

165 FERC ¶ 61,130
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

Kern River Gas Transmission Company

Docket Nos. RP19-55-000
RP19-76-000

ORDER APPROVING SETTLEMENT

(Issued November 15, 2018)

1. On October 11, 2018, in Docket No. RP19-76-000, Kern River Gas Transmission Company (Kern River) filed a Stipulation and Agreement of Settlement (Settlement) pursuant to Rules 207(a)(5) and 602 of the Commission's regulations¹ to implement a Tax Reform Credit for shippers paying the maximum base tariff rate and shippers paying any one part rate that includes fixed costs. The Commission approves Kern River's Settlement, as proposed.

I. Background and Proposal

2. On July 18, 2018, the Commission issued Order No. 849,² a 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. § 385.207(a)(5) and § 385.602 (2018).

² *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, Order No. 849, 83 Fed. Reg. 36,672 (July 30, 2018), FERC Stats. & Regs. ¶ 31,404 (2018) (cross-referenced at 164 FERC ¶ 61,031).

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, 83 Fed. Reg. 12,362 (Mar. 21, 2018), FERC Stats & Regs. ¶ 35,060 (2018), *order on reh'g*, 164 FERC ¶ 61,030 (2018).

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, pursuant to sections 10 and 14(a) of the Natural Gas Act (NGA), that all interstate natural gas companies with cost-based stated rates, that filed a 2017 FERC Form No. 2 or 2-A, must file a FERC Form No. 501-G informational filing.⁷ The FERC Form No. 501-G is designed to collect financial information to evaluate the impact of the Tax Cuts and Jobs Act and *United Airlines* Issuances on interstate natural gas pipelines' revenue requirements. Using the data in the pipelines' 2017 FERC Form Nos. 2 and 2-A, the form estimates (1) the percentage reduction in the pipeline's cost of service resulting from the Tax Cuts and Jobs Act and the Revised Policy Statement and (2) the pipeline's current Return on Equity (ROE) before and after the reduction in corporate income taxes and the elimination of income tax allowances for MLP pipelines.

3. Order No. 849 also provided several options 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. These included (1) a limited NGA section 4 rate reduction filing (Option 1), (2) a commitment to file a general 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 (Option 4).

4. On October 11, 2018, in Docket No. RP19-55-000, Kern River filed FERC Form No. 501-G consistent with the reporting requirements of Order No. 849. Kern River's FERC Form No. 501-G shows that its indicated cost-of-service reduction is 8.9 percent, and that its Total Estimated Return on Equity would be 21.4 percent, after adjustment to reflect the Tax Cuts and Jobs Act and *United Airlines* Issuances. Kern River filed a statement explaining why a rate adjustment is not needed and several supporting exhibits. Kern River states that two adjustments are required for FERC Form No. 501-G to accurately reflect Kern River's unique levelized rate structure, under which Kern River charges separate levelized rates for three different periods. First, the FERC Form No. 501-G should reflect the Commission's approval of a 100 percent equity capital structure for Kern River's Period Two contracts, rather than the 57 percent required in the form. Second, prior period adjustments must be made to the FERC Form No. 2 data to reflect Kern River's Period Two recontracting. On January 27, 2017, the Commission approved

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."

⁷ The One-time Report on Rate Effect of the Tax Cuts and Jobs Act may be referred to interchangeably as "One-time Report" or "FERC Form No. 501-G."

the Alternate Period Two settlement to establish an alternative set of reduced rates for eligible shippers, to improve the likelihood of recontracting expiring capacity. Additionally, the settlement extended the depreciation period. Kern River states that these adjustments to FERC Form No. 501-G result in a 12.9 percent ROE, not 21.4 percent.⁸ Kern River also states that the calendar year financial data used in the FERC Form No. 501-G does not reflect changes in its circumstances after December 31, 2017. In particular, Kern River states that on April 30, 2018, customers relinquished long-term contracts representing about 23 percent of its design capacity, and Kern River has only been able to remarket the capacity through short-term volumetric, index-based contracts.

5. On October 11, 2018, Kern River also filed the Settlement in Docket No. RP19-76-000, in response to Order No. 849. In the Settlement package Kern River submitted *pro forma* tariff records, an adjusted FERC Form No. 501-G to show the effect of the Tax Reform Credit provided for in the Settlement, and a matrix showing the maximum base tariff rate and the computation for each shipper group. The Tax Reform Credit provides an 11 percent reduction in the rate for shippers paying the maximum base tariff rate, or any one-part rate that includes fixed costs. The Settlement provides that, immediately after an order approving the Settlement becomes final,⁹ Kern River will file actual tariff records consistent with the *pro forma* tariff records included in the Settlement to be effective on the date of the initial order approving the Settlement. This rate reduction would remain in effect until a “triggering event” occurs, meaning either (1) the federal corporate income tax rate is raised above 21 percent, in which case the proposed tax reform credit will be reduced on a *pro rata* basis by the increase above 21 percent as a percentage of the initial corporate income tax reduction of 14 percent from 35 percent to 21 percent, or (2) the Commission initiates an NGA section 5 proceeding against Kern River.

6. The Settlement provides that the Tax Reform Credit will be provided to releasing shippers in temporary capacity release transactions, but not to the replacement shippers. The Settlement also provides that in Kern River’s next NGA section 4 rate case the maximum base tariff rate in effect before the Tax Reform Credit will establish the refund floor.

7. Pursuant to the revised FERC Form No. 501-G, the Settlement will result in an indicated cost-of-service reduction of 11 percent and an estimated ROE of 9.9 percent. Kern River requests approval of the Settlement expeditiously in order to allow its shippers the benefit of the rate credit as soon as possible.

⁸ See Exhibit 2 of the filing in RP19-55-000, p. 3, column G.

⁹ If no request for rehearing is filed, this date will be 30 days after the issuance of the initial order approving the Settlement.

II. Notice of Filing, Interventions, and Protests

8. Public notice of both of Kern River's filings was issued on October 15, 2018. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.¹⁰ Pursuant to Rule 214,¹¹ all timely motions to intervene and any unopposed motions to intervene filed out-of-time before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. On October 23, 2018, in Docket No. RP19-55-000, the Indicated Shippers¹² filed comments and Nevada Power Company (NPC) filed a conditional protest. On October 25, 2018, Kern River filed an answer to the Indicated Shippers and NPC. On October 23, 2018, in Docket No. RP18-76-000, the Indicated Shippers¹³ and Southwest Gas Corporation (Southwest Gas) filed comments in support of the Settlement, and Concord Energy LLC (Concord) and Mieco, Inc. (Mieco) filed motions to intervene reserving the right to file comments or protest at a later date. On October 25, 2018, Kern River filed reply comments to the Indicated Shippers, Southwest Gas, Concord and Mieco.

9. With regard to Kern River's FERC Form No. 501-G filing in Docket No. RP19-55-000, the Indicated Shippers and NPC urge the Commission to accept as soon as possible the Tax Reform Credit Settlement filed by Kern River. Otherwise, the Indicated Shippers disagree with Kern River's assertion that a rate adjustment is not needed, and NPC states its limited protest is a protective measure to preserve its right to protest the FERC Form No. 501-G filing if the Commission does not accept the Settlement. In its answer, Kern River refers to the conditional protests as a hedge against the Commission's failing to approve the Settlement and states that, if the Commission approves the Settlement, it may dispense with further consideration of the conditional protest.

10. With regard to Kern River's Settlement in Docket No. RP19-76-000, the Indicated Shippers and Southwest Gas urge the Commission to approve the Settlement as expeditiously as possible so that shippers may begin receiving the benefit as soon as possible. In its reply comments, Kern River asserts that the Commission should not disturb the delicate balance that Kern River and its shippers have crafted in this

¹⁰ 18 C.F.R. § 154.210 (2018).

¹¹ 18 C.F.R. § 385.214 (2018).

¹² In this proceeding, the Indicated Shippers are Aera Energy, LLC, Anadarko Energy Services Company, Chevron U.S.A. Inc., ConocoPhillips Company, Shell Energy North America (US), L.P., Southwest Gas Corporation, and XTO Energy Inc.

¹³ In this proceeding, the Indicated Shippers are Aera Energy, LLC, Anadarko Energy Services Company, Chevron U.S.A. Inc., ConocoPhillips Company, Shell Energy North America (US), L.P., and XTO Energy Inc.

uncontested Settlement, and urges the Commission to approve the Settlement, stating that the sooner the Commission acts, the earlier its customers will be able to benefit.

III. Discussion

11. The Commission finds that the Settlement is fair and reasonable and in the public interest. The Settlement is either uncontested or supported by shippers and provides an 11 percent reduction in the rate for shippers paying the maximum base tariff rate, or any one-part rate that includes fixed costs. Accordingly, the Commission approves the Settlement.

12. Article XIII(D) of the Settlement provides that the standard for review of changes to the Settlement by Kern River or a party to the Settlement shall be the “public interest” standard of review.¹⁴ Article XIII(D) continues, stating, “The standard of review for any change to this Stipulation proposed by a nonparty to the Stipulation, a Contesting Party or the Commission acting *sua sponte*, shall be the most stringent standard permitted by law.” Because the Settlement provides that the standard of review for modifications to the Settlement is “the most stringent standard permitted by law,” the Commission clarifies 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*.

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 Ass’n, Inc. v. FERC*, 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

¹⁴ *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) (*Mobile-Sierra*).

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

The Commission orders:

(A) Kern River's Settlement filed in Docket No. RP19-76-000 is approved, as discussed in the body of this order.

(B) Kern River must file actual tariff records consistent with the terms of the Settlement.

By the Commission. Commissioner McIntyre is not voting on this order.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.