement resolves the matters set for hearing, section 1.4 of the Settlement provides that the Settlement does not prejudice any party's efforts to address issues set for hearing in Docket No. RP19-63-000, and issues raised in protests and comments in Docket No. RP19-64-000, in an upcoming NGA section 4 rate case, which East Tennessee will file no later than June 30, 2020.

Commission's approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

13. 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 by the Commission acting *sua sponte*.

14. 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*,¹⁵ 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.

15. East Tennessee is directed to file tariff records in eTariff format,¹⁶ consistent with the terms of the Settlement, to reflect the Commission's action in this order.

16. This order terminates Docket No. RP19-63-001.

¹⁵ *New England Power Generators Ass'n v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

¹⁶ *Electronic Tariff Filings*, Order No. 714, 124 FERC ¶ 61,270 (2008).

The Commission orders:

(A) East Tennessee's Settlement is hereby approved, as discussed in the body of this order.

(B) East Tennessee shall file actual tariff records in eTariff format, as required by Order No. 714, consistent with the terms of the Settlement.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.