

The FERC Practice & Administrative Law Judges Committee of the Energy Bar Association  
Presents a Brown Bag on “Best Practices in Drafting FERC Settlement Agreements”

January 31, 2012

12:00 p.m. – 1:30 p.m. (Eastern Time)

**Brown Bag Meeting/Teleconference**  
(CLE IS NOT SECURED FOR THIS MEETING)

**Location:** Akin, Gump, Strauss, Hauer & Feld, L.L.P.

10th Floor Conference Center, 1333 New Hampshire Avenue, N.W., Washington, DC 20036-1564  
(enter the Akin, Gump lobby at 1333 New Hampshire Avenue (across from Ping Pong) or  
on 19th Street (across from the south exit of the Dupont Circle Metro Station))

Dear Colleague:

This luncheon will explore best practices in drafting settlement agreements in proceedings before the Federal Energy Regulatory Commission. Experienced practitioners including FERC Trial Staff will discuss a broad range of issues involved in the drafting of settlement agreements, including ensuring that the terms of the settlement are incorporated into the agreement, considerations for agreements in complex/multi-party proceedings, and the ramifications of *Mobile-Sierra* provisions in settlement agreements.

**Panelists:**

Becky Bruner, Davis Wright Tremaine LLP  
Bill Collins, Federal Energy Regulatory Commission  
John McCaffrey, Stinson Morrison Hecker LLP

**EBA FERC PRACTICE AND ALJ COMMITTEE'S  
BROWN BAG ON  
BEST PRACTICES IN DRAFTING FERC SETTLEMENT AGREEMENTS**

**Agenda**

- 12:00-12:10 Introduction
- 12:10-12:25 Topic 1: The Preliminaries of FERC Settlement Agreements
- 12:25-12:40 Topic 2: Settlement Agreement Drafting for Complex/Multi-Party FERC Proceedings
- 12:40-12:55 Topic 3: Mobile Sierra Provisions in FERC Settlement Agreements
- 12:55-1:15 Topic 4: Other Pertinent Provisions of the Settlement Agreement
- 1:15-1:30 Q&A

**SAMPLE CHECKLIST FOR BEST PRACTICES  
DRAFTING FERC SETTLEMENT AGREEMENTS**

- I. DRAFTING AND REVIEWING THE SETTLEMENT AGREEMENT
  - A. Settlement Judges
    1. Contact the Judge prior to the 1<sup>st</sup> settlement conference
    2. Know what the Judge expects and strive always to meet those expectations
    3. Keep Judge apprised of developments occurring between conferences
  - B. Ensure that all agreed upon substantive terms are included in settlement
  - C. Ensure all the individual terms add up to a harmonious package
    1. Are there unforeseen issues that arise in committing the agreed-upon terms to paper that must be addressed among the parties?
    2. Are there potential conflicts between various agreed-upon settlement terms that become apparent in reducing the settlement to writing?
  - D. If the settlement requires the submission of tariff sheets and/or rate schedules, do the tariff sheets conform to the settlement terms?
  - E. Considerations common to many FERC settlements
    1. Specify the scope of the settlement.
      - a. Does the settlement resolve all issues in the case, or is it limited to certain issues and/or participants?
    2. Does the settlement include numerous signatory parties or is it a filing by a single party (*e.g.*, the applicant in the case)?
      - a. If the settlement does not include all case participants as signatories, does the settlement include provisions that bind such non-signatories to the terms of the settlement if they “support or do not oppose settlement”
      - b. FERC Staff unlikely to be a formal party to most settlements – can the settlement include an affirmative

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Brown Bag on Best Practices In Drafting FERC Settlement Agreements

statement that FERC Staff is likely to support?

3. Defining the effective date of the settlement and any tariff changes
  - a. Typically tied to the date FERC order approving the settlement is no longer subject to rehearing
  - b. Specify if the effective date of any tariff changes is different
4. Standard of review for approval of the settlement agreement
  - a. Dictated by Rule 602 in most cases, except, arguably, where the settlement itself constitutes a “contract rate” within the meaning of the *Mobile-Sierra* Doctrine. See, e.g., David G. Tewksbury, Stephanie S. Lim and Grace Su, *New Chapters in the Mobile-Sierra Story: Application of the Doctrine after NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 32 Energy L.J. 433 at 443-44 (2011)
  - b. If settlement can be characterized as “contract rate” as opposed to terms of general application, proposed settlement may be entitled to *Mobile-Sierra* presumption of justness and reasonableness. See *Devon Power LLC*, 134 FERC ¶ 61,208, *reh’g denied*, 137 FERC ¶ 61,073 (2011) (petition for review pending); see also David G. Tewksbury, Stephanie S. Lim and Grace Su, *New Chapters in the Mobile-Sierra Story: Application of the Doctrine after NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 32 Energy L.J. 433 (2011).
5. Standard of review for future changes to the settlement
  - a. Even if settlement does not reflect contract rates entitled to *Mobile-Sierra* presumption of justness and reasonableness, parties to the settlement can choose to specify that future changes to the settlement sought by settling parties must satisfy *Mobile-Sierra* public interest mode of review. See, e.g., *High Island Offshore System, LLC*, 135 FERC ¶ 61,105 at P 25, n.22 (2011).
  - b. Where settlement does not reflect contract rates entitled to *Mobile-Sierra* presumption of justness and reasonableness, FERC has indicated that it will not accept settling parties’ imposition of *Mobile-Sierra* public interest standard of review on future changes proposed by Commission or non-settling third-parties in the absence of “compelling

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Brown Bag on Best Practices In Drafting FERC Settlement Agreements

circumstances” that rise to an “extraordinary level.” *See Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 at P 17 (2011); *Petal Gas Storage, L.L.C.*, 135 FERC ¶ 61,152 at PP 17-18 (2011); *High Island Offshore System, LLC*, 135 FERC ¶ 61,105 at PP 24-25 (2011); *Devon Power LLC*, 134 FERC ¶ 61,208, *reh’g denied*, 137 FERC ¶ 61,073 (2011).

6. Defining the term of the settlement
  - a. Are there are any issues that are intended to survive the term of the settlement and/or any terms that need to be carried over from past settlements?
  - b. Do the parties intend to have different effective dates, termination dates or rate refunds for certain charges?
7. Implementation of filing moratoria and/or future filing requirements (“stay-outs” and “come-backs”)
  - a. Timing
    - i. Consider whether the stay-out/come-back is tied to the *filing* date of the new proceeding or the *effective* date of the new tariff/rates
    - ii. In drafting, take into account required notice periods under FPA and NGA as well as potential suspension period
  - b. Define any exceptions to stay-outs and come-backs
8. Provisions addressing future contingencies
9. Interim implementation of settlement terms pending FERC approval of the settlement
  - a. Is Chief ALJ authorized to grant interim approval? *See* 18 C.F.R. § 375.307
  - b. Provisions unwinding any interim implementation in the event that settlement is not approved as filed
10. If there is a potential for opposition to settlement
  - a. Serve draft settlement documents on all parties on the official service list and ask for comments/positions by date certain

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Brown Bag on Best Practices In Drafting FERC Settlement Agreements

- b. Define Settling Parties and Contesting Parties
    - c. Propose approaches for FERC to address contested issues or parties. *See Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *reh'g denied*, 87 FERC ¶ 61,110 (1999).
  11. Terms governing the effect of FERC order approving the settlement with modifications or rejecting the settlement outright
    - a. Include provisions for rates/surcharges/refunds if interim rates have been in effect
    - b. Consider provisions for parties to accept, reject modifications or renegotiate settlement
  12. Effect of settlement on pending pleadings (*e.g.*, requests for rehearing)
  13. Whether any element of settlement is intended in the future to constitute precedent or deemed to be a “settled practice” as that term was interpreted in *Public Service Comm’n of New York v. FERC*, 642 F.2d 1335 (D.C. Cir. 1980), *cert denied*, 454 U.S. 879 (1981)
- F. Boilerplate (but sometimes important) provisions
  1. Specify that no party is deemed to have approved, accepted, consented to any principle or position or to have prejudiced positions taken in any other proceeding
  2. Inadmissibility of Rule 602 communications during settlement
  3. All parties participated in settlement and no ambiguity should be construed against any party as the primary drafter
  4. Settlement constitutes entire agreement among parties and supersedes any and all prior or contemporaneous
  5. Settlement is binding upon and for the benefit of the Parties and their successors and assigns
  6. Section headings are solely for convenience; capitalized terms have meaning in tariff or agreement, etc.
  7. In the event of a conflict between terms contained in settlement and other documents, the settlement shall govern
  8. Execution may be in counterparts

II. FILING PROCEDURES – SEE FERC RULE 602(c)

A. What to file

1. Cover letter

- a. Not required by Rule 602, but best practice for presenting offer of settlement package
- b. Most convenient place to specify the dates that comments on the settlement are due as required by Rule 602(d)(2)
- c. May also serve as the Explanatory Statement (see below)

2. Explanatory Statement

- a. Procedural background
- b. Major provisions of settlement agreement summarized
- c. Ensuring that all important terms are not just included in explanatory statement, but in the settlement agreement itself
  - i. Statement that in conflict between the explanatory statement and the settlement, settlement shall govern
  - ii. Parties may consider including some “legislative history” in the explanatory statement
- d. Responses to standard settlement questions required by October 23, 2003 Order of the Chief Administrative Law Judge (<http://www.ferc.gov/legal/admin-lit/rev-errata.pdf>)
  - i. What are the issues underlying the settlement and what are the major implications?
  - ii. Do any of the issues raise policy implications?
  - iii. Could other pending cases be affected by the settlement agreement?
  - iv. Does the settlement involve issues of first impression, or are there any previous reversals on the issues involved?
  - v. Is the settlement agreement subject to the just and reasonable standard or the *Mobile-Sierra* standard?

EBA FERC Practice & ALJ Committee  
Brown Bag on Best Practices In Drafting FERC Settlement Agreements

3. Supporting material
  4. Tariff sheets
  5. Draft letter approving settlement
- B. With whom to file
1. All offers must be filed with the Secretary
  2. If the case is pending before the Commission, the transmittal letter should specify that the offer is for consideration by the Commission
  3. If case is set for hearing and pending before an Administrative Law Judge, transmittal letter should specify that the offer of settlement should be transmitted to the presiding ALJ for consideration of certification to the Commission
  4. If the case is set for hearing, but before a *Settlement Judge*, the transmittal letter should specify that the offer of settlement should be transmitted to the Settlement Judge for consideration of certification to the Commission.
    - a. A Settlement Judge may certify an *uncontested* settlement to the Commission. *See City of Anaheim v. California Ind. Sys. Op. Corp.*, 101 FERC ¶ 61,392 (2002).
    - b. However, a Settlement Judge may not certify a *contested* settlement to the Commission, or even make the substantive determination as to whether a settlement should be considered contested when arguably adverse comments are filed. *See, e.g., American Elec. Power Serv. Corp.*, 100 FERC ¶ 61,346 (2002); *Midwest Ind. Transmission System Op., Inc.*, 136 FERC ¶ 63,014 (2011). If the settlement is potentially contested, the Settlement Judge will transmit the settlement to the Commission with a report.
- C. “Pre-filing” settlements
1. Process for filing clarified by FERC in *Dominion Transmission, Inc.*, 111 FERC ¶ 61,285 (2005)

**BEST PRACTICES IN DRAFTING FERC SETTLEMENTS**  
**EBA Brown Bag on January 31, 2012**  
**Bill Collins, Office of Administrative Litigation, FERC**

**TOPIC 1 Preliminary Matters Before Drafting Settlements**

**1. Overview of the Multi-Party Settlement Process before FERC**

**a) Pre-Filing Settlements.** For pipeline settlements negotiated and filed before a section 4 filing has been made, the FERC Trial Staff and the Settlement Judges are not involved. The Commission has clarified the procedures to follow. The settlement should not be filed under section 385.602 (Rule 602) of the Commission's regulations, which applies only to settlements in proceeding already before the Commission or set for hearing. Rather, pipelines should simply file a petition for approval of pre-filing settlements (together with *pro forma* tariff sheets) under section 385.207(a)(5). The Commission will then assign a new docket number and issue a notice for interventions, comments and protests. If the settlement is approved, the Commission will direct the filing of actual tariff sheets in compliance with the order approving the settlement. *Dominion Transmission, Inc.*, 111 FERC ¶ 61,285 at P 30-32 (2005).

**b) Post-Filing Settlements.** Most settlements are negotiated and filed after a case is set for hearing and/or settlement judge procedures. Electric rate proceedings are generally set for hearing and settlement judge proceedings 60 days after a section 205 filing. The hearing is held in abeyance (*i.e.*, there is no trial schedule) while the parties pursue settlement under the supervision of a FERC settlement ALJ. A settlement judge process has the advantage of providing more time to negotiate and draft a settlement but the parties may not have as much control over the process as they might otherwise have. Pipeline rate proceedings are set for hearing 30 days after a section 4 filing and generally do not involve a settlement judge. The parties to a pipeline case must negotiate a settlement usually within the Chief Judge's track 3 trial schedule (42 weeks from appointment of the trial judge to hearing date). The issuance of Staff's top sheets typically kick-starts the settlement process.

**2. The Term Sheet.**

The term sheet is an important tool to facilitate settlement drafting. A term sheet summarizes in some detail each element of the deal. It should be drafted and distributed to the active settlement participants as the negotiations proceed. With many offers and counter-offers over the course of months of negotiation, the term sheet keeps the drafting process within the four corners of the settlement reached. Parties often refer to the term sheet during settlement

drafting (and use it against each other) to ensure that issues are not added or subtracted.

### **3. The Drafting Conference.**

Normally, the applicant drafts and circulates the first settlement draft. Thereafter, the settlement drafting process often involves several phone conferences and exchanges of language additions and deletions via email. At least one face-to-face drafting conference following circulation of the initial draft provides benefits to customers and state commissions. Although a drafting conference necessitates additional time and expense, such conferences help parties drum up support around important language changes that the applicant might not otherwise include in the settlement.

### **4. Items FERC Trial Staff Would Like Specified in a Settlement.**

**a) Depreciation and Negative Salvage Rates.** Trial Staff requires depreciation and negative salvage rates to be specified in all settlements. Arguably, depreciation rates are required to be specified under section 9 of the NGA and section 302 of the FPA. Furthermore, depreciation rates need to be specified because they affect the depreciation reserve amount and the level of rate base included in the next rate case. Likewise, amortization periods must be specified.

Trial Staff has requested that settlements provide that any changes to the depreciation rates for wholesale services be made in a section 205 filing rather than be deemed to change without Commission authorization. In this connection, the Commission recently directed Florida Power Corporation to correct depreciation reserve adjustments made pursuant to a change in depreciation rates ordered by the Florida Commission, resubmit a corrected 2010 FERC Form 1 and record the effect of the retail ratemaking decisions as regulatory assets. *Florida Power Corp.*, 137 FERC ¶ 61,150 (2011).

Trial Staff insists that the stated depreciation rate in a settlement be a FERC rate. A blended rate from various state commissions must be approved by the Commission as a FERC rate. If a state commission orders a different depreciation rate for a utility than the one specified in a settlement, the company must make an FPA section 205 filing to seek to change the settlement depreciation rate and recover the associated expenses. If a state commission directs a change to depreciation reserves previously recorded under a FERC settlement, the company can for accounting purposes only book the retail rate adjustments as regulatory assets or liabilities, as applicable.

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**b) PBOP and South Georgia.** Post-Retirement benefits other than pensions (PBOPs) (and the use of external irrevocable trusts as a funding vehicle for PBOPS) and South Georgia adjustments to accumulated deferred income taxes must be specified. Generally, these items are a continuation of previous settlements.

**c) Rate of Return.** The return on equity (like depreciation rates) should always be specified in a formula rate settlement. In the context of stated rates for gas pipelines, Trial Staff insisted in the past that at least a pre-tax return be specified in an otherwise “black box” settlement. The concern was that a stated number would provide the Commission with a return on equity to use for future certificate applications and allowances for funds used during construction for new facilities. In recent years, as parties for various reasons have not wanted a return number stated, Trial Staff has not insisted on its inclusion. Settlements have no precedential value and the concerns above can be addressed directly through a settlement provision establishing the return figure to use.

**d) Comeback Provision.** Trial Staff has insisted on a comeback provision in settlements to ensure that pipeline and utility costs will not go unreviewed for too many years. Customers are split on whether comeback provisions provide benefits.

## **5. Items FERC Trial Staff Does Not Like to See in a Settlement.**

**a) Choice of Law Provisions.** Settlements should be interpreted by FERC in accordance with federal law. For example, Staff requested the removal of the following provision during a drafting conference: “This Settlement shall be interpreted in accordance with and governed by the laws of the State of Texas, without regard to its conflicts of laws principles.”

**b) Certain Contesting Party Provisions.** Trial Staff has opposed provisions that allow the applicant to reach out in the future and impose the higher filed or motion rates (as opposed to the settlement rates) on customers who in the applicant’s opinion have taken actions that make them contesting parties. For example, Staff opposed the following provision as one-sided, unreasonable (since the remedy may not fit the perceived violation) and unnecessarily coercive:

“[The Company] shall notify any party filing a pleading in these proceedings or failing to comply with the terms of this Settlement if such pleading, action or inaction would in [the Company’s] opinion make that party a Contesting party within the meaning of this

Article. [The Company] will notify a party that its comments or other pleading, action or inaction would cause such party to be a Contesting Party within five (5) business days of [the Company's] receipt of such comments or pleading, and such party must then effectuate the withdrawal or modification or take action as specified by [the Company] within five (5) business days of receipt of [the Company's] written notice to avoid becoming a Contesting Party under this paragraph. [The Company] shall inform the parties to these proceedings of any party so deemed to contest or refute the Settlement by filing a notice with the Commission in this docket (with service to all parties), which notice the allegedly Contesting Party shall have a right to challenge within five (5) business days if it in good faith believes that it did not violate the Settlement, and, absent a Commission determination (within 30 business days of [the Company's] notice) that [the Company] has wrongfully deemed the party a Contesting Party under the terms of the Settlement, [the Company] may collect from such party the Motion rates, provided that the collection of the Motion rates, shall be subject to refund with interest should the Commission determine that [the Company] had wrongfully deemed the party a Contesting Party under the terms of the Settlement. Such charging of the Motion Rates shall be made effective back to [the effective date of the rate increase] for such party."

## **TOPIC 2 Contested Settlements – Issues To Consider**

### **1. The *Trailblazer* Four Paths to Approval of Contested Settlements.**

The Commission has explained four approaches it has taken for approving a settlement despite the objections of one or more contesting parties. *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *reh'g denied and clarification granted*, 87 FERC ¶ 61,110 (1999), *reh'g denied*, 88 FERC ¶ 61,168 (1999). *See also El Paso Natural Gas Co.*, 120 FERC ¶ 61,208 (2007).

**Option 1:** The Commission may approve the settlement by making a merits decision on each contested settlement issue if there is an adequate record. This approach is appropriate where the issues are primarily policy issues or the parties have agreed that the record is sufficient for a merits call. Obviously, a settlement cannot be approved under this approach if the contesting parties' arguments have merit. In that case, the Commission should issue a merits decision modifying the settlement for all parties.

**Option 2:** The Commission may still approve a contested settlement as a package (without evaluating each contested provision) if the overall result of the settlement is just and reasonable and falls within a zone of reasonableness. Under this approach, the Commission will include a finding that the contesting party would be in no worse position under the settlement than if the case were litigated.

**Option 3:** Even if the settlement does not satisfy the just and reasonable standard, the Commission may approve the contested settlement where the benefits of the settlement outweigh the objections, and the contesting party's interest is too attenuated, such that the settlement can be approved under the fair and reasonable standard applicable to uncontested settlements. This approach usually includes a finding that the contesting party has another forum to raise its contentions, such as when the company agrees to file a new rate case. However, a contesting party need not be a current shipper on a pipeline to have a viable interest in the pipeline's rates. *See Arctic Slope Regional Corp. v. FERC*, 832 F.2d 158 (D.C. Cir. 1987) (finding that a contesting party who was not shipping on the pipeline and would not ship for several years, nonetheless had a sufficient interest since the pipeline's rates could affect the value of the contesting party's properties).

**Option 4:** As last resort, the contesting party may be severed from the settlement and obtain a litigated result, and the settlement may be approved for the consenting parties. On occasion, the Commission directs that Trial Staff not participate in the severed hearing if Trial Staff supports the settlement.

## 2. Severance limitations.

**a) Competing Pipelines or Utilities.** The courts and the Commission have recognized that pipelines competing with the applicant pipeline have interests and cannot be severed as contesting parties because their issues affect the rates and/or services of consenting parties to the settlement. *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158 (D.C. Cir. 1998); *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998).

**b) State Commissions.** Local distribution companies, or other parties to a settlement, within a state commission's jurisdiction are bound by the state commission's decision to contest a settlement and must be severed from the settlement if the state commission does not become a consenting party and is severed. *Panhandle Eastern Pipe Line Co.*, 77 FERC ¶ 61,284 (1996), *reh'g granted and denied*, 78 FERC ¶ 61,180 (1997).

c) **Direct and indirect interests.** Customers may be both direct customers of a pipeline and/or indirect customers (*e.g.*, a downstream customer of one of the pipeline's direct customers). The Commission has recognized that indirect customers are difficult to sever from a settlement without also severing the direct customer through which they receive service. *United Gas Pipe Line Co.*, 55 FERC ¶ 61,070 (1991), *reh'g denied*, 64 FERC ¶ 61,014 (1993); *Trailblazer*, 85 FERC ¶ 61,345 (1998). In *Southern California Edison v. FERC*, 162 F.3d 116 (D.C. Cir. 1998), the court reversed and remanded a Commission order approving a settlement for consenting parties under the fair and reasonable standard and severing Southern California Edison (SCE) (who opposed the settlement) in its capacity as an direct customer. In effect, the court held that the severance did not fully protect SCE's interests as an indirect customer. That proceeding subsequently settled without further rulings.

Since *SCE*, the Commission has not severed from any settlement a contesting party's indirect interest. The Commission has found in several cases that contesting parties were adequately protected by severing only their direct interests. *Trailblazer Pipeline Co.*, 106 FERC ¶ 61,034 (2004) (severing only contesting party's direct interest, including future interruptible and firm rates and capacity obtained through capacity release); *Wyoming Interstate Pipeline Co.*, 92 FERC ¶ 61,256 (2000) (severing only contesting party's direct interest, including capacity obtained in the future through capacity release); *Trailblazer Pipeline Co.*, 88 FERC ¶ 61,168 (1999) (severing only contesting party's direct interest, including future interruptible transportation and capacity release contracts); *Wyoming Interstate Pipeline Co.*, 87 FERC ¶ 61,339 (1999) (severing only contesting party's direct interest, including future interruptible and firm rates and capacity obtained in the future through capacity release)

### **TOPIC 3 Mobile-Sierra and Standard of Review Provisions**

1. On March 15, 2010, High Island Offshore System, LLC filed an uncontested settlement with the following *Mobile-Sierra* provision:

“To the extent the Commission considers any change to any then-effective provision(s) of the Settlement, it is agreed that the standard of review for any such proposed change shall be the most stringent standard permissible under applicable law, including the “public interest” standard for review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Co.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Co.*, 350 U.S. 348 (1956), as recently applied by the Supreme Court in *NRG Power Marketing, LLC v. Maine Public Utilities Commission* 130 S.Ct. 693 (2010).”

The Commission modified the provision in an order dated April 29, 2011, by rejecting the application of the *Mobile-Sierra* public interest standard of review to the Commission or non-settling third parties in favor of the just and reasonable standard of review. The Commission noted that the parties to the settlement could impose the stricter standard on themselves. *High Island Offshore System, LLC*, 135 FERC ¶ 61,105 at P 23-26 (2011).

2. On August 21, 2008, Petal Gas Storage, L.L.C. filed an uncontested settlement with the following *Mobile-Sierra* provision:

“To the extent the Commission considers any change to any then-effective provision(s) of the Settlement, the Settling Participants agree that the standard for review of any such change proposed by a Settling Participant, or by the Commission acting *sua sponte*, shall be the “public interest” standard for review. The standard for review of any change proposed by any other entity shall be the “just and reasonable” standard of the Natural Gas Act.”

The Commission modified the provision in an order dated May 19, 2011, stating that it would not approve application of the *Mobile-Sierra* public interest standard of review to the Commission. *Petal Gas Storage, L.L.C.*, 135 FERC ¶ 61,152 at P 16-19 (2011).

3. On September 30, 2011, Tennessee Gas Pipeline Company filed an uncontested settlement with the following *Mobile-Sierra* provision:

“[T]he standard for review for any proposed change to Settled Matters, to be effective during the Rate Moratorium, shall be the “public interest” standard for review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.* and *Federal Power Commission v. Sierra Pacific Co.* In any such proceeding, Supporting and Non-Opposing Parties shall not support any such change to be made effective during the Rate Moratorium.

With respect to proposed changes to any Settled Matter sought by non-settling third parties or the Commission acting *sua sponte*, the standard of review shall be the just and reasonable standard.”

The Commission approved the settlement in a letter order dated December 5, 2011. *Tennessee Gas Pipeline Co.*, 137 FERC ¶ 61,182 (2011).

4. On August 12, 2011, Gas Transmission Northwest LLC (GTN), filed an uncontested settlement with the following standard of review provision:

“To the extent the Commission considers any change to the terms of the Settlement during the Moratorium, the standard of review for any such proposed change shall be the most stringent standard permissible under applicable law.”

The Commission accepted this settlement language in a letter order dated November 30, 2011. *Gas Transmission Northwest, LLC*, 137 FERC ¶ 61,163 at P 10, 23 (2011).

5. On December 23, 2011, Tuscarora Gas Transmission Company filed an uncontested settlement of a complaint proceeding (Docket No. RP11-1823) with the same *Mobile-Sierra* provision contained in the GTN settlement. The settlement is before the Commission for approval. We should find out soon whether “the most stringent standard permissible under applicable law” (without any reference to the public interest standard) language passes muster.

#### **TOPIC 4 Other Pertinent Provisions of the Settlement Agreement**

##### **1. Comeback Provisions.**

a) The settlement of the National Fuel Gas Supply Corporation rate complaint case, Docket No. RP06-298, filed on November 17, 2006 includes the following comeback provision: “The effective date of National Fuel’s next general rate case under Section 4 of the Natural Gas Act shall not be earlier than December 1, 2011. ...National Fuel shall file a Section 4 rate filing with rates effective December 1, 2011.”

National Fuel filed a rate case on October 31, 2011 and requested that rates be made effective December 1, 2011. The Commission suspended the proposed rates five months to be effective on May 1, 2012. The New York Public Service Commission (NYPSC) argued that National Fuel violated the settlement by not filing the rate case sufficiently ahead to allow for a 5-month suspension. National Fuel responded that if the NYPSC wanted to specify a certain filing date it should have insisted on that language in the settlement. The Commission set the interpretation of the settlement language for hearing. *National Fuel Gas Supply Corp.*, 137 FERC ¶ 61,171 (2011).

b) The settlement of the Tennessee Gas Pipeline Company rate case, Docket No. RP11-1566, filed on September 30, 2011, includes the following

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comeback provision: “Unless TGP has previously filed an NGA Section 4 general rate case pursuant to the provisions of this Settlement, TGP shall be required to file a general rate case to be effective no later than November 1, 2015. TGP can assume a five-month suspension period for a rate increase when complying with this provision.”

## **2. Moratoriums or Stay-Out Provisions.**

Settlements containing a moratorium provision prohibit both the filing company and the supporting or non-opposing parties from proposing any rate or non-rate changes to be effective during moratorium period. These provisions delineate actions that are prohibited and actions that are permitted during the moratorium period. Generally, parties to the settlement cannot advocate any changes to the settlement or oppose charging the filed rates to contesting parties. However, settlements should allow consenting parties to advocate against the designation of any party as a contesting party.

Generally, pipeline settlements permit the following actions by the applicant and consenting parties to the settlement: 1) filings and rate adjustments permitted by the settlement; 2) challenges to the implementation of settlement terms on the basis that the implementation was improper; 3) activities and filings in rulemaking or legislative proceedings; 4) charges permitted by the current tariff (such as ACA charges) and surcharges imposed or allowed by the Commission on an industry-wide basis as well as refunds or rate reductions ordered on an industry-wide basis; and 5) filing for incremental rates for new facilities or rates for new services, which filings may be challenged by others.

## **3. Provisions Dealing with FERC Modification.**

Settlements usually contain provisions addressing the possibility that the Commission may condition or modify the agreement. If the applicant in its reasonable judgment is materially and adversely affected by the Commission’s modification, settlements provide a short period of time for the applicant to give notice whether or not it will withdraw or reject the settlement. If any settling parties are materially and adversely affected by the Commission’s modification, settlements often provide a short time for those affected parties to so notify the other parties and to initiate a meet-and-confer process to determine if the settlement can be amended by mutual agreement. If mutual agreement cannot be reached then the affected party will have a short time to provide notice as to whether it elects to be bound by the settlement or become a contesting party. The affected party also has the right to file for rehearing and judicial review to remove the modification. If the affected party elects to contest the settlement, some

settlements provide the applicant with the option of withdrawing the settlement. Other settlements provide a threshold level of revenues that need to be attributable to the contesting parties (such as 50 percent) before the settlement could be withdrawn.

**4. Recent Negotiated Provisions for Events Occurring during the Settlement Term.**

**a) Income Tax Rates.** Some settlements address the possibility of a change to the corporate income tax rate that may be enacted during the term of the settlement by permitting the applicant to make a filing to revise the settlement rates to reflect the higher or lower tax rates.

**b) Spin-Down or Spin-Off of Facilities.** Some settlements provide that if the applicant sells or implements a spin-down or spin-off of facilities during the settlement term, then the applicant must file to adjust the settlement rates to reflect the cost of service effect of the removal of depreciation and return and related taxes associated with such facilities based on the value of the sale proceeds not to exceed the net book value. Generally, there is a threshold dollar plant amount that must be exceeded to trigger such a filing.

**c) Pipeline Safety and Greenhouse Gas Costs.** Some settlements allow the applicant pipeline to file to recover costs associated with (1) greenhouse gas emissions resulting from new regulations or legislation, and (2) pipeline safety requirements issued by the US Department of Transportation Pipeline and Hazardous Materials Safety Administration resulting from new regulations or legislation. These filings are generally triggered only after a threshold dollar amount is reached and the annual amounts to be recovered are generally capped.

# **BEST PRACTICES IN DRAFTING FERC SETTLEMENT AGREEMENTS**

## **Panelist Biographies**

January 31, 2012

### **Becky M. Bruner**

Ms. Bruner is a partner with Davis Wright Tremaine with over 20 years of experience in federal and state energy regulation. She is a former hearings examiner and trial staff attorney for the Public Utility Commission of Texas, and a trial staff attorney and legal advisor for the Federal Energy Regulatory Commission (FERC). Since entering private sector in 2006, Ms. Bruner has represented a broad range of energy clients, including traditional and non-traditional transmission-owning utilities and merchant generators. She has represented transmission owners in rate cases involving single system and region-wide cost of service and rate design issues before FERC. She has also advised and represented clients on matters pertaining to Regional Transmission Organization (RTO) tariffs and agreements, energy markets and financial transmission rights, purchase power agreements, transmission interconnections, network upgrades and cost allocation. Ms. Bruner holds a B.A. and M.A. from the University of Texas, and a J.D. from the University of Texas School Of Law.

### **Bill Collins**

Mr. Collins is a trial attorney with the Office of Administrative Litigation at the Federal Energy Regulatory Commission (FERC). He joined the FERC in 1983, and with the exception of two years in private practice, has litigated gas and electric cases at FERC ever since. Mr. Collins holds a B.A. from the University of Virginia and a J.D. from Emory University School of Law.

### **John E. McCaffrey**

Mr. McCaffrey is a partner with Stinson Morrison Hecker LLP. He specializes in representing the interests of state public utility commissions, state consumer advocates, and municipal and cooperative utilities with respect to all aspects of FERC regulation. He has worked on a wide variety of public utility regulatory matters, including electric and gas industry restructuring and market design issues, RTO-related matters, FERC rulemaking and policy-setting proceedings, utility ratemaking, new project certifications, oil pipeline rate regulation under the Interstate Commerce Act, and energy-related merger issues. His experience also includes appellate matters before state and federal courts. Mr. McCaffrey holds a B.A. from Boston College and a J.D. from George Washington University.