General Counsel Roundtable
FERC’s Mission:

RELIABLE, EFFICIENT AND SUSTAINABLE ENERGY FOR CONSUMERS

Assist consumers in obtaining reliable, efficient and sustainable energy services at a reasonable cost through appropriate regulatory and market means.

Fulfilling this mission involves pursuing two primary goals:

1. Ensure that rates, terms and conditions are just, reasonable and not unduly discriminatory or preferential.

2. Promote the development of safe, reliable and efficient energy infrastructure that serves the public interest.
Goal 1: Just and Reasonable Rates, Terms and Conditions
Objective 1.1: Regulatory and Market Means
Objective 1.2: Oversight and Enforcement

Goal 2: Infrastructure
Objective 2.1: Infrastructure Development and Siting
Objective 2.2: Safety
Objective 2.3: Reliability

Appendix A: Factors that May Affect Goal Achievement
External Factors
Internal Factors

Appendix B: Program Evaluation
Appendix C: Guiding Principles
Appendix D: FERC Organizational Chart and Office Responsibility
Appendix E: Statutory Authority
Message from the Chairman

To the Speaker of the House of Representatives, the President of the Senate, the President pro tempore of the Senate and the Director of the Office of Management and Budget:

I am pleased to submit the Federal Energy Regulatory Commission’s Strategic Plan for fiscal years 2009 through 2014. We used this opportunity to restructure the Strategic Plan to align our strategic goals and objectives more closely with our statutory authorities. This change will allow the Commission to request resources and report progress to Congress and the public more clearly based on the Commission’s statutory purposes.

Our mission encapsulates our responsibilities from our longest standing authorities to our newest. It reflects the direction of the Commission in supporting national goals and speaks to the future energy policy of our country. The Commission will rely on its statutory authorities and enabling legislation to meet the pressing energy needs of our time. The Commission will continue to balance the competing needs and interests of affected parties and fulfill its role as an independent wholesale energy regulator.

Contained in this plan are the key strategies which the Commission will employ to achieve our strategic goals and objectives as well as performance measures to gauge our progress. The Commission’s strategic plan is a living document. As such, we will continuously evaluate our progress and make changes as necessary.

I am confident that the Commission and its dedicated staff will meet the needs of the American public and continue to serve in the public interest.

Jon Wellinghoff
Chairman
Federal Energy Regulatory Commission

September 2009 • Washington DC
GOAL 1

JUST AND REASONABLE RATES, TERMS AND CONDITIONS

ENSURE THAT RATES, TERMS AND CONDITIONS ARE JUST, REASONABLE AND NOT UNDULY DISCRIMINATORY OR PREFERENTIAL.

One of the Commission’s fundamental statutory responsibilities is to ensure that rates, terms and conditions for wholesale sales and transmission of electric energy and natural gas are just and reasonable and not unduly discriminatory or preferential. The Commission uses a combination of regulatory and market means to achieve this goal, consistent with national policy and priorities.

Oversight and enforcement are essential complements to the regulatory and market means by which the Commission ensures that rates, terms and conditions of service are just and reasonable and not unduly discriminatory or preferential. The Commission uses a balanced approach in its oversight and enforcement efforts, including: educating affected entities about market rules and other regulations; promoting internal compliance programs; employing robust audit and investigation programs; and, where appropriate, exercising the Commission’s civil penalty authority as a deterrent to violations.
OBJECTIVE 1.1
REGULATORY AND MARKET MEANS
Ensure implementation of appropriate regulatory and market means for establishing rates.

1. STRATEGY | Establish rules that enhance competition by allowing non-discriminatory market access to all supply-side and demand-side energy resources

The organized wholesale electric markets represent one area in which the Commission relies on regulatory and market means to ensure that rates are just and reasonable and not unduly discriminatory or preferential. Improving the competitiveness of these markets is important in achieving that goal because it encourages new entry among supply-side and demand-side resources, spurs innovation and deployment of new technologies, improves operating performance, and exerts downward pressure on costs. Notable benefits also stem from more broadly diversifying the fuels used to generate electricity. As described below, the Commission will take several additional steps to ensure a level playing field in jurisdictional markets for all types of resources.
Long Term Performance Goal

- Further barriers to participation by demand resources in organized wholesale electric markets will be identified and eliminated.

### ANNUAL PERFORMANCE TARGETS

<table>
<thead>
<tr>
<th>FY 2010:</th>
<th>Evaluate ISO/RTO filings on barriers to demand response. Complete and submit National Action Plan on Demand Response</th>
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<tr>
<td>FY 2011:</td>
<td>As appropriate, issue a notice of proposed rulemaking (NOPR) on further steps to eliminate barriers to demand resources, including steps identified in National Action Plan on Demand Response</td>
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<tr>
<td>FY 2012:</td>
<td>As appropriate, issue Final Rule on further steps to eliminate barriers to demand resources</td>
</tr>
<tr>
<td>FY 2013:</td>
<td>Implement Final Rule as appropriate</td>
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<tr>
<td>FY 2014:</td>
<td>Monitor implementation and performance. Evaluate performance and seek changes as necessary</td>
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**Barriers to Demand Resources:** The Commission will continue its efforts to identify and eliminate barriers to participation by demand resources in organized wholesale electric markets. Demand response, for example, can provide competitive pressure to reduce wholesale electric prices, increase awareness of energy usage, provide for more efficient operation of markets, mitigate market power, enhance reliability, and, in combination with certain new technologies, support the use of renewable energy resources and distributed generation. In its June 2009, Congressionally-mandated National Assessment of Demand Response Potential, the Commission found that the potential for peak electricity demand reductions across the country is between 38 gigawatts (GW) and 188 GW, up to 20 percent of national peak demand, depending on how extensively demand response is applied. In Order No. 719, issued in October 2008, the Commission recognized this potential and directed regional transmission organizations (RTOs) and independent system operators (ISOs) that operate organized wholesale electric markets to identify barriers to the comparable treatment of demand response resources. The Commission will consider additional market reforms in light of these filings and other developments, including the formulation of the Congressionally-mandated National Action Plan on Demand Response. The National Action Plan will, among other things, identify requirements for technical assistance and a national communications program, as well as tools and other materials to support the development of demand response.
Long Term Performance Goal

- Best practices for demand response products and procedures will be explored and, as appropriate, implemented in organized wholesale electric markets.

**ANNUAL PERFORMANCE TARGETS**

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<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
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<tr>
<td>FY</td>
<td>Perform outreach with ISOs/RTOs, demand response providers, and others; as appropriate, issue NOPR on best practices</td>
<td>As appropriate, issue Final Rule on best practices</td>
<td>Implement Final Rule as appropriate</td>
<td>Monitor implementation and performance</td>
<td>Evaluate performance and seek changes as necessary</td>
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**Best Practices for Demand Response Products and Procedures:** Encouraging the implementation of best practices for demand response products and procedures in the organized wholesale electric markets will help to achieve the potential benefits associated with demand response. The identification of best practices will further facilitate demand response participation in these markets on a non-discriminatory basis. The Commission will identify best practices through informal outreach with industry representatives and, as appropriate, will consider initiating formal proceedings to reform existing market rules.

**Faces of FERC: Susan Pollonais | Energy Industry Analyst**

How does FERC ensure that consumers are paying fair prices for energy in today’s modern and highly sophisticated market structure? By having pros like Susan Pollonais on our team. While Susan started her energy career working for a major utility in the Midwest, she jumped at the chance to come to FERC 12 years ago to “sit on the other side of the table.”

As an analyst at FERC, Susan’s place at the table requires her to ensure that wholesale customers purchase energy at just and reasonable rates. Her experiences as an advisor to a former FERC Chairman and as an advisor in FERC’s Office of Administrative Litigation have made her a true expert in natural gas and electricity.

“I am responsible for monitoring sales in the Nation’s wholesale electricity markets to help ensure that electricity is available at competitive prices and that market rules are working effectively,” Susan says.

Years at FERC: 12
Long Term Performance Goal

- All resources technically capable of providing needed ancillary services will have the opportunity to provide those services.

### ANNUAL PERFORMANCE TARGETS

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Performance Target</th>
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<tbody>
<tr>
<td>FY 2010</td>
<td>Perform outreach to identify the need for modification or creation of additional ancillary services, and issue NOPR, as appropriate</td>
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<tr>
<td>FY 2011</td>
<td>As appropriate, issue Final Rule on ancillary service products and procedures</td>
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<tr>
<td>FY 2012</td>
<td>Implement Final Rule as appropriate</td>
</tr>
<tr>
<td>FY 2013</td>
<td>Monitor implementation and performance</td>
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<tr>
<td>FY 2014</td>
<td>Evaluate performance and seek changes as necessary</td>
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**Participation in Ancillary Services Markets:** The provision of ancillary services is critical to the reliable operation of the interstate electric transmission grid. In Order No. 890, issued in February 2007, the Commission revised the *pro forma* Open Access Transmission Tariff to allow customers to self-supply any ancillary service that their resources are capable of providing (except for those services that, for technical reasons, are required to come from the transmission provider). To build on this reform, the Commission will consider instituting formal proceedings to determine whether the modification or creation of ancillary services is necessary to support the provision of transmission service on terms and conditions that are just and reasonable and not unduly discriminatory or preferential. As part of any such proceeding, the Commission could seek to remove barriers that may exist to any resource capable of providing an ancillary service from having the opportunity to do so.
Long Term Performance Goal

- Market reforms which will allow renewable resources to compete fairly will be explored and, as appropriate, implemented in Commission-jurisdictional markets.

**ANNUAL PERFORMANCE TARGETS**

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Performance Objective</th>
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<tbody>
<tr>
<td>FY 2010:</td>
<td>Perform outreach with industry and issue staff white paper identifying potential need for and types of market reforms</td>
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<tr>
<td>FY 2011:</td>
<td>Issue a notice of inquiry (NOI/NOPR) on market reforms, if appropriate</td>
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<tr>
<td>FY 2012:</td>
<td>Issue Final Rule on market reforms, if appropriate</td>
</tr>
<tr>
<td>FY 2013:</td>
<td>Monitor implementation and performance</td>
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<tr>
<td>FY 2014:</td>
<td>Evaluate performance and seek changes as necessary</td>
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**Renewable Resources**: The use of renewable energy resources to generate electricity has the potential to be a cost-effective means not only to reduce greenhouse gas emissions, but also to diversify the fuels used to generate electricity. The Commission will continue to pursue market reforms to allow all resources, including renewable energy resources, to compete in jurisdictional markets on a level playing field. These efforts could include amendments to market rules, the modification or creation of ancillary services and related policies, or the implementation of operational tools that support the reliable integration of renewable resources. By implementing these or other reforms, the Commission’s actions have the potential to increase the amount of electricity being produced from renewable energy resources.
2. STRATEGY | Promote operational efficiency in wholesale markets through the exploration and encouragement of the use of software and hardware that will optimize market operations

Long Term Performance Goal

- By FY 2014, efficiency in market operations will be enhanced through deployment of new software and optimization of hardware.

ANNUAL PERFORMANCE TARGETS

<table>
<thead>
<tr>
<th>Year</th>
<th>Target</th>
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</thead>
<tbody>
<tr>
<td>FY 2010:</td>
<td>Internal release of staff white paper; industry outreach, including technical conferences, to identify best practices</td>
</tr>
<tr>
<td>FY 2011:</td>
<td>Pursue voluntary adoption of best practices by RTOs/ISOs; if appropriate, issue Policy Statement and/or NOI/NOPR</td>
</tr>
<tr>
<td>FY 2012:</td>
<td>Follow-up workshops on best practices implementation; issue Final Rule, if relevant</td>
</tr>
<tr>
<td>FY 2013:</td>
<td>Monitor implementation and performance</td>
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<tr>
<td>FY 2014:</td>
<td>Evaluate performance and seek changes as necessary</td>
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</table>

The Commission will identify opportunities to enhance operational efficiency in jurisdictional markets by encouraging public utilities, particularly RTOs and ISOs, to deploy new modeling software and optimize their market operations. By improving efficiency in the use of computational methods and identifying ways in which the operation of utility assets can be optimized, the Commission will enhance operational efficiency to the benefit of all public utility customers. In addition, the Commission will consider implementation of rules and practices developed by individual RTOs and ISOs, as well as the North American Energy Standards Board (NAESB) and the North American Electric Reliability Corporation (NERC).
3. **STRATEGY** | Develop and implement a common set of performance metrics for markets within and outside of ISOs/RTOs

**Long Term Performance Goal**

- By FY 2014, the performance of markets within and outside of ISOs/RTOs will be measured using a common set of metrics.

**ANNUAL PERFORMANCE TARGETS**

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<tr>
<th>Year</th>
<th>Target</th>
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<tbody>
<tr>
<td>FY 2010:</td>
<td>Explore and develop appropriate operational and financial metrics for ISOs/RTOs</td>
</tr>
<tr>
<td>FY 2011:</td>
<td>Explore and develop appropriate operational and financial metrics for non-ISO/RTO regions</td>
</tr>
<tr>
<td>FY 2012:</td>
<td>Establish appropriate common metrics between ISOs/RTOs and non-ISOs/RTOs</td>
</tr>
<tr>
<td>FY 2013:</td>
<td>Monitor implementation and performance</td>
</tr>
<tr>
<td>FY 2014:</td>
<td>Evaluate performance and seek changes as necessary</td>
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**Faces of FERC: Kermit Banks | Energy Industry Analyst**

Formerly a math teacher, Kermit Banks joined FERC 12 years ago and continues to make sure the electric utilities play by the rules.

As a FERC energy industry analyst, Kermit examines the rate applications of electric utilities to make sure the companies are not engaging in market manipulation.

“I need to ensure fair rates for customers,” Kermit says of his work. “There are occasions when we discovered that certain companies were abusing the system, and we took away their rate authority. It is important that market power is mitigated and we protect consumers.”

Years at FERC: 12
In Order No. 2000, the Commission encouraged the voluntary formation of RTOs to operate the electric transmission grid and to create organized wholesale electric markets. The development of RTOs and modified market structures was aimed at increasing the efficiency of wholesale electric market operations and increasing non-discriminatory access to the transmission grid. The Commission mandated that RTOs be independent from market participants, fairly exercising operational authority over all transmission facilities under their control.

Today, RTOs and ISOs serve roughly two-thirds of all electricity customers in the United States by providing transmission service, interconnecting new resources to the transmission grid, and operating organized wholesale electric markets. In recent years, the Commission has issued dozens of orders implementing reforms to the services provided and the markets operated by RTOs and ISOs in an effort to enhance competition and increase efficiency. The Commission will continue to address various services, including congestion on the transmission grid and interconnection queues to increase efficiency and maintain just and reasonable rates, terms and conditions that are not unduly discriminatory or preferential.

To support these further enhancements to RTO and ISO activities, the Commission will develop appropriate operational and financial metrics to measure the performance of RTOs and ISOs and transactions in the markets they administer. The Commission will also develop appropriate metrics for non-ISO/RTO markets to allow for comparisons of various market structures. By FY 2014, all ISOs/RTOs and non-ISOs/RTOs will use a common set of metrics to measure performance.

Faces of FERC: Deborah Osborne | Group Manager, Dispute Resolution Service

Building the energy superhighways that power America means balancing the concerns of everyone from consumers to companies, and everything from the environment to culture to local history.

Few people could be more adept at this crucial juggling act than Deborah Osborne, who became a certified mediator after serving as an anthropologist and archaeologist at FERC. In fact, her experience with environmental and cultural resources and work experience with other cultures, such as Native Americans, made her a natural recruit for FERC’s Dispute Resolution Service shortly after it was formed in 1999.

The only difference between the two worlds of learning about people, she says, is that “artifacts don’t talk back.”

In dispute resolution, “we stand ready to help people,” she says. “You gain so much.”

Years at FERC: 23
4. STRATEGY | Promote broad participation, including the use of alternative dispute resolution services, in the Commission’s processes and procedures

**Long Term Performance Goal**

- By FY 2014, appropriate filings and issues will employ alternative dispute resolution and collaborative processes first.

**ANNUAL PERFORMANCE TARGETS**

<table>
<thead>
<tr>
<th>FY 2010:</th>
<th>Develop guidelines/tariff provisions to apply to filings/issues amenable to consensual resolution</th>
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<tbody>
<tr>
<td>FY 2011:</td>
<td>Implement rules setting forth guidelines/tariff provisions and initiate pilot programs</td>
</tr>
<tr>
<td>FY 2012:</td>
<td>Conduct study to determine if pilot program should be expanded</td>
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<tr>
<td>FY 2013:</td>
<td>Determine if number of consensual resolutions increased</td>
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<tr>
<td>FY 2014:</td>
<td>Evaluate whether additional steps are necessary to achieve appropriate use of ADR and collaborative processes</td>
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The Commission recognizes the value of using an open and transparent process in which stakeholders are engaged early. This practice increases the probability of a successful outcome in which all parties’ concerns are addressed. This concept has been successfully implemented in the Commission’s Integrated Licensing Process for siting hydroelectric infrastructure and in the pre-filing process for siting natural gas infrastructure. In these processes, the Commission fully engages stakeholders to identify and discuss issues that may impact the development of the project. The Commission will apply this concept to other areas of the Commission’s work in order to improve regulatory outcomes.

The Commission further recognizes the value of resolving cases through consensual means and of using alternative dispute resolution techniques in the energy market proceedings it oversees. In fact, about 80 percent of the contested proceedings set for hearing at the Commission are settled. The settlement of these cases is enormously beneficial to energy consumers. It dramatically limits the time, expense and resources that the Commission and outside parties would otherwise need to devote to these cases. Further, when appropriate, a settlement provides...
rapid refunds of overcharges to energy consumers. In fact, Commission approved settlements provide hundreds of millions of dollars of refunds annually to ratepayers throughout the United States. Additionally, settlements provide regulatory certainty in a much shorter period of time than if the case were litigated. This allows informed investment decisions to be made by energy companies wishing to develop energy infrastructure, including renewable energy resources, in a more timely and efficient manner. Further, the resolution of a case through settlement is likely to be more acceptable to the parties than a litigated outcome, and therefore minimizes the likelihood of an appeal. Thus, settlements eliminate the time and expense associated with the appellate court process and a potential remand of the case to the Commission.

The Commission also offers a full range of independent, neutral, third party Alternative Dispute Resolution (ADR) services within the Commission and to outside parties to prevent, manage and resolve energy conflicts. Facilitation, mediation and early-neutral-evaluation processes have a proven track record of success across a wide spectrum of energy and environmental disputes in all energy sectors regulated by the Commission. Stakeholders committed to ADR processes for collaborative problem-solving and case dispute resolution at the Commission average an 86 percent success rate. Parties that use ADR are satisfied with the results, produce durable consensual agreements and often return to ADR because it is proven to have positive effects on business relationships. Going forward, ADR processes and tools will increase in value and popularity to meet consumer needs and fulfill the requirements of complex, multi-disciplinary energy initiatives on the Nation’s horizon.

In the coming years, the Commission will apply these concepts to other areas of the Commission’s work in order to improve regulatory outcomes. The Commission will begin by identifying issues and proceedings that lend themselves to consensual resolution and conducting a pilot project. After analyzing the effects of the pilot, the Commission will look for ways to expand the effort.

The Commission promotes broad participation in its processes in several other ways, as well. For example, the Commission generally issues a Notice of Proposed Rulemaking, which is published in the Federal Register, to announce its consideration of changes to its regulations and to solicit comments from any interested entities. The Commission considers all such comments in development of any final rule. The Commission may also issue a Notice of Inquiry through the Federal Register to gather information. The Commission also holds technical conferences as a way to involve stakeholders in rulemaking and other proceedings. Technical conferences provide the Commission with valuable information on stakeholders’ views and other information that may prove useful in the development of new policies.
OBJECTIVE 1.2
OVERSIGHT AND ENFORCEMENT
Increase compliance with the Commission’s rules and deter market manipulation.

1. STRATEGY | Promote internal compliance programs and self-reporting of violations

Long Term Performance Goal

- By FY 2014, electric and natural gas industries will meet the following criteria:

  1. 70 percent of company compliance programs reviewed on Commission audits for the audit focus areas are found to be adequate to demonstrate a culture of compliance.

ANNUAL PERFORMANCE TARGETS

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<th>Performance Measure 1</th>
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<tr>
<td>FY 2010: 10%</td>
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<td>FY 2011: 25%</td>
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<td>FY 2012: 40%</td>
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<tr>
<td>FY 2013: 55%</td>
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<td>FY 2014: 70%</td>
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2. 70 percent of compliance programs reviewed through investigations that involve a penalty are found to be sufficiently robust to merit credit to reduce the penalty.

ANNUAL PERFORMANCE TARGETS

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<th>Performance Measure 2</th>
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<td>FY 2010:</td>
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<td>FY 2011:</td>
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<td>FY 2012:</td>
<td>40%</td>
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<tr>
<td>FY 2013:</td>
<td>55%</td>
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<tr>
<td>FY 2014:</td>
<td>70%</td>
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To increase compliance with the Commission’s rules, the Commission sees opportunities to explain the intent and requirements of its rules to stakeholders. Moreover, the Commission has encouraged utilities to adopt internal compliance programs to prevent violations and instances of noncompliance. The Commission issued a policy statement on compliance that identified elements of an effective compliance program. The Commission also stated that if a robust compliance program was in effect when a violation occurred, any resultant penalty may be reduced or eliminated.

The Commission will review compliance programs as part of its compliance audits, issue publicly available audit reports, and engage in formal and informal outreach efforts to promote effective compliance programs. In addition, the Commission will further this strategy by giving companies credit against settlements if a robust compliance program was in effect when the violation occurred. In cases where a company is given a reduced civil penalty, the settlement agreement should be made known to the industry in order to encourage others to adopt and implement robust and thorough compliance programs.

The success of these efforts will be measured by the existence of robust compliance programs by the regulated entities. The Commission anticipates that it will find, through audits and investigations, that regulated entities have created a culture of compliance. The Commission further expects that this culture of compliance will lead to companies actively addressing and minimizing areas of systematic noncompliance.
2. STRATEGY | Use a risk-based approach to plan and prioritize audits of jurisdictional companies

Long Term Performance Goal

- By FY 2014, 80 percent of the Commission’s audit program will be planned using a risk-based approach.

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<td>FY 2010: 40%</td>
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<td>FY 2011: 60%</td>
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<td>FY 2012: 80%</td>
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<td>FY 2013: 80%</td>
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<td>FY 2014: 80%</td>
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In its enforcement role, the Commission takes proactive steps on a variety of fronts to reduce the probability that violations will occur. The Commission conducts compliance audits and performs investigations of alleged violations of relevant statutes and Commission rules.

The Commission prepares a plan each year that addresses a variety of audit topics for the upcoming fiscal year. The audit plan represents the Commission’s formal plan of action to accomplish the audit goals and objectives for the fiscal year. Audits are planned and prioritized using a risk-based approach in order to maximize the impact of the Commission’s resources. Audit topics included are determined from many sources including, but not limited to, legal and technical experts at the Commission, information gleaned from ongoing and completed audits, and contact with industry and state commissions.

Audit candidates included in the plan are chosen based on three primary methods: (1) internally developed screens that consider various risk factors; (2) input from the Commission’s other program offices; and (3) Commission orders. Once an audit candidate is selected, the Commission assesses the areas of potential risk of noncompliance under the Commission’s regulatory requirements. The risk assessment is typically completed before an audit begins and is updated as necessary during the audit.

Although the Commission currently uses risk factors in developing its audit plan, the Commission is striving to have 80 percent of its audits planned using a risk-based approach by FY 2014. The Commission will develop approaches that take many risk factors into account when planning and prioritizing audits.
The Commission plays an important role in the development of a strong energy infrastructure that operates efficiently, safely and reliably.

One aspect of the Commission’s role in energy infrastructure development stems from siting authority that includes licensing non-federal hydropower projects, certificating interstate natural gas pipelines and storage projects, authorizing liquefied natural gas (LNG) facilities, and, in certain circumstances, permitting electric transmission lines. Throughout all of these processes, the Commission’s goal is to expedite application processing without compromising environmental responsibilities or public participation. Reconciling these interests, however, remains a significant challenge. The Commission believes that issues are best addressed openly and early in the application process. The Commission encourages, and sometimes requires, project proponents to engage in early involvement of state and federal agencies, Indian tribes, affected landowners and the public.
The efficient operation of energy infrastructure involves improving the use and operation of infrastructure through, for example, the use of new technologies, and procedures that enhance economic efficiency. The Commission promotes these goals in several ways. For example, the Commission can provide incentives for the appropriate use of advanced technologies. In the context of the electric transmission system, the use of advanced technologies can, among other benefits, improve energy efficiency by decreasing line losses or it may enable customers to make choices about when to shift or reduce demand. Similarly, effective electric transmission planning that evaluates all resources and options for cost effective solutions can contribute to the development of energy efficient infrastructure that enhances economic efficiency.

The Commission is responsible for the safety of LNG and non-federal hydropower facilities throughout the entire life cycle of a project: design review, construction and operation. To meet this mandate, FERC primarily relies on physical inspections of the facilities. The dynamic dam safety program must adapt to assimilate advances in technology as well as new technical challenges presented by the aging national water resources infrastructure.

The Commission also has an important role in maintaining the reliability of the electric transmission grid. The Energy Policy Act of 2005 charged the Commission with overseeing a reliable bulk power system infrastructure and mandated the establishment of an Electric Reliability Organization (ERO). The ERO is to develop and enforce mandatory reliability and cyber security standards, subject to the Commission’s oversight and approval. The Commission also monitors system disturbances to identify near and long-term issues affecting generation and transmission. In addition, the Commission will be exploring technical, reliability and market issues associated with integrating additional renewable generation into the electric transmission grid.

**Faces of FERC: Brooks Carter | Manager, Dockets and Registry**

The next time you easily locate a newly filed document on the FERC eLibrary site, thank Brooks Carter and the team of FERC Systems Operations and Engineering staff who work to format and post the thousands of pages of documents filed with and issued by FERC each day.

Brooks and the staff handled nearly 36,000 electronic submissions to the Commission during fiscal year 2009—significantly higher than the 2,000 electronic submissions in 2001—and another 25,000 paper filings.

Brooks joined FERC’s predecessor agency, the Federal Power Commission, in 1976 after working for Chrysler Corp. in the Saturn Apollo space program in the 1960s and 1970s. He takes pride in what the Systems Operations and Engineering staff does to make FERC a leader in document processing and posting.

“I’m competitive by nature,” he says. “The goal is to make FERC a leader in all electronic endeavors—eFiling, eForms, eNotification. I want people coming to us to ask how we’re doing it.”

**Years at FERC:** 32
OBJECTIVE 2.1
INFRASTRUCTURE DEVELOPMENT AND SITING
Increase efficient infrastructure consistent with demand.

1. STRATEGY | Encourage new electric transmission facilities that advance efficient transmission system operation

Long Term Performance Goal

- By FY 2014, 50 percent of all new transmission projects will incorporate advanced technologies.

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<th>ANNUAL PERFORMANCE TARGETS</th>
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<tr>
<td>FY 2010: 5%</td>
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<tr>
<td>FY 2011: 10%</td>
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<tr>
<td>FY 2012: 20%</td>
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<tr>
<td>FY 2013: 35%</td>
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<td>FY 2014: 50%</td>
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The lack of adequate transmission facilities creates a significant barrier to trade between markets and among regions. To encourage greater investment in the Nation’s transmission infrastructure, Congress directed the Commission in the Energy Policy Act of 2005 to adopt rules making incentive rate treatments available for electric transmission infrastructure investments meeting certain criteria. Incentive rate treat-
ments granted pursuant to those rules include, for example, recovery of increased return on equity, recovery in rate base of 100 percent of construction work in progress, and recovery of prudently incurred costs for projects that are abandoned for reasons beyond the utility’s control.

Congress has also directed the Commission to adopt standards and protocols to govern the implementation of smart grid technologies that can enhance reliability and efficiency in the operation of the Nation’s electric transmission grid. Smart grid advancements use digital communications and advanced technologies to modernize the transmission of electricity and the operation of energy markets. The Commission will support the deployment of smart grid applications by reviewing and adopting, as appropriate, standards and protocols developed through the process coordinated by the National Institute of Standards and Technology (NIST). In addition, the Commission will implement rate treatment policies that support investments in smart grid technologies in the interim period between development and approval of smart grid standards.

Through the use of incentive rates, the adoption of smart grid standards, and other transmission-related activities, the Commission aims to increase the number of transmission projects that incorporate advanced technologies. By 2014, 50 percent of all new transmission projects will incorporate advanced technologies.

**Faces of FERC: Carlton Steen | Energy Industry Analyst**

Carlton Steen is on the front lines ensuring that natural gas and oil consumers are paying just and reasonable rates for the energy they use. He’s gone from auditing natural gas producer costs for rate cases to analyzing pipeline companies’ costs, no small undertaking.

“It can be kind of difficult at times,” Carlton says. “You have to make sure all the pipes get their fair share of overhead costs.”

In the case of a dispute, Carlton provides either written or oral testimony for contested hearings.

It’s rewarding work, Carlton says. “You feel good once you get it done.”

**Years at FERC: 30**
2. STRATEGY | Support electric transmission planning through the use of open and transparent processes that include analysis and consideration on a comparable basis of proposed solutions involving any of generation, transmission, and demand resources

Long Term Performance Goal

By FY 2014, all public utilities will implement open and transparent transmission planning processes that meet the strategy.

ANNUAL PERFORMANCE TARGETS

<table>
<thead>
<tr>
<th>FY 2010:</th>
<th>Assessment of transmission planning process best practices, including the potential for collaborative decision making, and issue NOPR, as appropriate</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 2011:</td>
<td>As appropriate, issue Final Rule on transmission planning process best practices</td>
</tr>
<tr>
<td>FY 2012:</td>
<td>Implement Final Rule as appropriate</td>
</tr>
<tr>
<td>FY 2013:</td>
<td>Monitor implementation and performance</td>
</tr>
<tr>
<td>FY 2014:</td>
<td>Evaluate performance and seek changes as necessary</td>
</tr>
</tbody>
</table>

Although ownership of the interstate electric transmission grid is highly disaggregated, with more than 500 owners, the need for, and effect of, transmission expansions to meet both reliability and economic needs must be considered not only on a local basis, but also on a sub-regional and regional basis. The Commission therefore requires transmission providers to participate in an open and transparent regional transmission planning process that aims to improve the coordination of transmission planning among utilities. Such coordination will support the development of an efficient transmission system and enhance competition in wholesale electric markets by reducing barriers to trade between markets and among regions. These transmission planning processes will also increase the availability of non-discriminatory access to transmission service, increase access to renewable energy resources, and ensure that proposed solutions involving generation, transmission and demand resources are analyzed and considered in a comparable manner. As transmission providers refine their transmission planning processes, the Commission will assess best practices, including the potential for collaborative decision making, and adopt reforms as necessary to its transmission planning process requirements.

1 Assessment includes how options to transmission are considered.
3. STRATEGY | Promote efficient design and operation of natural gas facilities

**Long Term Performance Goal**

- By FY 2014, 100 percent of jurisdictional natural gas companies will be examined for feasibility of installing waste heat recovery systems.

<table>
<thead>
<tr>
<th>ANNUAL PERFORMANCE TARGETS</th>
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<tbody>
<tr>
<td>FY 2010: 20%</td>
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<tr>
<td>FY 2011: 40%</td>
</tr>
<tr>
<td>FY 2012: 60%</td>
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<tr>
<td>FY 2013: 80%</td>
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<tr>
<td>FY 2014: 100%</td>
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</tbody>
</table>

The Commission is examining the design and operation of jurisdictional natural gas facilities and exploring ways to improve and promote greater efficiency at these facilities, including the feasibility of installing waste heat recovery systems in jurisdictional natural gas facilities. The Interstate Natural Gas Association of America’s (INGAA) February 2008 White Paper as supplemented in June 2009, identified applicability thresholds for various waste heat recovery opportunities for interstate natural gas pipelines. Waste heat recovery is the process of collecting the waste heat emitted from compressor units as a by-product of combustion, and then using that heat to run generators and create electricity. Waste heat recovery is important because it has the potential to allow the industry to transform a current waste product, otherwise lost into the atmosphere, into additional electricity for our Nation.

Beginning in FY 2010 and continuing through FY 2014, Commission staff will conduct bi-monthly reviews of Electronic Bulletin Boards (EBBs) to gauge the availability of information on waste heat recovery potential. Companies are not currently required to post information regarding waste heat feasibility on their EBBs, but the Commission will encourage companies to post this information voluntarily so that there is greater transparency across the industry. Staff will also review the FERC Form 567, annual flow diagrams, to identify companies with facilities that may be candidates for waste heat recovery efforts. Working with INGAA, the Commission will meet with other industry representatives to discuss and gain feedback on these efforts. The Commission will also consider the potential flow implications of taking compressors out of service for installation of waste heat recovery facilities while facilities balance their stated transportation contracts.

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2 EBBs are internet sites where pipeline companies must post certain information to be in compliance with Part 284.12 and 284.13 of the Commission’s regulations.
OBJECTIVE 2.2
SAFETY
Minimize risk to the public.

1. STRATEGY | Incorporate risk-informed decision making (RIDM) into the dam safety program

**Long Term Performance Goal**

- By FY 2014, risk-informed decision making will be incorporated into the FERC dam safety program.

<table>
<thead>
<tr>
<th>ANNUAL PERFORMANCE TARGETS</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 2010: Develop action plan</td>
</tr>
<tr>
<td>FY 2011: Portfolio Risk Assessment of FERC dam inventory</td>
</tr>
<tr>
<td>FY 2012: Determine RIDM is consistent with regulatory process</td>
</tr>
<tr>
<td>FY 2013: Finalize policy and technical guidelines</td>
</tr>
<tr>
<td>FY 2014: Fully incorporate RIDM into the dam safety program</td>
</tr>
</tbody>
</table>

The administration and execution of the Commission’s dynamic dam safety program ensures that the non-federal hydropower projects under the Commission’s jurisdiction are safe. The dam safety program involves physical safety inspections and also applies advances in technology to address the technical challenges presented by aging national water resources infrastructure.
In FY 2009, the Commission explored how risk assessment methodologies could benefit its dam safety program. The Commission determined that risk assessment could have the following positive impacts on its program:

- Better understand and quantify potential failure modes;
- Identify previously unidentified failure modes with high risk;
- Understand the consequences of potential failure modes on life, health and property;
- Understand the uncertainty and variability in traditional analyses;
- Understand the risk associated with a single dam or the Commission’s entire inventory of dams;
- Compare the safety of different dams using a common basis, risk;
- Compare the relative contribution to risk of all failure modes at a given dam; and
- Evaluate risk reduction alternatives and effectively reduce the risk that Commission-jurisdictional dams pose to the public in quantifiable and defensible terms.

Many other federal regulatory agencies have incorporated risk assessment methodologies into their work as well. Importantly, the United States Bureau of Reclamation has been a leader in the development of dam safety risk assessment methodologies and currently uses a risk-informed decision making process in the process of continuously evaluating the safety of its dams. Over the last two years, the United States Army Corps of Engineers (USACE), in cooperation with Reclamation and with requested participation from Commission staff, has developed a series of policy and procedure documents that will guide the use of risk-informed decision making in USACE.

**Faces of FERC: Kim Nguyen | Civil Engineer**

How do you generate 15 million megawatts of clean energy for millions of people while looking out for fish, animal habitat, boaters and people? Ask Kim Nguyen. Little did she know when she showed up at a recruiting session at the Society of Women Engineers 18 years ago that she would wind up devoting her career to bringing Americans safe, reliable and clean energy.

Kim’s work is essential to millions of Americans. She coordinated the teams that worked on the relicensing of integral parts of the largest hydroelectric system in the country – a major source of electricity for millions of people in the Pacific Northwest.

Kim’s work on dam licenses involves balancing crucial environmental, cultural and recreational concerns with the power generation of the Pacific Northwest.

Thanks to Kim and her FERC coworkers, the dams will protect and enhance fish populations, including salmon, trout and sturgeon, as well as other animals and their habitat, while protecting the scenic Columbia River and its recreational activities, historic and cultural resources.
The Commission will develop an action plan in FY 2010 that could lead to fully incorporating risk-informed decision making into the dam safety program. This action plan will identify and schedule the critical steps in progressing toward this goal. In FY 2011, the Commission will prepare a portfolio risk assessment of FERC’s dam inventory. Through this high-level process of assessing each dam, staff will be able to identify high-risk dams that need more urgent attention. By identifying these dams, the current safety status and the need for additional dam safety studies and investigations will be thoroughly evaluated. By using risk-informed decision making, the Commission will be able to focus its resources on those structures that pose the greatest risk.

In the event of a dam failure, there are both economic (property damage, environmental impacts and costs associated with loss of use of the resource) and loss of life consequences. Risk-informed decision making will enable the Commission to make better dam safety decisions that will, in turn, better protect life, health and property. Risk-informed decision making will be an added tool with which to assess dam safety. It will not replace the other, more traditional methods such as Commission inspections or independent engineering consultant inspections of dams.
OBJECTIVE 2.3
RELIABILITY
Maintain the reliability of the electric transmission grid.

1. STRATEGY  |  Process Reliability Standards in a timely manner

Long Term Performance Goal

- By FY 2014, proposed Reliability Standards will be processed in a timely manner at least 80 percent of the time.

<table>
<thead>
<tr>
<th>ANNUAL PERFORMANCE TARGETS</th>
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</thead>
<tbody>
<tr>
<td>FY 2010: 75%</td>
</tr>
<tr>
<td>FY 2011: 75%</td>
</tr>
<tr>
<td>FY 2012: 75%</td>
</tr>
<tr>
<td>FY 2013: 80%</td>
</tr>
<tr>
<td>FY 2014: 80%</td>
</tr>
</tbody>
</table>

The Reliability Standards development process requires the ERO to use an open and inclusive process that involves extensive negotiation, consultation and coordination among many stakeholders. Regional Entities may also develop and propose regional Reliability Standards or regional modifications to a national Reliability Standard. In addition, the ERO may submit interpretations of approved standards, subject to Commission review.

In all such cases, the Commission must either accept or remand these types of filings submitted by the ERO. Once proposed standards are filed, it is important that the Commission respond in a timely manner so that mandatory and enforceable standards affecting reliability can be implemented.
2. STRATEGY | Monitor, audit and enforce Reliability Standards

Long Term Performance Goal

- By FY 2014, Reliability Standards will be enforced effectively, resulting in a reduction of the frequency of repeat violations by at least 10 percent.

<table>
<thead>
<tr>
<th>ANNUAL PERFORMANCE TARGETS</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 2010: Establish tracking process</td>
</tr>
<tr>
<td>FY 2011: Track violations per entity</td>
</tr>
<tr>
<td>FY 2012: Track violations per entity</td>
</tr>
<tr>
<td>FY 2013: Identify number of repeat violations using NOPs</td>
</tr>
<tr>
<td>FY 2014: Decrease repeat violations by 10%</td>
</tr>
</tbody>
</table>

Faces of FERC: Cynthia Pointer | Electrical Engineer

The massive blackout of August 14, 2003 plunged millions of Americans into darkness, and left consumers and government officials demanding answers. FERC engineer Cynthia Pointer was among the six FERC engineers who answered the call to help the U.S.-Canada Power System Outage Task Force analyze data from the blackout that would answer the crucial questions: how did this happen, and how can we prevent it from happening again?

“The Commission was not known for having electrical engineers” at that time, she says. “When the blackout occurred, they (former Chairman Wood and his chief advisor) were interested in finding people within the Commission who knew how to read and understand the event data.”

Cynthia’s specialty, system protection and control, gave her the experience necessary to sift through and help make sense of what went wrong. And the engineering support she and her colleagues provided the Task Force helped set the stage for FERC to take on the added authority of overseeing the reliability of the Nation’s bulk power.

Today, Cynthia continues to oversee the development of reliability standards designed to protect Americans from a terrible event like the blackout of 2003.

Years at FERC: 11
The Commission will enforce compliance with the Reliability Standards primarily through its oversight of the ERO and Regional Entities. This will typically be accomplished by participating in selected ERO and Regional Entity compliance audits and investigations of users, owners and operators of the bulk power system. The Commission will also perform independent audits occasionally as well as conduct independent investigations of significant blackouts, system disturbances and other reliability incidents.

When the Regional Entities or the ERO identifies a violation – whether through self-reports of violations, audits, investigations or complaints – the ERO submits a Notice of Penalty (NOP) filing for Commission approval. The NOP filing includes the evidence supporting a finding of a violation of one or more Reliability Standards, a proposed penalty, and a mitigation plan to remedy the violation(s) and prevent recurrence.

Rigorous audits and investigations of potential violations, coupled with appropriate penalties and adequate mitigation plans, should reduce the frequency of repeat violations of the Reliability Standards. In order to determine the effectiveness of the compliance program, the Commission will track the number and type of violations, particularly violations of Reliability Standards involving high Violation Risk Factors.
3. STRATEGY | Identify reliability parameters that affect national goals of reducing carbon and increasing the penetration of renewable energy resources on the electric transmission grid

Long Term Performance Goal

- By FY 2014, reliability parameters that could affect national goals of reducing carbon and increasing the penetration of renewable energy resources on the electric transmission grid will be finalized.

ANNUAL PERFORMANCE TARGETS

<table>
<thead>
<tr>
<th>FY 2010:</th>
<th>Establish contacts and develop research, data collection and reporting processes</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 2011:</td>
<td>Track studies and identify or propose reliability parameters. Perform initial analysis to assess if they are feasible for the bulk power system</td>
</tr>
<tr>
<td>FY 2012:</td>
<td>Track studies and identify or propose reliability parameters. Perform expanded analysis to assess if they are feasible for the bulk power system</td>
</tr>
<tr>
<td>FY 2013:</td>
<td>Present analysis to industry</td>
</tr>
<tr>
<td>FY 2014:</td>
<td>Consider industry input and finalize the parameters</td>
</tr>
</tbody>
</table>

The President and Members of Congress are currently drafting and proposing policies and legislation to advance renewable energy and drive clean energy production. In FY 2010, Commission staff will establish processes to track studies that are related to the development of reliability parameters associated with the integration of these initiatives. Using this data, the Commission will perform analyses to see if these reliability parameters are feasible for the bulk power system. In subsequent years, more detailed analysis will be performed and documented to determine if the selected reliability parameters are feasible. The Commission also will seek input from industry and will coordinate and
work with other government agencies to identify reliability issues that affect the national goals of reducing carbon and increasing the penetration of renewable energy resources.

The Commission’s strategy to identify these reliability parameters includes: tracking current, past and future studies performed in the interconnections, regions, ISOs, RTOs, international arena and state commissions; participating in industry groups in the areas of renewable energy resources, carbon-based generation, and carbon sequestration; researching legislation and regulation in the U.S. and in the international arena to gauge the success of similar or proposed reliability parameters; tracking equipment and developing technologies on the products that impact a particular reliability parameter; and developing, analyzing and presenting proposals to form the basis of a study that will identify reliability parameters by using the expertise in the Commission, industry, educational institutions and the Department of Energy’s National Labs.
APPENDIX A

FACTORS THAT MAY AFFECT GOAL ACHIEVEMENT

EXTERNAL FACTORS

The Commission faces a number of external and internal challenges in its efforts to meet its strategic goals.

Market Dynamics

While the Commission seeks to encourage investment in energy infrastructure by establishing rules that allow for non-discriminatory market access to all resources, the financial community may decide that other investments are better uses of limited capital.

Several factors affect the supply and demand for energy, which in turn, affect the business operations of the public utilities subject to the Commission’s jurisdiction and its ability to implement Commission policies. For example, changes in economic conditions impact the supply and demand for energy and the related need for energy infrastructure investment. Weather conditions such as cooler than normal temperatures in the summer, or warmer than normal temperatures in the winter, can reduce the amount of electricity and natural gas needed to cool and heat homes. Severe weather can damage existing energy infrastructure and impede the development of new facilities.
Stakeholder Actions
The Commission encourages the development of competitive markets by approving efficient market rules, reducing barriers to participation by all supply-side and demand-side resources, and preventing the exercise of market power. However, the Commission cannot control the actions or preferences of individual market participants. Support for particular types of products or resources will be driven by consumer demand and, as a result, markets may develop in different ways and at a different pace.

The Commission encourages broad stakeholder participation in the development of new regulatory programs and market rules. However, the ability and willingness of stakeholders to engage in the process of identifying and implementing reforms is beyond the control of the Commission.

Government Actions
Congress or state legislatures could enact legislation that prevents, inhibits or accelerates the effectiveness of reforms pursued by the Commission. Congress may not appropriate adequate funds for the Commission to achieve its strategic goals.

State commissions could take actions that affect the desire of companies to invest in new technologies and other resources or that otherwise affect reforms pursued by the Commission.

Technology
The ability of companies to enhance operational efficiency will be driven by advancements in technology. Delays in the development and deployment of software and hardware could therefore affect the Commission’s efforts to increase efficiency in the operations of companies subject to its jurisdiction.

INTERNAL FACTORS
The Commission’s ability to meet its strategic goals also depends on using its limited resources productively and efficiently. The Commission’s most valuable resource is its staff, which includes highly qualified economists, attorneys, engineers, industry analysts, information technology experts, administrative staff and other experts. The Commission’s ability to recruit, hire, train, motivate and retain qualified staff in a competitive job market is critical to its ability to meet its strategic goals.

Technology also drives the ability of the Commission to gather and analyze data regarding energy markets. The Commission must continue to upgrade its own infrastructure in order to achieve its strategic goals.
APPENDIX B

PROGRAM EVALUATION

To prepare for the update of the Strategic Plan, Commission staff met with OMB to discuss ways in which the document could be improved. Commission staff and OMB focused on four major initiatives that will improve the current Strategic Plan and lay the foundation for future updates:

• Develop a focused and well-defined mission statement;
• Align strategic goals with statutory authorities;
• Develop a short list of long-lasting performance measures; and
• Create a more user-friendly document that is written clearly and in plain English.

To begin the update, a cross-office team was assembled to discuss the four major initiatives. This team worked with the Chairman and his Chief of Staff to develop the new Mission Statement. The new Mission Statement, which is derived from statutory authorities, reflects the shifting national focus and priorities for the country’s energy future.
The team compiled a list of statutory authorities and worked with the Chairman and his staff to write the new strategic goals and objectives. The strategies to achieve the objectives were then written. The strategies reflect the Commission’s priorities and direction. The senior leaders of the Commission developed long term performance measures that will be used to gauge progress towards achievement of strategic objectives.

Each year during the Congressional Performance Budget cycle, results for these performance measures will be gathered and evaluated. The Commission will take advantage of this opportunity to track the success of each measure and determine if the actual results will lead to the accomplishment of each long term performance measure, thus leading to the achievement of the Commission’s long term performance goals and objectives. Through this annual evaluation process, the Commission will be able to identify when means and strategies must be adapted to changing circumstances.

The Commission will also identify indicators that can be monitored by the program offices throughout the year to assess progress in between the annual evaluation cycle. The Chairman will meet at least semiannually with senior leaders to discuss progress towards performance measures, external and internal factors affecting success and the indicators. The Chairman and staff will use the information discussed in these meetings to make decisions about means and strategies.

Because the Strategic Plan’s structure is rooted in statutory authority, we are confident it will lead to a long lasting document that will enable long term evaluation of goals and objectives. Only through consistent evaluation and monitoring can the Commission stay on course to achieve its strategic goals.

Further, the Commission’s future performance budgets and performance reports will be aligned with this new Strategic Plan. This will allow the Commission to examine the full-time equivalent (FTE) and funding associated with each strategic goal and objective.

The Commission is committed to high-quality management practices and internal controls to ensure that all resources are used effectively and efficiently, and in accordance with established laws and regulations. The Commission will also continue to undergo an annual financial audit, conducted by independent auditors. Further, the Commission’s Division of Internal Audits will continue to review and make recommendations on performance measures, data collection methodologies and reporting of results.
APPENDIX C

GUIDING PRINCIPLES THAT STRENGTHEN THE COMMISSION’S OVERALL PERFORMANCE

Five principles guide the Commission as it exercises its jurisdiction under its governing statutes. Whether the Commission is adjudicating a rate filing, ruling on a permit application, or developing a new policy, it strives to meet these criteria as a means of ensuring that each of its actions is consistent with the public interest.

Organizational Excellence

Above all, the Commission strives to use its resources efficiently and effectively to achieve its strategic priorities. The Commission performs targeted recruiting and hiring and has developed a markets-oriented training curriculum for entry-level as well as experienced staff. The Commission also makes efficient use of its information technology to receive filings, produce reports and orders, and maintain data repositories. The Commission tracks the activities of its staff to ensure that they meet the Commission’s strategic goals and objectives.
Due Process and Transparency
Paramount in all of its proceedings is the Commission’s determination to be open and fair to all participants. All significant initial filings submitted to the Commission are announced by way of public notice published in the Federal Register. Material issues of fact are litigated at public hearings governed by due process rules. The Commission encourages the use of alternative dispute resolution procedures, which provide for effective public participation in resolution of a proceeding. The Commission often conducts conferences to receive input from members of the public on controversial issues. The Commission also provides free webcasts on its Web site of major technical conferences held at the Commission and of open Commission meetings where many of its major decisions are announced and discussed.

Regulatory Certainty
In each of the thousands of orders, opinions and reports issued by the Commission each year, the Commission strives to provide regulatory certainty through consistent approaches and actions. Without an assurance that the Commission’s policies will be internally consistent and applied fairly, investors may be unwilling to bear the risks associated with investing in critical energy infrastructure. Where it is appropriate, the Commission provides generic direction to industry participants in the form of guidance orders, policy statements or rulemakings, to avoid the uncertainty present in case-by-case adjudications. The Commission also has adopted market rules designed to help prevent market manipulation, provide a more stable marketplace, and create an environment that will attract needed investment capital.

Stakeholder Involvement
The Commission conducts regular outreach to ensure that interested parties have an appropriate opportunity to contribute to the performance of the Commission’s responsibilities. The Commission also organizes technical conferences and workshops designed to explain and explore issues related to the development and implementation of its policies. The Commission also holds regional conferences to identify infrastructure conditions, needs and investment, as well as environmental and landowner concerns. Finally, in processing hydropower and gas related permit applications, the Commission conducts an extensive collaborative pre-filing process, during which it receives input from a multitude of stakeholders including citizen groups, environmental organizations, tribal interests, and local, state and federal resource agencies. The Commission has applied the same pre-filing process for resolution of certain transmission siting applications.

Timeliness
The Commission’s goal is to reach an appropriate resolution of each proceeding in an expeditious manner. Toward that end, the Commission has steadily decreased the time it takes to act on projects, such as LNG import terminals, gas storage facilities and interstate natural gas pipelines. It has done so without compromising its environmental protection and public participation responsibilities. The Commission also sets and tracks compliance with goals for timely resolution of filings for cost recovery, new services or changes to existing services, as well as opinions resolving initial decisions, complaints and FPA section 203 applications.
APPENDIX D

ORGANIZATIONAL CHART AND OFFICE RESPONSIBILITY

As of June 30, 2009

As of June 30, 2009
Office of Administrative Law Judges (ALJ)
Resolves contested cases as directed by the Commission either through impartial hearing and decision or through negotiated settlement, ensuring that the rights of all parties are preserved.

Office of Administrative Litigation (OAL)
Litigates or otherwise resolves cases set for hearing. Represents the public interest and seeks to litigate or settle cases in an equitable manner while ensuring the outcomes are consistent with Commission policy. The Dispute Resolution Service (DRS) is located within OAL and provides neutral, third-party assistance using alternative dispute resolution (ADR) methods to parties in regulatory and environmental conflict; trains staff and energy stakeholders in collaborative problem-solving tools to develop and ensure a reliable infrastructure.

Office of Electric Reliability (OER)
Oversees the development and review of mandatory reliability and security standards; ensures compliance with the approved mandatory standards by the users, owners and operators of the bulk power system.

Office of Energy Market Regulation (OEMR)
Provides technical and policy advice on matters involving markets, tariffs and rates relating to electric, natural gas and oil pipeline facilities and services as well as demand response, energy efficiency, distributed generation, renewable energy issues, greenhouse gas emissions policies and advanced technologies relevant to the grid and wholesale markets.

Office of External Affairs (OEA)
Responsible for all external communications with the public and media for the Commission.

Office of Energy Policy and Innovation (OEPI)
Issues, coordinates and develops proposed policy reforms to address emerging issues affecting wholesale and interstate energy markets, including such areas as climate change, the integration of renewable resources, and the deployment of demand response and distributed resources, smart grid and other advanced technologies.

Office of Energy Projects (OEP)
Fosters economic and environmental benefits for the Nation through the approval and oversight of hydroelectric, natural gas (including pipelines, storage and liquefied natural gas (LNG) facilities) and electric transmission projects that are in the public interest.

Office of Enforcement (OE)
Protects customers through understanding markets and their regulation, timely identifying and remediating market problems, assuring compliance with rules and regulations, and detecting violations and crafting appropriate remedies, including civil penalties.

Office of the Executive Director (OED)
Provides administrative support services to the Commission including human resources (HR), procurement, information technology (IT), organizational management, financial and logistic functions.

Office of the General Counsel (OGC)
Provides legal services to the Commission. Represents the Commission before the courts and Congress and is responsible for the legal aspects of the Commission’s activities.
APPENDIX E

STATUTORY AUTHORITY

ELECTRIC, HYDROPOWER, & GENERAL STATUTES

- Federal Power Act (FPA)
- Power Plant and Industrial Fuel Use Act
- Department of Energy Organization Act
- Electric Consumers Protection Act (ECPA)
- Electronic Freedom of Information Act of 1996
- Energy Independence and Security Act of 2007 (EISA)
- Public Utility Holding Company Act of 1935 (PUHCA)
- Public Utility Regulatory Policies Act of 1978 (PURPA)
- Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)
- Information Technology Management Reform Act of 1996 (ITMRA/Clinger-Cohen Act)

NATURAL GAS STATUTES

- Natural Gas Act
- Natural Gas Policy Act of 1978
- Alaska Natural Gas Pipeline Act of 2004
- Alaska Natural Gas Transportation Act of 1976
- Outer Continental Shelf Lands Act of 1978 (OCSLA)
- Natural Gas Wellhead Decontrol Act of 1989 (NGWDA)

OIL STATUTES

- Interstate Commerce Act

ENVIRONMENTAL AND OTHER STATUTES

- Clean Air Act
- Clean Water Act
- Rivers and Harbors Act
- Endangered Species Act
- Wild and Scenic Rivers Act
- Coastal Zone Management Act
- National Historic Preservation Act
- Fish and Wildlife Coordination Act
- National Environmental Policy Act (NEPA)
FERC RESPONSIBILITIES

What FERC Does:

- Regulates the transmission and wholesale sales of electricity in interstate commerce
- Reviews certain mergers and acquisitions and corporate transactions by electricity companies
- Regulates the transportation and sale of natural gas for resale in interstate commerce
- Regulates the transportation of oil by pipeline in interstate commerce
- Approves the siting and abandonment of interstate natural gas pipelines and storage facilities
- Reviews siting applications for electric transmission projects under limited circumstances
- Ensures the safe operation and reliability of proposed and operating LNG terminals
- Licenses and inspects private, municipal and state hydroelectric projects
- Protects the reliability of the high voltage interstate transmission system through mandatory reliability standards
- Monitors and investigates energy markets
- Enforces FERC regulatory requirements through imposition of civil penalties and other means
- Oversees environmental matters related to natural gas and hydroelectricity projects and other matters
- Administers accounting and financial reporting regulations and conduct of regulated companies

What FERC Does Not Do:

Many areas outside of FERC’s jurisdictional responsibility are dealt with by state public utility commissions. Areas considered outside of FERC’s responsibility include:

- Regulation of retail electricity and natural gas sales to consumers
- Approval for the physical construction of electric generation facilities
- Regulation of most activities of state and municipal power systems, federal power marketing agencies like the Tennessee Valley Authority, and most rural electric cooperatives
- Regulation of nuclear power plants
- Issuance of state water quality certificates
- Oversight for the construction of oil pipelines
- Abandonment of service as related to oil facilities
- Mergers and acquisitions as related to natural gas and oil companies
- Responsibility for pipeline safety or for pipeline transportation on or across the Outer Continental Shelf
- Regulation of local distribution of electricity and natural gas
- Development and operation of natural gas vehicles
- Reliability problems related to failures of local distribution facilities
- Tree trimming near local distribution power lines in residential neighborhoods
For additional information on the Strategic Plan, please contact:

Office of the Executive Director
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Washington, DC  20426

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1.866.208.3372 (Toll-free)
customer@ferc.gov

www.FERC.gov

Printed on recycled paper
Key Issues in Nuclear Licensing and Regulation

Energy Bar Association
2010 Annual Meeting

Stephen Burns, General Counsel
U.S. Nuclear Regulatory Commission
Stephen.Burns@nrc.gov
Operating Power Reactors

• NRC regulates 104 operating reactors at 65 sites in 31 states, which produce about 20% of U.S. electricity.
• Maintaining operational safety even as the NRC considers new or renewed licenses is a major focus.
• Major rulemakings to codify security enhancements concluded in 2009.
License Renewal

- The Atomic Energy Act limits power reactor licenses to an initial term of 40 years.
- NRC allows consideration of license renewal for additional 20 year increments.
- 58 operating units have had their licenses renewed; applications covering 19 units are pending.
- NRC has maintained its basic framework in the face of challenges to reconsider the scope of renewal review.
New Reactor Licensing

• The “new” scheme was first adopted in 1989 in 10 CFR Part 52 and contains 3 primary features:
  – Approval of sites through *early site permit* (ESP).
  – Approval, via *design certification* rulemaking (DCR), of standardized reactor designs.
  – Single *combined license* (COL) authorizing plant construction and operation, and which may reference ESP and/or DCR.

• The Commission is actively reviewing 13 applications for COLs and several design certification applications.

• Although the basic process is sound, Commission has been faced with parallel reviews of DCRs and COLs rather than the expected sequential review.
High Level Waste: Yucca Mountain

• In June 2008, DOE submitted an application to construct a high level waste repository at Yucca Mountain.
• NRC’s technical review was proceeding and hearing issues were admitted by the Licensing Board in 2009.
• On March 3, 2010, DOE moved NRC to withdraw the Yucca Mountain application “with prejudice.”
• Washington, South Carolina, NARUC and others have filed opposition to withdrawal before NRC.
• Several suits are pending in the D.C. Circuit also challenging withdrawal.
• NRC’s Licensing Board has suspended further proceedings pending D.C. Circuit resolution; DOE has sought full Commission review of that action.
Waste Confidence

- “Waste Confidence” refers to the NRC’s generic assessment the long-term environmental impacts of spent fuel storage; waste confidence rule deals with this issue generically, so that post operation spent fuel storage does not have to be litigated in individual proceedings. 10 CFR 51.23.

- Current rule assumes availability of a repository by about 2025.


- Status of Yucca Mountain, DOE’s “Blue Ribbon” Commission, and long term storage studies will likely shape decision on nature and extent of any final rule.
BIBLIOGRAPHY on CURRENT ISSUES in NUCLEAR LICENSING and REGULATION

Stephen G. Burns, General Counsel
U.S. Nuclear Regulatory Commission

A. New Reactor Licensing


B. License Renewal

1. 10 C.F.R. Part 54 (2010)
3. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3 (2001)
5. NJ Dept' of Envtl Protection v. NRC, 561 F.3d 132 (3d Cir. 2009)
6. Amergen Energy Co. (Oyster Creek Generating Station Creek), CLI-09-07, 69 NRC 235 (2009) (license renewal for Oyster Creek), review pending sub nom. NJ Envtl Federation v. NRC, 09-2567 (3d Cir.)

C. Waste Confidence and High-Level Waste
1. *State of Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979)
2. *NRDC v NRC*, 582 F.2d 166 (2d Cir. 1978)

3. 10 C.F.R. § 51.23 (2010) (Current Waste Confidence Rule)


5. SECY-09-0090, Final Update of the Commission’s Waste Confidence Decision (June 15, 2009) (decision pending) (ADAMS Accession No. ML091660274)


8. *U.S. Dep’t of Energy* (High Level Waste Repository) Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) (NRC ASLB Docket No. 63-001-HLW, April 6, 2010) (ADAMS # ML100960441)

**D. Security**


**E. NEPA and Terrorism**


2. *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509 (2008), *challenged sub nom.* San Luis Obispo Mothers for Peace v. NRC, No. 08-75058 (9th Cir.) (argument pending)


April 6, 2010

Gregory B. Jaczko  
Chairman  
Nuclear Regulatory Commission  
11555 Rockville Pike  
Rockville, MD 20852

Dear Chairman Jaczko:

We are writing in response to your request that the Bipartisan Policy Center conduct a review of the NRC licensing process for new reactors. You asked that we examine whether there have been unnecessary delays in the licensing process for new nuclear plants caused either by the NRC or by the nuclear industry. In short, we did not find any evidence that either the NRC or industry has needlessly delayed or extended the licensing process. You also asked for a report on any findings and recommendations to improve the process going forward. This letter constitutes our response to your request.

To accomplish this task, we interviewed NRC staff and former NRC commissioners, representatives of reactor vendors, applicants for Combined Operating Licenses (COLs), nuclear engineering firms, and representatives of environmental and other organizations that have actively engaged in the licensing process. We also hosted a half-day forum to which we invited a broad group of stakeholders to discuss issues raised during the individual interviews and to elicit additional views and comments.

General Themes/Issues
In summary, we found that, while many of the stakeholders have encountered some problems in maneuvering through the licensing process, there was a near-unanimous view that all parties have acted appropriately and in good faith to resolve any problems. The NRC was not seen to have needlessly delayed or extended the licensing process. Based on our interviews, we believe that the difficulty of obtaining financing is a bigger obstacle to nuclear plant construction at the moment than licensing issues.

Nonetheless, a number of suggestions were made for improving the process going forward that we found to be well grounded and reasonable so we mention them in this report. In particular, the parties hope and expect that the lessons learned in the processing of the initial applications will result in changes that will improve the process and make it more transparent and efficient. Given the NRC’s performance to date, we expect that this will be the case.

The licensing process for new reactors that is now underway has been a learning experience for all involved. Indeed, the NRC has confronted an unprecedented challenge
in processing the initial applications. The licensing system embodied in Part 52 of the NRC’s regulations had envisioned that applications for COLs would reference designs that had been certified and sites that had the benefit of early site permits. It was anticipated that, with these pieces in place, the review process for COLs would be simplified and relatively straightforward. As it happened, numerous COL applications were filed in parallel with applications for certified designs. The staff thus had the challenge of dealing simultaneously with a large number of overlapping applications that were filed pursuant to an entirely new and largely untested licensing regime. This was further complicated by the fact that new-plant licensing at the NRC has been dormant for many years and needed to be resuscitated. And, at the same time, the NRC was undertaking the hiring and training of a large cadre of new employees and managers, while industry was simultaneously rebuilding its staff. Overall, we believe that the NRC staff has done a remarkable job under trying circumstances. Many stakeholders commented on the high level of commitment demonstrated by the NRC staff to resolve disputes in a fair, consistent, and clear manner.

It was also clear from our interviews, however, that there has on occasion been some miscommunication between NRC staff and applicants, leading to some confusion and delay. Much of the confusion can apparently be traced to misunderstandings as to NRC expectations in regard to the level of detail required in applications. Since the licensing process is new, successful templates by which an applicant can measure its filings do not yet exist. This has put the applicants (and interveners) in a difficult position when applications had to be supplemented as the process has moved forward. Some industry representatives acknowledged that they have not always been able to respond to NRC staff’s Requests for Additional Information (RAIs) in as timely a manner as they would like—the responses can on occasion require significant time and effort—and they also accept some responsibility for past miscommunications. In our judgment, many of these issues should resolve themselves as all sides gain more experience. The Commission and NRC staff should also strive to provide clear guidance to applicants to minimize delays caused by miscommunications as subsequent applications make their way through the process.

Design Certification
The current Design Certification (DC) process has proven cumbersome, in large part because of the parallel submission of COL applications referencing a design then undergoing review for certification. As noted above, efficiencies would have been available if the design certifications had been completed before the NRC was required to process the COL applications referencing that design. The simultaneous processing of DC and COL applications has created some uncertainty arising from the interplay between the two processes. This put interveners in a difficult position by forcing them to monitor multiple proceedings. Nonetheless, all parties appear committed to make the best of the situation. These issues should resolve themselves when the current design certifications are completed and subsequent COL applications reference certified designs.
Scheduling certainty and clarity of NRC management expectations are critical for the vendors. Some vendors believe that the NRC staff has not been consistent over time in the detail that is expected from the vendor. We were told that there have been situations in which different reviewers have caused confusion by applying different standards for review. Indeed, some vendors have complained that issues that were believed to have been resolved were subject to reopening as different reviewers became involved. We conclude that the Commission should focus its attention on providing clear guidance on the level of design detail and analysis that is expected in applications. We understand that the NRC staff is paying attention to this issue, and we bring it up here because we believe that this is an area where a continuing active focus by the Commission and NRC management is warranted.

Ensuring a sensible path forward for future reactor design modifications was also an issue of concern for some stakeholders. There is an inherent tension between the policy goals of, on the one hand, building a standardized fleet of new reactors and, on the other hand, ensuring that modifications based on experience with a design are applied so as to improve safety and environmental performance. We understand that at least one design center has created a committee to look at the issue of how best to incorporate new technology changes into future reactor construction. We believe this is a sensible step and the Commission should closely monitor progress to ensure that there is a transparent and efficient methodology to achieve an appropriate balance between these two important goals.

**Combined Operating License**

Although there have been occasional “bumps in the road” in the processing of COL applications, the fact that problems have surfaced was neither unexpected nor have the problems proven insurmountable. The general sense is that the NRC staff has generally worked with the applicants in a direct way to resolve issues in a timely fashion. Because there has not yet been a successful application that has gone through the entire process from beginning to end, applicants have no model upon which to base their submissions. Both applicants and the NRC are learning as the initial applications are processed. Not surprisingly, there on occasion have been differing expectations as to what is required. Once the process has run its course a few times, we expect that many of these issues will resolve themselves.

Nearly all the applicants indicated that certainty in scheduling is more crucial than speed. Nonetheless, although the Part 52 process largely serves to move regulatory decisions as early in the process as they can reasonably be made, there often are significant expenditures that must be incurred for long-lead-time components before the licensing process has been completed. With hundreds of millions of dollars at stake, even a small delay can have a significant financial impact. Therefore, efforts should be made to avoid unnecessary delays.

Several applicants questioned the need for a mandatory uncontested hearing – a hearing that is held even in the absence of a successful intervention by a party opposing a license
-- at the end of the COL process. They observed that there are multiple opportunities for public involvement and expert review in the current licensing process, and that the mandatory hearing requirement is an anachronism from an earlier age. They noted the public access that is now a standard part of the staff’s review of the licensing application and the environmental impact statement and the detailed review that is undertaken by the independent experts on the Advisory Committee on Reactor Safeguards. As a result, they claim that a mandatory uncontested hearing is a duplicative and time-consuming step that serves little purpose. Some intervener groups, on the other hand, point out that the industry has been successful in recent time in rehabilitating public support for nuclear power and that the quickest way to subvert that momentum would be to eliminate the mandatory hearing requirement or to otherwise limit the confidence of the public in the integrity of the licensing process.

We understand that a mandatory hearing on each application for a construction permit is required by the Atomic Energy Act and therefore it is beyond the authority of the Commission to eliminate it. However, even in the absence of a legislative change, the Commission can reduce the uncertainty associated with the duration of the hearing. For example, the Commission might convene a legislative-style hearing to ascertain the sufficiency of the licensing review. Rather than limiting public involvement, a legislative-style hearing might allow appropriate and efficient wide-scale scrutiny to supplement the staff and the ACRS’s licensing review. Of course, such a hearing would be in addition to any detailed review of contentions by the Atomic Safety and Licensing Board (ASLB) in cases in which there has been a successful intervention.

Another major issue that was brought to our attention relates to the environmental review process. We understand that, at least in respect to the initial COL applications, the EIS process is currently more advanced than the safety review process. In these cases, any effort to “speed up” the environmental reviews will have no effect on the overall licensing schedule. This may not continue to be the case for other applications in the queue. That is, the time needed for the safety review of subsequent COL applications referencing a certified design will likely be reduced because non-site specific issues will have already been addressed. Thus, the timing of the environmental review may become a critical consideration going forward.

One suggestion offered in our meetings was to allow the filing of contested issues on the draft EIS, instead of waiting until the final EIS to issue. It was argued that such an approach would allow any ASLB hearing to start earlier. However, the draft EIS would have to be of high quality for this approach to be effective and there is no certainty that time would be saved for every application. For example, interveners would retain the right to file contentions relating to issues arising from any changes introduced in the final EIS. And perhaps little efficiency might be gained if the concurrence by other agencies has not been obtained on the draft EIS. Experience going forward should indicate whether such a change in process would be helpful.
Our comment on this point reflects a general rule: the NRC and the other stakeholders should seek to learn from the existing processing of applications and should seek to achieve efficiencies based on that knowledge going forward. The overall aim should be to reduce the licensing burden without affecting the quality, scope or the thoroughness of the review. A commitment to learn from experience should be the guide.

**Summary**

In sum, we note that there was near-universal respect and admiration for the NRC staff among the stakeholders we interviewed. Although the licensing process is new, both the NRC and the industry have done a remarkable job in very trying circumstances in assuring the thorough and timely evaluation of license applications. The fact that all parties have experienced some problems in navigating the process was to be expected under the circumstances. But it is apparent that all those involved have been diligent in working through the issues in a forthright manner.

The Commission can, and should, continue to exercise clear leadership to ensure that the processing of the applications continues with the same attention to detail and to efficiency as has been the case to date. The Commission should ensure that the lessons learned in the first round of applications are rigorously applied to make the processing of subsequent applications more efficient. We also believe that the changes we outlined above would have a modest, but measurable impact upon the process.

On behalf of the Bipartisan Policy Center, we thank you for giving us the opportunity to assess the progress that has been made in laying the foundations for the deployment of safe nuclear power in the U.S. We commend you for your willingness to invite an independent analysis, as well as for your commitment to ensuring the transparency and integrity of the NRC licensing process. We hope that this review is helpful.

Pete V. Domenici

Dr. Richard Meserve

CC: George Apostolakis, Commissioner
CC: William Magwood, Commissioner
CC: William Ostendorff, Commissioner
CC: Kristine Svinicki, Commissioner
Senator Pete V. Domenici  
Dr. Richard A. Meserve  
Bipartisan Policy Center  
1225 Eye Street NW, Suite 1000  
Washington, D.C. 20005

Dear Senator Domenici and Dr. Meserve:

Thank you for responding to my request that the Bipartisan Policy Center (BPC) conduct a review of the U.S. Nuclear Regulatory Commission (NRC) licensing process for new reactors. This is exactly the type of high-quality, thorough analysis that I had hoped to receive and for which the BPC is known. Such a comprehensive review would not have been possible without your strong leadership, the hard work of the BPC staff, and the BPC’s dedication to improving public policy. This independent report will be of great assistance to the NRC as it assesses and seeks to strengthen its licensing review process.

I am pleased that the BPC assessment recognizes and confirms the high-quality work of the NRC staff in conducting thorough and timely reviews of license applications. The agency has a strong commitment to continuous improvement, and I fully support your recommendation for the NRC to ensure that lessons learned from the first round of applications enhance any subsequent reviews. Moving forward, I plan to ask the NRC staff to conduct a lessons-learned analysis after the first combined license review has been completed. As part of this review, I also intend to ask the staff to develop policy proposals for Commission consideration that would strengthen the review process based on the lessons learned.

I sincerely appreciate the efforts of the BPC in conducting this valuable study. The insights and recommendations provided will be invaluable in improving the new reactor licensing process.

Sincerely,

Gregory B. Jaczko
Mobile-Sierra Doctrine –
*NRG Power Marketing, LLC v. Maine Public Utilities Commission*
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NRG POWER MARKETING, LLC, ET AL. v. MAINE PUBLIC UTILITIES COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT


For many years, New England’s supply of electricity capacity was barely sufficient to meet the region’s demand. FERC and New England’s generators, electricity providers, and power customers made several attempts to address the problem. This case arises from the latest effort to design a solution. Concerned parties reached a comprehensive settlement agreement (Agreement) that, inter alia, established rate-setting mechanisms for sales of energy capacity and provided that the Mobile-Sierra public interest standard would govern rate challenges. FERC approved the Agreement, finding that it presents a just and reasonable outcome that is consistent with the public interest. Objectors to the settlement sought review in the D. C. Circuit, which largely rejected their efforts to overturn FERC’s approval order, but agreed with them that when a challenge to a contract rate is brought by noncontracting third parties, Mobile-Sierra’s public interest standard does not apply.

Held: The Mobile-Sierra presumption does not depend on the identity of the complainant who seeks FERC investigation. The presumption is not limited to challenges to contract rates brought by contracting par-
ties. It applies, as well, to challenges initiated by noncontracting parties. Pp. 5–11.

(a) Morgan Stanley did not reach the question presented here, but its reasoning strongly suggests that the D. C. Circuit’s holding misperceives the aim, and diminishes the force, of the Mobile-Sierra doctrine. Announced three months after the Court of Appeals’ disposition in this case, Morgan Stanley reaffirmed Mobile-Sierra’s instruction to FERC to “presume that the rate set out in a freely negotiated . . . contract meets the ‘just and reasonable’ requirement” unless “FERC concludes that the contract seriously harms the public interest.” 554 U. S., at ___. The Morgan Stanley opinion makes it unmistakably clear that the public interest standard is not, as the D. C. Circuit suggested, independent of, and sometimes at odds with, the “just and reasonable” standard. Rather, the public interest standard defines “what it means for a rate to satisfy the just-and-reasonable standard in the contract context.” Id., at ___. And if FERC itself must presume just and reasonable a contract rate resulting from fair, arms-length negotiations, noncontracting parties may not escape that presumption. Moreover, the Mobile-Sierra doctrine does not neglect third-party interests; it directs FERC to reject a contract rate that “seriously harms the consuming public.” 554 U. S., at ___. Finally, the D. C. Circuit’s confinement of Mobile-Sierra to rate challenges by contracting parties diminishes the doctrine’s animating purpose: promotion of “the stability of supply arrangements which all agree is essential to the health of the [energy] industry.” Mobile, 350 U. S., at 344. A presumption applicable to contracting parties only, and inoperative as to everyone else—consumers, advocacy groups, state utility commissions, elected officials acting parens patriae—could scarcely provide the stability Mobile-Sierra aimed to secure. Pp. 5–10.

(b) Whether the rates at issue qualify as “contract rates” for Mobile-Sierra purposes, and, if not, whether FERC had discretion to treat them analogously are questions raised before, but not ruled upon by, the D. C. Circuit. They remain open for that court’s consideration on remand. Pp. 10–11.

520 F. 3d 464, reversed in part and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, BREYER, ALITO, and SOTOMAYOR, JJ., joined. STEVENS, J., filed a dissenting opinion.
Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 08–674

NRG POWER MARKETING, LLC, ET AL., PETITIONERS
v. MAINE PUBLIC UTILITIES COMMISSION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 13, 2010]

JUSTICE GINSBURG delivered the opinion of the Court.

The Federal Power Act (FPA or Act), 41 Stat. 1063, as amended, 16 U. S. C. §791a et seq., authorizes the Federal Energy Regulatory Commission (FERC or Commission) to superintend the sale of electricity in interstate commerce and provides that all wholesale-electricity rates must be “just and reasonable,” §824d(a). Under this Court’s Mobile-Sierra doctrine, FERC must presume that a rate set by “a freely negotiated wholesale-energy contract” meets the statutory “just and reasonable” requirement. Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty., 554 U. S. ___, ___ (2008) (slip op., at 1). “The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest.” Ibid.

This case stems from New England’s difficulties in maintaining the reliability of its energy grid. In 2006, after several attempts by the Commission and concerned parties to address the problems, FERC approved a comprehensive settlement agreement (hereinafter Settlement Agreement or Agreement). Most relevant here, the
Agreement established rate-setting mechanisms for sales of energy capacity, and provided that the Mobile-Sierra public interest standard would govern rate challenges. Parties who opposed the settlement petitioned for review in the United States Court of Appeals for the D. C. Circuit. Among multiple objections to FERC’s order approving the Agreement, the settlement opponents urged that the rate challenges of nonsettling parties should not be controlled by the restrictive Mobile-Sierra public interest standard. The Court of Appeals agreed, holding that “when a rate challenge is brought by a non-contracting third party, the Mobile-Sierra doctrine simply does not apply.” Maine Pub. Util. Comm’n v. FERC, 520 F. 3d 464, 478 (2008) (per curiam).

We reverse the D. C. Circuit’s judgment to the extent that it rejects the application of Mobile-Sierra to noncontracting parties. Our decision in Morgan Stanley, announced three months after the D. C. Circuit’s disposition, made clear that the Mobile-Sierra public interest standard is not an exception to the statutory just-and-reasonable standard; it is an application of that standard in the context of rates set by contract. The “venerable Mobile-Sierra doctrine” rests on “the stabilizing force of contracts.” Morgan Stanley, 554 U. S., at ___ (slip op., at 19); see id., at 22 (describing contract rates as “a key source of stability”). To retain vitality, the doctrine must control FERC itself, and, we hold, challenges to contract rates brought by noncontracting as well as contracting parties.

I

In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases from a generator an option to buy a quantity of energy, rather than purchasing the energy itself. To maintain the reliability of the grid, electricity providers generally purchase more capacity, i.e., rights to acquire energy, than necessary to
meet their customers' anticipated demand. For many years in New England, the supply of capacity was barely sufficient to meet the region’s demand. FERC and New England’s generators, electricity providers, and power customers made several attempts to address this problem. This case stems from the latest effort to design a solution.

In 2003, a group of generators sought to enter into “reliability must-run” agreements with the New England Independent System Operator (ISO), which operates the region's transmission system. In its orders addressing those agreements, FERC directed the ISO to develop a new market mechanism that would set prices separately for various geographical sub-regions. Devon Power LLC, 103 FERC ¶ 61,082, pp. 61,266, 61,271 (2003).


After four months of negotiations, on March 6, 2006, a settlement was reached. Of the 115 negotiating parties, only 8 opposed the settlement.

The Settlement Agreement installed a “forward capacity market” under which annual auctions would set capacity

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1An ISO is an independent company that has operational control, but not ownership, of the transmission facilities owned by member utilities. ISOs “provide open access to the regional transmission system to all electricity generators at rates established in a single, unbundled, grid-wide tariff . . . .” Midwest ISO Transmission Owners v. FERC, 373 F. 3d 1361, 1364 (CADC 2004) (internal quotation marks omitted).
prices; auctions would be conducted three years in advance of the time when the capacity would be needed. *Devon Power LLC*, 115 FERC ¶ 61,340, pp. 62,304, 62,306–62,308 (2006). Each energy provider would be required to purchase enough capacity to meet its share of the “installed capacity requirement,” i.e., the minimum level of capacity needed to maintain reliability on the grid, as determined by the ISO. *Id.*, at 62,307. For the three-year gap between the first auction and the time when the capacity procured in that auction would be provided, the Agreement prescribed a series of fixed, transition-period payments to capacity-supplying generators. *Id.*, at 62,308–62,309.


FERC approved the Settlement Agreement, “finding that as a package, it presents a just and reasonable outcome for this proceeding consistent with the public interest.” 115 FERC, at 62,304. The *Mobile-Sierra* provision, FERC explicitly determined, “appropriately balances the need for rate stability and the interests of the diverse entities who will be subject to the [forward capacity market’s auction system].” *Id.*, at 62,335.

Six of the eight objectors to the settlement sought review in the D. C. Circuit. For the most part, the Court of

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2The transition period runs from December 1, 2006 to June 1, 2010.
Appeals rejected the objectors’ efforts to overturn FERC’s order approving the settlement. 520 F.3d, at 467. But the objectors prevailed on the Mobile-Sierra issue: The D. C. Circuit held that Mobile-Sierra applies only to contracting parties. Id., at 478. In this Court, the parties have switched places. Defenders of the settlement, including the Mobile-Sierra provision, are petitioners; objectors to the settlement, victorious in the Court of Appeals only on the Mobile-Sierra issue, are respondents.

Because of the importance of the issue, and in light of our recent decision in Morgan Stanley, we granted certiorari, 556 U. S. ___ (2009), to resolve this question: “[Does] Mobile-Sierra’s public-interest standard appl[y] when a contract rate is challenged by an entity that was not a party to the contract[?]” Brief for Petitioners i. Satisfied that the answer to that question is yes, we reverse the D. C. Circuit’s judgment insofar as it rejected application of Mobile-Sierra to noncontracting parties.

II

The FPA gives FERC authority to regulate the “sale of electric energy at wholesale in interstate commerce.” See 16 U. S. C. §824(b)(1). The Act allows regulated utilities to set rates unilaterally by tariff; alternatively, sellers and buyers may agree on rates by contract. See §824d(c), (d). Whether set by tariff or contract, however, all rates must be “just and reasonable.” §824d(a). Rates may be examined by the Commission, upon complaint or on its own initiative, when a new or altered tariff or contract is filed or after a rate goes into effect. §§824d(e), 824e(a). Following a hearing, the Commission may set aside any rate found “unjust, unreasonable, unduly discriminatory or preferential,” and replace it with a just and reasonable rate. §824e(a).

The Mobile-Sierra doctrine originated in twin decisions announced on the same day in 1956: United Gas Pipe Line
Co. v. Mobile Gas Service Corp., 350 U. S. 332, and FPC v. Sierra Pacific Power Co., 350 U. S. 348. Both concerned rates set by contract rather than by tariff. Mobile involved the Natural Gas Act, which, like the FPA, requires utilities to file all new rates with the regulatory commission. 15 U. S. C. §717c(c). In Mobile, we rejected a gas utility’s argument that the file-all-new-rates requirement authorized the utility to abrogate a lawful contract with a purchaser simply by filing a new tariff. 350 U. S., at 336–337. Filing, we explained, was a precondition to changing a rate, not an authorization to do so in violation of a lawful contract. Id., at 339–344; see Morgan Stanley, 554 U. S., at ___ (slip op., at 4).

The Sierra case involved a further issue. Not only had the Commission erroneously concluded that a newly filed tariff superseded a contract rate. In addition, the Commission had suggested that, in any event, the contract rate, which the utility sought to escape, was itself unjust and unreasonable. The Commission thought that was so “solely because [the contract rate] yield[ed] less than a fair return on the [utility’s] net invested capital.” 350 U. S., at 355.

The Commission’s suggestion prompted this Court to home in on “the question of how the Commission may evaluate whether a contract rate is just and reasonable.” Morgan Stanley, 554 U. S., at ___ (slip op., at 4). The Sierra Court answered the question this way:

“[T]he Commission’s conclusion appears on its face to be based on an erroneous standard. . . . [W]hile it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bar-
Opinion of the Court

gain. . . . In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.” 350 U. S., at 354–355 (some emphasis added).

In a later case, we similarly explained: “The regulatory system created by the [FPA] is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity.” Permian Basin Area Rate Cases, 390 U. S. 747, 822 (1968).3

Two Terms ago, in Morgan Stanley, 554 U. S. ___, the Court reaffirmed and clarified the Mobile-Sierra doctrine. That case presented two questions: First, does the Mobile-Sierra presumption (that contract rates freely negotiated between sophisticated parties meet the just and reasonable standard imposed by 16 U. S. C. §824d(a)) “apply only when FERC has had an initial opportunity to review a contract rate without the presumption?” 554 U. S., at ___ (slip op., at 1). “Second, does the presumption [generally] impose as high a bar to challenges by purchasers of wholesale electricity as it does to challenges by sellers?” Id., at ___

3Consistent with the lead role of contracts recognized in Mobile-Sierra, we held in United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div., 358 U. S. 103, 110–113 (1958), that parties may contract out of the Mobile-Sierra presumption. They could do so, we ruled, by specifying in their contracts that a new rate filed with the Commission would supersede the contract rate. Courts of Appeals have approved an option midway between Mobile-Sierra and Memphis Light: A contract that does not allow the seller to supersede the contract rate by filing a new rate may nonetheless permit the Commission to set aside the contract rate if it results in an unfair rate of return, without a further showing that it adversely affects the public interest. See, e.g., Papago Tribal Util. Auth. v. FERC, 723 F. 2d 950, 953 (CADC 1983); Louisiana Power & Light Co. v. FERC, 587 F. 2d 671, 675–676 (CA5 1979).
Answering no to the first question and yes to the second, the Court emphasized the essential role of contracts as a key factor fostering stability in the electricity market, to the longrun benefit of consumers. *Id.* at __, __ (slip op., at 19, 22); see, *e.g.*, Market-Based Rates ¶6, 72 Fed. Reg. 39906 (2007) (noting chilling effect on investments caused by “uncertainties regarding rate stability and contract sanctity”); *Nevada Power Co. v. Duke Energy Trading & Marketing, L. L. C.* 99 FERC ¶61,047, pp. 61,184, 61,190 (2002) (“Competitive power markets simply cannot attract the capital needed to build adequate generating infrastructure without regulatory certainty, including certainty that the Commission will not modify market-based contracts unless there are extraordinary circumstances.”).

*Morgan Stanley* did not reach the question presented here: Does Mobile-Sierra’s public interest standard apply to challenges to contract rates brought by noncontracting parties? But *Morgan Stanley*’s reasoning strongly suggests that the D. C. Circuit’s negative answer misperceives the aim, and diminishes the force, of the Mobile-Sierra doctrine.

In unmistakably plain language, *Morgan Stanley* re-stated Mobile-Sierra’s instruction to the Commission: FERC “must presume that the rate set out in a freely negotiated wholesale-energy contract meets the ‘just and reasonable’ requirement imposed by law. The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest.” 554 U. S., at __ (slip op., at 1). As our instruction to FERC in *Morgan Stanley* conveys, the public interest standard is not, as the D. C. Circuit presented it, a standard independent of, and sometimes at odds with, the “just and reasonable” standard, see 520 F. 3d, at 478; rather, the public interest standard defines “what it means for a rate to satisfy the just-and-reasonable standard in the contract context.”
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*Morgan Stanley*, 554 U. S., at ___ (slip op., at 17). And if FERC itself must presume just and reasonable a contract rate resulting from fair, arms-length negotiations, how can it be maintained that noncontracting parties nevertheless may escape that presumption?  

Moreover, the *Mobile-Sierra* doctrine does not overlook third-party interests; it is framed with a view to their protection. The doctrine directs the Commission to reject a contract rate that “seriously harms the consuming public.” *Morgan Stanley*, 554 U. S., at ___ (slip op., at 17); see *Verizon Communications Inc. v. FCC*, 535 U. S. 467, 479 (2002) (When a buyer and a seller agree upon a rate, “the principal regulatory responsibility [i]s not to relieve a contracting party of an unreasonable rate, . . . but to protect against potential discrimination by favorable contract rates between allied businesses to the detriment of other wholesale customers.” (Emphasis added.)).

Finally, as earlier indicated, see *supra*, at 7–8, the D. C. Circuit’s confinement of *Mobile-Sierra* to rate challenges by contracting parties diminishes the animating purpose of the doctrine: promotion of “the stability of supply arrangements which all agree is essential to the health of the [energy] industry.” *Mobile*, 350 U. S., at 344. That dominant concern was expressed by FERC in the order on review: “Stability is particularly important in this case,

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which was initiated in part because of the unstable nature of [installed capacity] revenues and the effect that has on generating units, particularly those . . . critical to maintaining reliability.” 115 FERC, at 62,335. A presumption applicable to contracting parties only, and inoperative as to everyone else—consumers, advocacy groups, state utility commissions, elected officials acting paresns patriae—could scarcely provide the stability Mobile-Sierra aimed to secure.\(^5\)

We therefore hold that the Mobile-Sierra presumption does not depend on the identity of the complainant who seeks FERC investigation. The presumption is not limited to challenges to contract rates brought by contracting parties. It applies, as well, to challenges initiated by third parties.

III

The objectors to the settlement appearing before us maintain that the rates at issue in this case—the auction rates and the transition payments—are prescriptions of general applicability rather than “contractually negotiated rates,” hence Mobile-Sierra is inapplicable. See Brief for Respondents 15–17, and n. 1 (internal quotation marks omitted). FERC agrees that the rates covered by the settlement “are not themselves contract rates to which the Commission was required to apply Mobile-Sierra.” Brief for FERC 15. But, FERC urges, “the Commission had discretion to do so,” id., at 28; furthermore, “[t]he court of appeals’ error in creating a third-party exception to the Mobile-Sierra presumption is a sufficient basis for reversing its judgment,” id., at 22. Whether the rates at issue

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qualify as “contract rates,” and, if not, whether FERC had discretion to treat them analogously are questions raised before, but not ruled upon by, the Court of Appeals. They remain open for that court’s consideration on remand. See Tr. of Oral Arg. 16.

*   *   *

For the reasons stated, the judgment of the Court of Appeals for the D. C. Circuit is reversed to the extent that it rejects the application of Mobile-Sierra to noncontracting parties, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.
JUSTICE STEVENS, dissenting.

The opinion that the Court announces today is the third chapter in a story about how a reasonable principle, extended beyond its foundation, becomes bad law.

In the first chapter the Court wisely and correctly held that a seller who is a party to a long-term contract to provide energy to a wholesaler could not unilaterally repudiate its contract obligations in response to changes in market conditions by simply filing a new rate schedule with the regulatory commission. Only if the rate was so low that the seller might be unable to stay in business, thereby impairing the public interest, could the seller be excused from performing its contract. That is what the Court held in United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U. S. 332 (1956), and FPC v. Sierra Pacific Power Co., 350 U. S. 348 (1956).

In the second chapter the Court unwisely and incorrectly held that the same rule should apply to a buyer who had been forced by unprecedented market conditions to enter into a long-term contract to buy energy at abnormally high prices. The Court held the Federal Energy Regulatory Commission (FERC) could not set aside such a contract as unjust and unreasonable, even though it saddled consumers with a duty to pay prices that would be considered unjust and unreasonable under normal market

The Court held in Morgan Stanley that Mobile-Sierra established a presumption: FERC “must presume that the rate set out in a freely negotiated wholesale-energy contract meets the ‘just and reasonable’ requirement imposed by law.” 554 U. S., at ___ (slip op., at 1). And that presumption, according to the Court, is a simple application of the just-and-reasonable standard to contract rates, not a different standard of review. Id., at ___ (slip op., at 6) (rejecting the “obviously indefensible proposition that a standard different from the statutory just-and-reasonable standard applies to contract rates”). But applying the presumption nonetheless sets a higher bar for a rate challenge.1 FERC may abrogate the rate only if the public interest is seriously harmed. Id., at ___ (slip op., at 22) (“[U]nder the Mobile-Sierra presumption, setting aside a contract rate requires a finding of ‘unequivocal public necessity,’” Permian Basin Area Rate Cases, 390 U. S. 747, 822 (1968), “or ‘extraordinary circumstances,’ Arkansas Louisiana Gas Co. v. Hall, 453 U. S. 571, 582 (1981)”).

As I explained in my dissent in Morgan Stanley, the imposition of this additional burden on purchasers challenging rates was not authorized by the governing statute. Under the Federal Power Act (FPA), all wholesale electricity rates must be “just and reasonable.” 16 U.S.C. §824d(a). “[N]othing in the statute mandates differing application of the statutory standard to rates set by con-

1 Whether the Court explains the Mobile-Sierra doctrine as a presumption or as a different standard of review, “[t]here is no significant difference between requiring a heightened showing to overcome an otherwise conclusive presumption and imposing a heightened standard of review.” Morgan Stanley, 554 U. S., at ___ (slip op., at 3) (Stevens, J., dissenting).
STEVENS, J., dissenting

tract.” Morgan Stanley, 554 U. S., at ___ (slip op., at 3) (STEVENS, J., dissenting) (internal quotation marks omitted; emphasis deleted). And the Mobile-Sierra line of cases did not “mandate a ‘serious harm’ standard of review,” much less “require any assumption that high rates and low rates impose symmetric burdens on the public interest.” Morgan Stanley, 554 U. S., at ___ (slip op., at 7) (STEVENS, J., dissenting). Instead, “the statement in Permian Basin about ‘unequivocal public necessity,’ 390 U. S., at 822, speaks to the difficulty of establishing injury to the public interest in the context of a low-rate challenge,” i.e., one brought by sellers of electricity. Id., at ___ (slip op., at 8). It does not establish a new standard that applies as well to a “high-rate challenge” brought by purchasers. Ibid.

But even accepting Morgan Stanley as the law, the Court unwisely goes further today. In this third chapter of the Mobile-Sierra story, the Court applies a rule—one designed initially to protect the enforceability of freely negotiated contracts against parties who seek a release from their obligations—to impose a special burden on third parties exercising their statutory right to object to unjust and unreasonable rates. This application of the rule represents a quantum leap from the modest origin set forth in the first chapter of this tale. As the Court of Appeals correctly concluded in the opinion that the Court sets aside today: “This case is clearly outside the scope of the Mobile-Sierra doctrine.” Maine Pub. Util. Comm’n v. FERC, 520 F. 3d 464, 477 (CADC 2008) (per curiam).

As the D. C. Circuit noted,2 “[c]ourts have rarely men-
tioned the Mobile-Sierra doctrine without reiterating that it is premised on the existence of a voluntary contract between the parties.” *Ibid.* But, the Court asks, “[I]f FERC itself must presume just and reasonable a contract rate resulting from fair, arms-length negotiations, how can it be maintained that noncontracting parties nevertheless may escape that presumption?” *Ante,* at 9. This Court’s understanding of Sierra provides an answer. “Sierra was grounded in the commonsense notion that ‘[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a “just and reasonable” rate as between the two of them.’” *Morgan Stanley,* 554 U. S., at ___ (slip op., at 17) (quoting *Verizon Communications Inc. v. FCC,* 535 U. S. 467, 479 (2002); emphasis added). This “commonsense notion” supports the rule requiring FERC to apply a presumption against letting a party out of its own contract, as the D. C. Circuit recognized. 520 F. 3d, at 478 (“The Mobile-Sierra doctrine applies a more deferential standard of review to preserve the terms of the bargain as between the contracting parties”). It does not, however, support a rule requiring FERC to apply a presumption against abrogating any rate set by contract, even when, as in this case, a noncontracting party may be required in practice to pay a rate it did not agree to.

The Court further reasons that “confinement of Mobile-Sierra to rate challenges by contracting parties diminishes the animating purpose of the doctrine,” which is ensuring the stability of contract-based supply arrangements. *Ante,* at 9. Maybe so, but applying Mobile-Sierra to rate challenges by noncontracting parties loses sight of the animating purpose of the FPA, which is “the protection of the public interest.” *Sierra,* 350 U. S., at 355. That interest is

challenge rates.” 520 F. 3d, at 478.
“the interest of consumers in paying ‘the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.’” Morgan Stanley, 554 U.S., at ___ (slip op., at 7) (STEVENS, J., dissenting) (quoting Permian Basin, 390 U.S., at 793). I do not doubt that stable energy markets are important to the public interest, but “under the FPA, Congress has charged FERC, not the courts, with balancing the short-term and long-term interests of consumers” under the just-and-reasonable standard of review. Morgan Stanley, 554 U.S., at ___ (slip op., at 9) (STEVENS, J., dissenting). The Court today imposes additional limits upon FERC’s ability to protect that interest. If a third-party wholesale buyer can show a rate harms the public interest (perhaps because it is too high to be just and reasonable under normal review), but cannot show it seriously harms the public, FERC may do nothing about it.

The Court assures respondents that the “public interest standard” does not “overlook third-party interests” and is “framed with a view to their protection.” Ante, at 8, 9. Perhaps in practice the Mobile-Sierra doctrine will protect third parties’ interests, and the public interest, just as well as the so-called “ordinary” just-and-reasonable standard. But respondents are rightly skeptical. The Mobile-Sierra doctrine, as interpreted by the Court in Morgan Stanley, must pose a higher bar to respondents’ rate challenge—that is, it requires them to show greater harm to

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FERC agrees with petitioners that the public interest standard “govern[s] all challenges to the rates set by contract, regardless of the identity of the challenger.” Reply Brief for FERC 4. But “not even FERC has the authority to endorse [this] rule.” Morgan Stanley, 554 U.S., at ___ (slip op., at 9) (STEVENS, J., dissenting). “The FPA does not indulge, much less require, a ‘practically insurmountable’ presumption, see Papago Tribal Util. Auth. v. FERC, 723 F. 2d 950, 954 (CADC 1983) (opinion for the court by Scalia, J.), that all rates set by contract comport with the public interest and are therefore just and reasonable.” Id., at ___ (slip op., at 9–10).
the public. Otherwise, it would hardly serve to protect contract stability better than the plain vanilla just-and-reasonable standard and the Court’s decision in *Morgan Stanley* would have little effect. Furthermore, the Court today reiterates that the doctrine poses a high bar. See *ante*, at 7–8.

It was sensible to require a contracting party to show something more than its own desire to get out of what proved to be a bad bargain before FERC could abrogate the parties’ bargain. It is not sensible, nor authorized by the statute, for the Court to change the *de facto* standard of review whenever a rate is set by private contract, based solely on the Court’s view that contract stability should be

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4In my view, “whether a rate is ‘just and reasonable’ is measured against the public interest, not the private interests of regulated [parties].” *Id.*, at ___ (slip op., at 7). But I note the Court’s assertion that the *Mobile-Sierra* doctrine protects “third-party interests,” *ante*, at 9, is a new twist on the “public interest standard” as traditionally understood. As the Court recognized in *Morgan Stanley*, one consequence of applying *Mobile-Sierra* is that “the sole concern of the Commission’” is the public interest, and FERC cannot consider, for example, whether a rate guarantees a sufficient rate of return to a regulated entity. 554 U.S., at ___ (slip op., at 4) (quoting *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956)); see also *Morgan Stanley*, 554 U.S., at ___ (slip op., at 17, n. 3). In addition to requiring that FERC find some greater degree of harm to the public than would be required under the ordinary just-and-reasonable standard, therefore, the *Mobile-Sierra* doctrine leaves little room for respondents—at least one of which did not negotiate the rate but must nonetheless purchase electricity at that price in the forward capacity market unless it self-supplies its capacity—to assert their private interest in making a rate challenge. The Court suggests that FERC could set aside a rate under the public interest standard if the contract established favorable rates between allied businesses to the detriment of other wholesale customers, *ante*, at 9, but has not spelled out whether a challenger would still have to show that circumstance harmed the public interest. It remains unclear whether a noncontracting party that must purchase or sell electricity at a rate it did not negotiate could argue that a rate fails the “public interest standard” because the rate is detrimental to that entity’s private interest.
preserved unless there is extraordinary harm to the public interest.

For these reasons, I respectfully dissent.
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

MORGAN STANLEY CAPITAL GROUP INC. v. PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06–1457. Argued February 19, 2008—Decided June 26, 2008*

Under the Mobile-Sierra doctrine, the Federal Energy Regulatory Commission (FERC) must presume that the electricity rate set in a freely negotiated wholesale-energy contract meets the “just and reasonable” requirement of the Federal Power Act (FPA), see 16 U. S. C. §824d(a), and the presumption may be overcome only if FERC concludes that the contract seriously harms the public interest. See United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U. S. 332; FPC v. Sierra Pacific Power Co., 350 U. S. 348. Under FERC’s current regulatory regime, a wholesale electricity seller may file a “market-based” tariff, which simply states that the utility will enter into freely negotiated contracts with purchasers. Those contracts are not filed with FERC before they go into effect. In 2000 and 2001, there was a dramatic increase in the price of electricity in the western United States. As a result, respondents entered into long-term contracts with petitioners that locked in rates that were very high by historical standards. Respondents subsequently asked FERC to modify the contracts, contending that the rates should not be presumed just and reasonable under Mobile-Sierra. The Administrative Law Judge concluded that the presumption applied and that the contracts did not seriously harm the public interest. FERC affirmed, but the Ninth Circuit remanded. The court held that contract rates are pre-

*Together with No. 06–1462, American Electric Power Service Corp. et al. v. Public Utility District No. 1 of Snohomish County et al., also on certiorari to the same court.
sumptively reasonable only where FERC has had an initial opportunity to review the contracts without applying the Mobile-Sierra presumption and therefore that the presumption should not apply to contracts entered into under “market-based” tariffs. The court alternatively held that there is a different standard for overcoming the Mobile-Sierra presumption when a purchaser challenges a contract: whether the contract exceeds a “zone of reasonableness.”

Held:

1. The Commission was required to apply the Mobile-Sierra presumption in evaluating the contracts here. Sierra held that a rate set out in a contract must be presumed to be just and reasonable absent serious harm to the public interest, regardless of when the contract is challenged. FPC v. Texaco Inc., 417 U. S. 380, distinguished. Also, the Ninth Circuit’s rule requiring FERC to ask whether a contract was formed in an environment of market “dysfunction” is not supported by this Court’s cases and plainly undermines the role of contracts in the FPA’s statutory scheme. Pp. 15–19.

2. The Ninth Circuit’s “zone of reasonableness” test fails to accord an adequate level of protection to contracts. The standard for a buyer’s rate-increase challenge must be the same, generally, as the standard for a seller’s challenge: The contract rate must seriously harm the public interest. The Ninth Circuit misread Sierra in holding that the standard for evaluating a high-rate challenge and setting aside a contract rate is whether consumers’ electricity bills were higher than they would have been had the contract rates equaled “marginal cost.” Under the Mobile-Sierra presumption, setting aside a contract rate requires a finding of “unequivocal public necessity,” Permian Basin Area Rate Cases, 390 U. S. 747, 822, or “extraordinary circumstances,” Arkansas Louisiana Gas Co. v. Hall, 453 U. S. 571, 582. Pp. 19–23.

3. The judgment below is nonetheless affirmed on alternative grounds, based on two defects in FERC’s analysis. First, the analysis was flawed or incomplete to the extent FERC looked simply to whether consumers’ rates increased immediately upon conclusion of the relevant contracts, rather than determining whether the contracts imposed an excessive burden “down the line,” relative to the rates consumers could have obtained (but for the contracts) after elimination of the dysfunctional market. Sierra’s “excessive burden” on customers was the current burden, not just the burden imposed at the contract’s outset. See 350 U. S., at 355. Second, it is unclear from FERC’s orders whether it found respondents’ evidence inadequate to support their claim that petitioners engaged in unlawful market manipulation that altered the playing field for contract negotiations. In such a case, the Commission should not presume that a
contract is just and reasonable. Like fraud and duress, unlawful market activity directly affecting contract negotiations eliminates the premise on which the *Mobile-Sierra* presumption rests: that the contract rates are the product of fair, arms-length negotiations. On remand, FERC should amplify or clarify its findings on these two points. Pp. 23–26.

471 F. 3d 1053, affirmed and remanded.

SCALIA, J., delivered the opinion of the Court, in which KENNEDY, THOMAS, and ALITO, JJ., joined, and in which GINSBURG, J., joined as to Part III. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined. ROBERTS, C. J., and BREYER, J., took no part in the consideration or decision of the cases.
JUSTICE SCALIA delivered the opinion of the Court.

Under the *Mobile-Sierra* doctrine, the Federal Energy Regulatory Commission (FERC or Commission) must presume that the rate set out in a freely negotiated wholesale-energy contract meets the “just and reasonable” requirement imposed by law. The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest. These cases present two questions about the scope of the *Mobile-Sierra* doctrine: First, does the presumption apply only when FERC has had an initial opportunity to review a contract rate without the presumption? Second, does the presumption im-
pose as high a bar to challenges by purchasers of wholesale electricity as it does to challenges by sellers?

I

A

Statutory Background

The Federal Power Act (FPA), 41 Stat. 1063, as amended, gives the Commission\(^1\) the authority to regulate the sale of electricity in interstate commerce—a market historically characterized by natural monopoly and therefore subject to abuses of market power. See 16 U. S. C. §824 et seq. Modeled on the Interstate Commerce Act, the FPA requires regulated utilities to file compilations of their rate schedules, or “tariffs,” with the Commission, and to provide service to electricity purchasers on the terms and prices there set forth. §824d(c). Utilities wishing to change their tariffs must notify the Commission 60 days before the change is to go into effect. §824d(d).

Unlike the Interstate Commerce Act, however, the FPA also permits utilities to set rates with individual electricity purchasers through bilateral contracts. §824d(c), (d). As we have explained elsewhere, the FPA “departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting.” Verizon Communications Inc. v. FCC, 535 U. S. 467, 479 (2002). Like tariffs, contracts must be filed with the Commission before they go into effect. 16 U. S. C. §824d(c), (d).

The FPA requires all wholesale-electricity rates to be “just and reasonable.” §824d(a). When a utility files a new rate with the Commission, through a change to its tariff or a new contract, the Commission may suspend the rate for up to five months while it investigates whether

\(^{1}\)We also use “Commission” to refer to the Federal Power Commission, FERC’s predecessor.
the rate is just and reasonable. §824d(e). The Commission may, however, decline to investigate and permit the rate to go into effect—which does not amount to a determination that the rate is “just and reasonable.” See 18 CFR §35.4 (2007). After a rate goes into effect, whether or not the Commission deemed it just and reasonable when filed, the Commission may conclude, in response to a complaint or on its own motion, that the rate is not just and reasonable and replace it with a lawful rate. 16 U. S. C. §824e(a) (2000 ed., Supp. V).


In two cases decided on the same day in 1956, we addressed the authority of the Commission to modify rates set bilaterally by contract rather than unilaterally by tariff. In United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U. S. 332, we rejected a natural-gas utility’s argument that the Natural Gas Act’s requirement that it file all new rates with the Commission authorized it to
abrogate a lawful contract with a purchaser simply by filing a new tariff, see id., at 336–337. The filing require-
ment, we explained, is merely a precondition to changing a rate, not an authorization to change rates in violation of a
lawful contract (i.e., a contract that sets a just and reasonable rate). See id., at 339–344.

In FPC v. Sierra Pacific Power Co., 350 U. S. 348, 352–353 (1956), we applied the holding of Mobile to the analo-
gous provisions of the FPA, concluding that the complaining utility could not supersede a contract rate simply by filing a new tariff. In Sierra, however, the Commission had concluded not only (contrary to our holding) that the newly filed tariff superseded the contract, but also that the contract rate itself was not just and reasonable, “solely because it yield[ed] less than a fair return on the net invested capital” of the utility. Id., at 355. Thus, we were confronted with the question of how the Commission may evaluate whether a contract rate is just and reasonable.

We answered that question in the following way:

“[T]he Commission’s conclusion appears on its face to be based on an erroneous standard. . . . [W]hile it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. . . . In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.” Id., at 354–355 (emphasis deleted).

As we said in a later case, “[t]he regulatory system created
by the [FPA] is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity.” *Permian Basin*, *supra*, at 822.

Over the past 50 years, decisions of this Court and the Courts of Appeals have refined the *Mobile-Sierra* presumption to allow greater freedom of contract. In *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div.*, 358 U. S. 103, 110–113 (1958), we held that parties could contract out of the *Mobile-Sierra* presumption by specifying in their contracts that a new rate filed with the Commission would supersede the contract rate. Courts of Appeals have held that contracting parties may also agree to a middle option between *Mobile-Sierra* and *Memphis Light*: A contract that does not allow the seller to supersede the contract rate by filing a new rate may nonetheless permit the Commission to set aside the contract rate if it results in an unfair rate of return, not just if it violates the public interest. See, *e.g.*, *Papago Tribal Util. Auth. v. FERC*, 723 F. 2d 950, 953 (CADC 1983); *Louisiana Power & Light Co. v. FERC*, 587 F. 2d 671, 675–676 (CA5 1979). Thus, as the *Mobile-Sierra* doctrine has developed, regulated parties have retained broad authority to specify whether FERC can review a contract rate solely for whether it violates the public interest or also for whether it results in an unfair rate of return. But the *Mobile-Sierra* presumption remains the default rule.

Moreover, even though the challenges in *Mobile* and *Sierra* were brought by sellers, lower courts have concluded that the *Mobile-Sierra* presumption also applies where a purchaser, rather than a seller, asks FERC to modify a contract. See *Potomac Elec. Power Co. v. FERC*, 210 F. 3d 403, 404–405, 409–410 (CADC 2000); *Boston Edison Co. v. FERC*, 856 F. 2d 361, 372 (CA1 1988). This Court has seemingly blessed that conclusion, explaining
that under the FPA, “[w]hen commercial parties . . . avail themselves of rate agreements, the principal regulatory responsibility [is] not to relieve a contracting party of an unreasonable rate.” Verizon, 535 U. S., at 479 (citing Sierra, supra, at 355).

Over the years, the Commission began to refer to the two modes of review—one with the Mobile-Sierra presumption and the other without—as the “public interest standard” and the “just and reasonable standard.” See, e.g., Southern Co. Servs., Inc. Gulf States Utils. Co. v. Southern Co. Servs., Inc., 39 FERC ¶63,026, pp. 65,134, 65,141 (1987). Decisions from the Courts of Appeals did likewise. See, e.g., Kansas Cities v. FERC, 723 F. 2d 82, 87–88 (CADC 1983); Northeast Utils. Serv. Co. v. FERC, 993 F. 2d 937, 961 (CA1 1993). We do not take this nomenclature to stand for the obviously indefensible proposition that a standard different from the statutory just-and-reasonable standard applies to contract rates. Rather, the term “public interest standard” refers to the differing application of that just-and-reasonable standard to contract rates. See Philadelphia Elec. Co., 58 F. P. C. 88, 90 (1977). (It would be less confusing to adopt the Solicitor General’s terminology, referring to the two differing applications of the just-and-reasonable standard as the “ordinary” “just and reasonable standard” and the “public interest standard.” See Reply Brief for Respondent FERC 6.)

B

Recent FERC Innovations; Market-Based Tariffs

In recent decades, the Commission has undertaken an ambitious program of market-based reforms. Part of the impetus for those changes was technological evolution. Historically, electric utilities had been vertically integrated monopolies. For a particular geographic area, a single utility would control the generation of electricity, its transmission, and its distribution to consumers. See
Midwest ISO Transmission Owners v. FERC, 373 F. 3d 1361, 1363 (CADC 2004). Since the 1970’s, however, engineering innovations have lowered the cost of generating electricity and transmitting it over long distances, enabling new entrants to challenge the regional generating monopolies of traditional utilities. See generally New York v. FERC, 535 U. S. 1, 7–8 (2002); Public Util. Dist. No. 1 of Snohomish Cty. v. FERC, 272 F. 3d 607, 610 (CADC 2001).

To take advantage of these changes, the Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity. It has sought to promote competition in those areas of the industry amenable to competition, such as the segment that generates electric power, while ensuring that the segment of the industry characterized by natural monopoly—namely, the transmission grid that conveys the generated electricity—cannot exert monopolistic influence over other areas. See New York, supra, at 9–10; Snohomish, supra. To that end, FERC required in Order No. 888 that each transmission provider offer transmission service to all customers on an equal basis by filing an “open access transmission tariff.” Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21540 (1996); see New York, supra, at 10–12. That requirement prevents the utilities that own the grid from offering more favorable transmission terms to their own affiliates and thereby extending their monopoly power to other areas of the industry.

To further pry open the wholesale-electricity market and to reduce technical inefficiencies caused when different utilities operate different portions of the grid independently, the Commission has encouraged transmission providers to establish “Regional Transmission Organizations”—entities to which transmission providers would
transfer operational control of their facilities for the purpose of efficient coordination. Order No. 2000, 65 Fed. Reg. 810, 811–812 (2000); see Midwest ISO, supra, at 1364. It has encouraged the management of those entities by “Independent System Operators,” not-for-profit entities that operate transmission facilities in a nondiscriminatory manner. See Midwest ISO, supra. In addition to coordinating transmission service, Regional Transmission Organizations perform other functions, such as running auction markets for electricity sales and offering contracts for hedging against potential grid congestion. See Blumsack, Measuring the Benefits and Costs of Regional Electric Grid Integration, 28 Energy L. J. 147, 147 (2007).

Against this backdrop of technological change and market-based reforms, the Commission over the past two decades has begun to permit sellers of wholesale electricity to file “market-based” tariffs. These tariffs, instead of setting forth rate schedules or rate-fixing contracts, simply state that the seller will enter into freely negotiated contracts with purchasers. See generally Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities, Order No. 697, 72 Fed. Reg. 39904 (2007) (hereinafter Market-Based Rates); McGrew 160–167. FERC does not subject the contracts entered into under these tariffs (as it subjected traditional wholesale-power contracts) to §824d’s requirement of immediate filing, apparently on the theory that the requirement has been satisfied by the initial filing of the market-based tariffs themselves. See Brief for Respondent FERC 28–29 (hereinafter Brief for FERC).

FERC will grant approval of a market-based tariff only if a utility demonstrates that it lacks or has adequately mitigated market power, lacks the capacity to erect other barriers to entry, and has avoided giving preferences to its affiliates. See Market-Based Rates, ¶7, 72 Fed. Reg. 39907. In addition to the initial authorization of a market-based
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tariff, FERC imposes ongoing reporting requirements. A seller must file quarterly reports summarizing the contracts that it has entered into, even extremely short-term contracts. See California ex rel. Lockyer v. FERC, 383 F. 3d 1006, 1013 (CA9 2004). It must also demonstrate every four months that it still lacks or has adequately mitigated market power. See ibid. If FERC determines from these filings that a seller has reattained market power, it may revoke the authority prospectively. See Market-Based Rates, ¶5, 72 Fed. Reg. 39906. And if the Commission finds that a seller has violated its Regional Transmission Organization’s market rules, its tariff, or Commission orders, the Commission may take appropriate remedial action, such as ordering refunds, requiring disgorgement of profits, and imposing civil penalties. See ibid.

Both the Ninth Circuit and the D. C. Circuit have generally approved FERC’s scheme of market-based tariffs. See Lockyer, supra, at 1011–1013; Louisiana Energy & Power Auth. v. FERC, 141 F. 3d 364, 365 (CADC 1998). We have not hitherto approved, and express no opinion today, on the lawfulness of the market-based-tariff system, which is not one of the issues before us. It suffices for the present cases to recognize that when a seller files a market-based tariff, purchasers no longer have the option of buying electricity at a rate set by tariff and contracts no longer need to be filed with FERC (and subjected to its investigatory power) before going into effect.

C

California’s Electricity Regulation and Its Consequences

2008)); see generally Cudahy, Whither Deregulation: A Look at the Portents, 58 N. Y. U. Annual Survey of Am. Law 155, 172–185 (2001) (hereinafter Cudahy). The bill transferred operational control of the transmission facilities of California’s three largest investor-owned utilities to an Independent Service Operator (Cal-ISO). See Pacific Gas & Elec. Co. v. FERC, 464 F. 3d 861, 864 (CA9 2006). It also established the California Power Exchange (CalPX), a nonprofit entity that operated a short-term market—or “spot market”—for electricity. The bill required California’s three largest investor-owned utilities to divest most of their electricity-generation facilities. It then required those utilities to purchase and sell the bulk of their electricity from and to the CalPX’s spot market, permitting only limited leeway for them to enter into long-term contracts. See Public Util. Dist. No. 1 of Snohomish Cty. v. FERC, 471 F. 3d 1053, 1068 (CA9 2006) (case below).

In 1997, FERC approved the Cal-ISO as consistent with the requirements for an Independent Service Operator established in Order No. 888. FERC also approved the CalPX and the investor-owned utilities’ authority to make sales at market-based rates in the CalPX, finding that, in light of the divesture of their generation units and other conditions imposed under the restructuring plan, those utilities had adequately mitigated their market power. See Pacific Gas & Elec. Co., 81 FERC ¶61,122, pp. 61,435, 61,435–61,436, 61,537–61,548 (1997).

The CalPX opened for business in March 1998. In the summer of 1999, it expanded to include an auction for sales of electricity under “forward contracts”—contracts in which sellers promise to deliver electricity more than one day in the future (sometimes many years). But the participation of California’s large investor-owned utilities in that forward market was limited because, as we have said, AB 1890 strictly capped the amount of power that they
could purchase outside of the spot market. See 471 F. 3d, at 1068.

That diminishment of the role of long-term contracts in the California electricity market turned out to be one of the seeds of an energy crisis. In the summer of 2000, the price of electricity in the CalPX’s spot market jumped dramatically—more than fifteenfold. See ibid. The increase was the result of a combination of natural, economic, and regulatory factors: “flawed market rules; inadequate addition of generating facilities in the preceding years; a drop in available hydropower due to drought conditions; a rupture of a major pipeline supplying natural gas into California; strong growth in the economy and in electricity demand; unusually high temperatures; an increase in unplanned outages of extremely old generating facilities; and market manipulation.” CA ­ifornians for Renewable Energy, Inc. v. Sellers of Energy and Ancillary Servs., 119 FERC ¶ 61,058, pp. 61,243, 61,246 (2007).

Because California’s investor-owned utilities had for the most part been forbidden to obtain their power through long-term contracts, the turmoil in the spot market hit them hard. See Cudahy 174. The high prices led to rolling blackouts and saddled utilities with mounting debt.

In late 2000, the Commission took action. A central plank of its emergency effort was to eliminate the utilities’ reliance on the CalPX’s spot market and to shift their purchases to the forward market. To that end, FERC abolished the requirement that investor-owned utilities purchase and sell all power through the CalPX and encouraged them to enter into long-term contracts. See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs., 93 FERC ¶ 61,294, pp. 61,980, 61,982 (2000); see also 471 F. 3d, at 1069. The Commission also put price caps on wholesale electricity. See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs., 95 FERC ¶ 61,418, p. 62,545 (2001). By June 2001, electricity prices
began to decline to normal levels. *Id.*, at 62,456.

**D**

**Genesis of These Cases**

The principal respondents in these cases are western utilities that purchased power under long-term contracts during that tumultuous period in 2000 and 2001. Although they are not located in California, the high prices in California spilled over into other Western States. See 471 F. 3d, at 1069. Petitioners are the sellers that entered into the contracts with respondents.

The contracts between the parties included rates that were very high by historical standards. For example, respondent Snohomish signed a 9-year contract to purchase electricity from petitioner Morgan Stanley at a rate of $105/megawatt hour (MWh), whereas prices in the Pacific Northwest have historically averaged $24/MWh. The contract prices were substantially lower, however, than the prices that Snohomish would have paid in the spot market during the energy crisis, when prices peaked at $3,300/MWh. See *id.*, at 1069–1070.

After the crisis had passed, buyer’s remorse set in and respondents asked FERC to modify the contracts. They contended that the rates in the contracts should not be presumed to be just and reasonable under *Mobile-Sierra* because, given the sellers’ market-based tariffs, the contracts had never been initially approved by the Commission without the presumption. See *Nevada Power Co. v. Enron Power Marketing, Inc.*, 103 FERC ¶61,353, pp. 62,382, 62,387 (2003). Respondents also argued that contract modification was warranted even under the *Mobile-Sierra* presumption because the contract rates were so high that they violated the public interest. See 103 FERC, at 62,383, 62,387–62,395.

In a preliminary order, the Commission instructed the Administrative Law Judge (ALJ) to consider 12 different
factors in deciding whether the presumption could be overcome for the contracts, such as the terms of the contracts, the available alternatives at the time of sale, the relationship of the rates to Commission benchmarks, the effect of the contracts on the financial health of the purchasers, and the impact of contract modification on national energy markets. After a hearing, the ALJ concluded that the Mobile-Sierra presumption should apply to the contracts and that the contracts did not seriously harm the public interest. In fact, according to the ALJ, even if the Mobile-Sierra presumption did not apply, respondents would not be entitled to have the contracts modified. 103 FERC, at 62,390–62,394.

Between the ALJ’s decision and the Commission’s ruling, the Commission’s staff issued a report (Staff Report) concluding that unlawful activities of various sellers in the spot market had affected prices in the forward market. See id., at 62,396. Respondents raised the report at oral argument before the Commission, and some of them argued that petitioners “were unlawfully manipulating market prices, thereby engaging in fraud and deception in violation of their market-based rate tariffs.” Ibid. Petitioners contended, however, that the Staff Report demonstrated only a correlation between rates in the spot and forward markets, not a causal connection. See ibid.

FERC affirmed the ALJ. The Commission first held that the Mobile-Sierra presumption did apply to the contracts at issue. Although agreeing with respondents that the presumption applies only where FERC has had an initial opportunity to review a contract rate, the Commission relied on the somewhat metaphysical ground that the grant of market-based authority to petitioners qualified as that initial opportunity. See 103 FERC, at 62,388–62,389. The Commission then held that respondents could not overcome the Mobile-Sierra presumption. It recognized that the Staff Report had “found that spot market distor-
tions flowed through to forward power prices,” 103 FERC, at 62,396–62,397, but concluded that this finding, even if true, was not “determinative” because:

“a finding that the unjust and unreasonable spot market caused forward bilateral prices to be unjust and unreasonable would be relevant to contract modification only where there is a ‘just and reasonable’ standard of review. . . . Under the ‘public interest’ standard, to justify contract modification it is not enough to show that forward prices became unjust and unreasonable due to the impact of spot market dysfunctions; it must be shown that the rates, terms and conditions are contrary to the public interest.” Id., at 62,397.

The Commission determined that under the factors identified in Sierra, as well as under a totality-of-the-circumstances test, respondents had not demonstrated that the contracts threatened the public interest. See 103 FERC, at 62,397–62,399. On rehearing, respondents reiterated their complaints, including their charge that “their contracts were the product of market manipulation by Enron, Morgan Stanley and other [sellers].” 105 FERC ¶ 61,185, pp. 61,979, 61,989 (2003). The Commission answered that there was “no evidence to support a finding of market manipulation that specifically affected the contracts at issue.” Ibid.

Respondents filed petitions for review in the Ninth Circuit, which granted the petitions and remanded to the Commission, finding two flaws in the Commission’s analysis.2 First, the court agreed with respondents that rates set by contract (whether pursuant to a market-based tariff

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2In a holding not challenged before this Court, the Ninth Circuit concluded that the contracts at issue did not contain “Memphis clause[s],” 471 F. 3d 1053, 1079 (2006) (citing United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div., 358 U. S. 103 (1958)), see supra, at 5, that would have precluded application of the Mobile-Sierra presumption.
or not) are presumptively reasonable only where FERC has had an initial opportunity to review the contracts without applying the *Mobile-Sierra* presumption. To satisfy that prerequisite under the market-based tariff regime, the court said, the Commission must promptly review the terms of contracts after their formation and must modify those that do not appear to be just and reasonable when evaluated without the *Mobile-Sierra* presumption (rather than merely revoking market-based authority prospectively but leaving pre-existing contracts intact). See 471 F. 3d, at 1075–1077, 1079–1085. This initial review must include an inquiry into “the market conditions in which the contracts at issue were formed,” and market “dysfunction” is a ground for finding a contract not to be just and reasonable. *Id.*, at 1085–1087. Second, the Ninth Circuit held that even assuming that the *Mobile-Sierra* presumption applied, the standard for overcoming that presumption is different for a purchaser’s challenge to a contract, namely, whether the contract rate exceeds a “zone of reasonableness.” 471 F. 3d, at 1088–1090.

We granted certiorari. See 551 U. S. ___ (2007).

II

Application of *Mobile-Sierra* Presumption to Contracts Concluded under Market-Based Rate Authority

As noted earlier, the FERC order under review here agreed with the Ninth Circuit’s premise that the Commission must have an initial opportunity to review a contract without the *Mobile-Sierra* presumption, but maintained that the authorization for market-based rate authority qualified as that initial review. Before this Court, however, FERC changes its tune, arguing that there is no such prerequisite—or at least that FERC could reasonably
conclude so and therefore that *Chevron* deference is in order. See Brief for FERC 20–21, 33–34; *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). We will not uphold a discretionary agency decision where the agency has offered a justification in court different from what it provided in its opinion. See *SEC v. Chenery Corp.*, 318 U. S. 80, 94–95 (1943). But FERC has lucked out: The *Chenery* doctrine has no application to these cases, because we conclude that the Commission was *required*, under our decision in *Sierra*, to apply the *Mobile-Sierra* presumption in its evaluation of the contracts here. That it provided a different rationale for the necessary result is no cause for upsetting its ruling. “To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency action into a ping-pong game.” *NLRB v. Wyman-Gordon Co.*, 394 U. S. 759, 766–767, n. 6 (1969) (plurality opinion).

We are in broad agreement with the Ninth Circuit on a central premise: There is only one statutory standard for assessing wholesale electricity rates, whether set by contract or tariff—the just-and-reasonable standard. The plain text of the FPA states that “[a]ll rates . . . shall be just and reasonable.” 16 U. S. C. §824d(a); see also §824e(a) (2000 ed., Supp. V). But we disagree with the Ninth Circuit’s interpretation of *Sierra* as requiring (contrary to the statute) that the Commission apply the standard differently, depending on *when* a contract rate is challenged. In the Ninth Circuit’s view, *Sierra* was premised on the idea that “as long as the rate was just and reasonable when the contract was formed, there would be a presumption . . . that the reasonableness continued throughout the term of the contract.” 471 F. 3d, at 1077. In other words, so long as the Commission concludes (either after a hearing or by allowing a rate to go into effect) that a contract rate is just and reasonable when
initially filed, the rate will be presumed just and reason­able in future proceedings.

That is a misreading of Sierra. Sierra was grounded in the commonsense notion that “[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a ‘just and reasonable’ rate as between the two of them.” Verizon, 535 U. S., at 479. Therefore, only when the mutually agreed-upon contract rate seriously harms the consuming public may the Commission declare it not to be just and reasonable.3 Sierra thus provided a definition of what it means for a rate to satisfy the just-and-reasonable standard in the contract context—a definition that applies regardless of when the contract is reviewed. The Ninth Circuit, by contrast, essentially read Sierra “as the equivalent of an estoppel doctrine,” whereby an initial Commis­sion opportunity for review prevents the Commission from modifying the rates absent serious future harm to the public interest. Tewksbury & Lim, Applying the Mobile-Sierra Doctrine to Market-Based Rate Contracts, 26 En­ergy L. J. 437, 457–458 (2005). But Sierra said nothing of the sort. And given that the Commission’s passive per­mission for a rate to go into effect does not constitute a finding that the rate is just and reasonable, it would be odd to treat that initial “opportunity for review” as curtail­ing later challenges.

The Ninth Circuit found support for its prerequisite in our decision in FPC v. Texaco Inc., 417 U. S. 380 (1974). In that case, we warned that the Commission’s attempt to rely solely on market forces to evaluate rates charged by

3We do not say, as the dissent alleges, post, at 7 (opinion of STEVENS, J.), that the public interest is not also relevant in a challenge to unilaterally set rates. But it is the “sole concern” in a contract case. See FPC v. Sierra Pacific Power Co., 350 U. S. 348, 355 (1956).
small natural-gas producers was inconsistent with the Natural Gas Act's insistence that rates be just and reasonable. See id., at 397. The Ninth Circuit apparently took this to mean that all initially filed contracts must be subject to review without the Mobile-Sierra presumption. But Texaco had nothing to do with that doctrine. It held that the Commission had improperly implemented a scheme of total deregulation by applying no standard of review at all to small-producer rates. See 417 U.S., at 395–397. It did not cast doubt on the proposition that in a proper regulatory scheme, the ordinary mode for evaluating contractually set rates is to look to whether the rates seriously harm the public interest, not to whether they are unfair to one of the parties that voluntarily assented to the contract. Cf. id., at 391, n. 4.

Nor do we agree with the Ninth Circuit that FERC must inquire into whether a contract was formed in an environment of market "dysfunction" before applying the Mobile-Sierra presumption. Markets are not perfect, and one of the reasons that parties enter into wholesale-power contracts is precisely to hedge against the volatility that market imperfections produce. That is why one of the Commission's responses to the energy crisis was to remove regulatory barriers to long-term contracts. It would be a perverse rule that rendered contracts less likely to be enforced when there is volatility in the market. (Such a rule would come into play, after all, only when a contract formed in a period of "dysfunction" did not significantly harm the consuming public, since contracts that seriously harm the public should be set aside even under the Mobile-Sierra presumption.) By enabling sophisticated parties who weathered market turmoil by entering long-term contracts to renounce those contracts once the storm has passed, the Ninth Circuit's holding would reduce the incentive to conclude such contracts in the future. Such a rule has no support in our case law and plainly under-
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mines the role of contracts in the FPA’s statutory scheme.

To be sure, FERC has ample authority to set aside a contract where there is unfair dealing at the contract formation stage—for instance, if it finds traditional grounds for the abrogation of the contract such as fraud or duress. See 103 FERC, at 62,399–62,400 (“[T]here is no evidence of unfairness, bad faith, or duress in the original negotiations”). In addition, if the “dysfunctional” market conditions under which the contract was formed were caused by illegal action of one of the parties, FERC should not apply the Mobile-Sierra presumption. See Part III, infra. But the mere fact that the market is imperfect, or even chaotic, is no reason to undermine the stabilizing force of contracts that the FPA embraced as an alternative to “purely tariff-based regulation.” Verizon, 535 U. S., at 479. We may add that evaluating market “dysfunction” is a very difficult and highly speculative task—not one that the FPA would likely require the agency to engage in before holding sophisticated parties to their bargains.

We reiterate that we do not address the lawfulness of FERC’s market-based-rates scheme, which assuredly has its critics. But any needed revision in that scheme is properly addressed in a challenge to the scheme itself, not through a disfigurement of the venerable Mobile-Sierra doctrine. We hold only that FERC may abrogate a valid contract only if it harms the public interest.

B
Application of “Excessive Burden” Exception to High-Rate Challenges

We turn now to the Ninth Circuit’s second holding: that a “zone of reasonableness” test should be used to evaluate a buyer’s challenge that a rate is too high. In our view that fails to accord an adequate level of protection to contracts. The standard for a buyer’s challenge must be the same, generally speaking, as the standard for a seller’s
challenge: The contract rate must seriously harm the public interest. That is the standard that the Commission applied in the proceedings below.

We are again in agreement with the Ninth Circuit on a starting premise: It is clear that the three factors we identified in *Sierra*—“where [a rate] might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory,” 350 U. S., at 355—are not all precisely applicable to the high-rate challenge of a purchaser (where, for example, the relevant question is not whether “other customers” [of the utility] would be excessively burdened, but whether any customers of the purchaser would be); and that those three factors are in any event not the exclusive components of the public interest. In its decision below, the Commission recognized both these realities. See 103 FERC, at 62,397 (“Nevada Companies failed to show that the contract terms at issue impose an excessive burden on their customers” (emphasis added)); id., at 62,398 (“The record also demonstrates that Snohomish presented no evidence that its contract with Morgan Stanley adversely affected Snohomish or its ratepayers” (emphasis added)); id., at 62,398–62,399 (evaluating the “totality of circumstances”); see also Brief for FERC 41–42.4

Where we disagree with the Ninth Circuit is on the

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4 The dissent criticizes the Commission’s decision because it took into account under the heading “totality of the circumstances” only the circumstances of the contract formation, not “circumstances exogenous to contract negotiations, including natural disasters and market manipulation by entities not parties to the challenged contract.” *Post*, at 13. Those considerations are relevant to whether the contracts impose an “excessive burden” on consumers relative to what they would have paid absent the contracts. It is precisely our uncertainty whether the Commission considered those “circumstances exogenous to contract negotiations,” discussed in Part III of our opinion, that causes us to approve the remand to FERC.
overarching "zone of reasonableness" standard it established for evaluating a high-rate challenge and setting aside a contract rate: whether consumers' electricity bills "are higher than they would otherwise have been had the challenged contracts called for rates within the just and reasonable range," i.e., rates that equal "marginal cost." 5

The Ninth Circuit derived this test from our statement in Sierra that a contract rate would have to be modified if it were so low that it imposed an "excessive burden" on other wholesale purchasers. The Ninth Circuit took "excessive burden" to mean merely the burden caused when one set of consumers is forced to pay above marginal cost to compensate for below-marginal-

5 Elsewhere the Ninth Circuit softened this standard somewhat, saying that "[e]ven if a particular rate exceeds marginal cost . . . it may still be within this reasonable range—or 'zone of reasonableness'—if that higher-than-cost-based price results from normal market forces and is part of a general trend toward rates that do reflect cost." 471 F. 3d, at 1089. We are not sure (and we think no one can be sure) precisely what this means. It has no basis in our opinions, and is in any event wrong because its point of departure (the general principle that rates cannot exceed marginal cost) contradicts Mobile-Sierra.

The Ninth Circuit purported to find support for its "zone of reasonableness" test in the case law of the District of Columbia Circuit. But the cited case stands only for the proposition that a market-based scheme must assure that market forces will, "over the long pull," cause rates to approximate marginal cost. Interstate Natural Gas Assn. of Am. v. FERC, 285 F. 3d 18, 31 (2002). Nowhere does the opinion suggest that the standard for reforming a particular contract validly entered into under a market-based scheme is whether the rates approximate marginal cost.

By the same token, our approval of FERC's decision not to set perspective area rates solely with reference to pre-existing contract prices, Permian Basin Area Rate Cases, 390 U. S. 747, 792–793 (1968), does not support, as the dissent thinks, post, at 8, n. 2, the view that the standard for abrogating an existing, valid contract is anything less than the Mobile-Sierra standard. That is the standard Permian Basin applied when actually confronted with the issue of contract modification. See 390 U. S., at 781–784, 821–822.
cost rates charged other consumers. See 471 F. 3d, at 1088. And it proceeded to apply a similar notion of “excessive burden” to high-rate challenges (where all the burden of the above-marginal-cost contract rate falls on the purchaser’s own customers, and does not affect the customers of third parties). Id., at 1089. That is a misreading of Sierra and our later cases. A presumption of validity that disappears when the rate is above marginal cost is no presumption of validity at all, but a reinstitution of cost-based rather than contract-based regulation. We have said that, under the Mobile-Sierra presumption, setting aside a contract rate requires a finding of “unequivocal public necessity,” Permian Basin, 390 U. S., at 822, or “extraordinary circumstances,” Arkansas Louisiana Gas Co. v. Hall, 453 U. S. 571, 582 (1981). In no way can these descriptions be thought to refer to the mere exceeding of marginal cost.

The Ninth Circuit’s standard would give short shrift to the important role of contracts in the FPA, as reflected in our decision in Sierra, and would threaten to inject more volatility into the electricity market by undermining a key source of stability. The FPA recognizes that contract stability ultimately benefits consumers, even if short-term rates for a subset of the public might be high by historical standards—which is why it permits rates to be set by contract and not just by tariff. As the Commission has recently put it, its “first and foremost duty is to protect consumers from unjust and unreasonable rates; however, . . . uncertainties regarding rate stability and contract sanctity can have a chilling effect on investments and a seller’s willingness to enter into long-term contracts and this, in turn, can harm customers in the long run.” Market-Based Rates, ¶6, 72 Fed. Reg. 33906–33907.

Besides being wrong in principle, in its practical effect the Ninth Circuit’s rule would impose an onerous new burden on the Commission, requiring it to calculate the
marginal cost of the power sold under a market-based contract. Assuming that FERC even ventured to undertake such an analysis, rather than reverting to the ancien régime of cost-of-service ratesetting, the regulatory costs would be enormous. We think that the FPA intended to reserve the Commission’s contract-abrogation power for those extraordinary circumstances where the public will be severely harmed.6

III

Defects in FERC’s Analysis Supporting Remand

Despite our significant disagreement with the Ninth

6The dissent claims that we have misread the FPA because its provisions “do not distinguish between rates set unilaterally by tariff and rates set bilaterally by contract.” Post, at 2. But the dissent’s interpretation, whatever plausibility it has as an original matter, cannot be squared with Sierra, which plainly distinguished between unilaterally and bilaterally set rates, and said that the only relevant consideration for the Commission in the latter case is whether the public interest is harmed. And the circumstances identified in Sierra as implicating the public interest refer to something more than a small dent in the consumer’s pocket, which is why our subsequent cases have described the standard as a high one.

At the end of the day, the dissent simply argues against the settled understanding of the FPA that has prevailed in this Court, lower courts, and the Commission for half a century. Although the dissent is correct that we have never used the phrase “Mobile-Sierra doctrine” in our cases, that is probably because the understanding of it was so uniform that no circuit split concerning its meaning arose until the Ninth Circuit’s erroneous decision in these cases. If one searches the Commission’s reports, over 600 decisions since 2000 alone have cited the doctrine, see Brief for Electric Power Supply Association et al. as Amici Curiae 15, and the Courts of Appeals have used the term “Mobile-Sierra doctrine” (or “Sierra-Mobile” doctrine) over 75 times since 1974. If there were ever a context where long-settled understanding should be honored it is here, where a statutory decision (subject to revision by Congress) has been understood the same way for many years by lower courts, by this Court, by the federal agency the statute governs, and hence surely by the private actors trying to observe the law.
Circuit, we find two errors in the Commission’s analysis, and we therefore affirm the judgment below on alternative grounds.

First, it appears, as the Ninth Circuit concluded, see 471 F. 3d, at 1090, that the Commission may have looked simply to whether consumers’ rates increased immediately upon the relevant contracts’ going into effect, rather than determining whether the contracts imposed an excessive burden on consumers “down the line,” relative to the rates they could have obtained (but for the contracts) after elimination of the dysfunctional market. For example, the Commission concluded that two of the respondents would experience “rate decreases of approximately 20 percent for retail service” during the period covered by the contracts. 103 FERC, at 62,397. But the baseline for that computation was the rate they were paying before the contracts went into effect. That disparity is certainly a relevant consideration; but so is the disparity between the contract rate and the rates consumers would have paid (but for the contracts) further down the line, when the open market was no longer dysfunctional. That disparity, past a certain point, could amount to an “excessive burden.” That is what was contemplated by Sierra, which involved a challenge 5 years into a 15-year contract. The “excessive burden” on other customers to which the opinion referred was assuredly the current burden, and not only the burden imposed at the very outset of the contract. See 350 U. S., at 355. The “unequivocal public necessity” that justifies overriding the Mobile-Sierra presumption does not disappear as a factor once the contract enters into force. Thus, FERC’s analysis on this point was flawed—or at least incomplete. As the Ninth Circuit put it, “[i]t is entirely possible that rates had increased so high during the energy crises because of dysfunction in the spot market that, even with the acknowledged decrease in rates, consumers still paid more under the forward contracts
than they otherwise would have.” 471 F. 3d, at 1090. If that is so, and if that increase is so great that, even taking into account the desirability of fostering market-stabilizing long-term contracts, the rates impose an excessive burden on consumers or otherwise seriously harm the public interest, the rates must be disallowed.

Second, respondents alleged before FERC that some of the petitioners in these cases had engaged in market manipulation in the spot market. See, e.g., 105 FERC, at 61,989 (“Snohomish and Nevada Companies argue that their contracts were the product of market manipulation by Enron, Morgan Stanley and other Respondents, which, as established by the Commission Staff, engaged in market manipulation”). The Staff Report concluded, as we have said, that the abnormally high prices in the spot market during the energy crisis influenced the terms of contracts in the forward market. But the Commission dismissed the relevance of the Staff Report on the ground that it had not demonstrated that forward market prices were so high as to overcome the Mobile-Sierra presumption. We conclude, however, that if it is clear that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations, the Commission should not presume that the contract is just and reasonable. Like fraud and duress, unlawful market activity that directly affects contract negotiations eliminates the premise on which the Mobile-Sierra presumption rests: that the contract rates are the product of fair, arms-length negotiations. The mere fact that the unlawful activity occurred in a different (but related) market does not automatically establish that it had no effect upon the contract—especially given the Staff Report’s (unsurprising) finding that high prices in the one market produced high prices in the other. We are unable to determine from the Commission’s orders whether it found the evidence inadequate to support the claim that respondents’ alleged unlawful activities af-
fected the contracts at issue here. It said in its order on
rehearing, 105 FERC, at 61,989, that “[w]e . . . found no
evidence to support a finding of market manipulation [by
respondents] that specifically affected the contracts at
issue.” But perhaps that must be read in light of the
Commission’s above described rejection of the Staff Report
on the ground that high spot market prices caused by
manipulation are irrelevant unless the forward market
prices fail the Mobile-Sierra standard; and in light of the
statement in its initial order, in apparent response to the
claim of spot-market manipulation by respondents, 103
FERC, at 62,397, that “a finding that the unjust and
unreasonable spot market prices caused forward bilateral
prices to be unjust and unreasonable would be relevant to
contract modification only where there is a ‘just and rea­
sonable’ standard of review.”

We emphasize that the mere fact of a party’s engaging
in unlawful activity in the spot market does not deprive its
forward contracts of the benefit of the Mobile-Sierra pre­
sumption. There is no reason why FERC should be able to
abrogate a contract on these grounds without finding a
causal connection between unlawful activity and the
contract rate. Where, however, causality has been estab­
lished, the Mobile-Sierra presumption should not apply.

On remand, the Commission should amplify or clarify
its findings on these two points. The judgment of the
Court of Appeals is affirmed, and the cases are remanded
for proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE and JUSTICE BREYER took no part in
the consideration or decision of these cases.
JUSTICE GINSBURG, concurring in part and concurring in the judgment.

Recommending denial of the petition for certiorari in these cases, the Federal Energy Regulatory Commission urged that review “would be premature” given “the interlocutory nature of th[e] issues.” Brief for Respondent Federal Energy Regulatory Commission in Opposition 22, 25. In this regard, the Commission called our attention to “new measures” it had taken, as well as recent enactments by Congress, bearing on “the evaluation of contracts under Mobile-Sierra.” Id., at 14–16. In view of these developments, the Commission suggested, this Court should await “the better-developed record that would be produced by FER[C] . . . on remand.” Id., at 22. I agree that the Court would have been better informed had it awaited the Com-
mission’s decision on remand. I think it plain, however, that the Commission erred in the two respects identified by the Court. See ante, at 24–26. I therefore concur in the Court’s judgment and join Part III of the Court’s opinion.
The basic question presented by these complicated cases is whether “the Federal Energy Regulatory Commission (FERC or Commission) must presume that the rate set out in a freely negotiated wholesale-energy contract meets the ‘just and reasonable’ requirement imposed by law.” Ante, at 1. The opening sentence of the Court’s opinion tells us that the “Mobile-Sierra doctrine”—a term that makes its first appearance in the United States Reports today—mandates an affirmative answer. This holding finds no support in either case that lends its name to the doctrine. Nevertheless, in the interest of guarding against “disfigurement of the venerable Mobile-Sierra doctrine,” ante, at 19, the Court mangles both the governing statute and
Under the Federal Power Act (FPA), 41 Stat. 1063, 16 U. S. C. §791a et seq., wholesale electricity prices are established in the first instance by public utilities, either via tariffs or in contracts with purchasers. §824d(c). Whether set by tariff or contract, all rates must be filed with the Commission. See ibid. Section 205(a) of the FPA provides, “All rates and charges . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.” 16 U. S. C. §824d(a). Pursuant to §206(a), if FERC determines “that any rate . . . or that any rule, regulation, practice, or contract affect[ing] such rate . . . is unjust [or] unreasonable . . . , the Commission shall determine the just and reasonable rate, . . . rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.” 16 U. S. C. §824e(a). These provisions distinguish between the rate-setting roles of utilities (which initially set rates) and the Commission (which may override utility-set rates that are not just and reasonable), but they do not distinguish between rates set unilaterally by tariff and rates set bilaterally by contract. However the utility sets its prices, the standard of review is the same—rates must be just and reasonable.

The Court purports to acknowledge that “[t]here is only one statutory standard for assessing wholesale electricity rates, whether set by contract or tariff—the just-and-reasonable standard.” Ante, at 16. Unlike rates set by tariff, however, the Court holds that any “freely negotiated” contract rate is presumptively just and reasonable unless it “seriously harms” the public interest. Ante, at 1. According to the Court, this presumption represents a “differing application of [the] just-and-reasonable standard,” but not a different standard altogether. Ante, at 6.
I disagree. There is no significant difference between requiring a heightened showing to overcome an otherwise conclusive presumption and imposing a heightened standard of review. I agree that applying a separate standard of review to contract rates is "obviously indefensible," ibid., but that is also true with respect to the Court's presumption.

Even if the "Mobile-Sierra presumption" were not tantamount to a separate standard, nothing in the statute mandates "differing application" of the statutory standard to rates set by contract. Ibid. Section 206(a) of the FPA provides, "without qualification or exception," that FERC may replace any unjust or unreasonable contract with a lawful contract. Permian Basin Area Rate Cases, 390 U. S. 747, 783–784 (1968) (construing identical language in the Natural Gas Act, 15 U. S. C. §717d(a)). The statute does not say anything about a mandatory presumption for contracts, much less define the burden of proof for overcoming it or delineate the circumstances for its nonapplication. Cf. ante, at 1, 19. Nor does the statute prohibit FERC from considering marginal cost when reviewing rates set by contract. Cf. ante, at 20–22, and n. 5.

If Congress had intended to impose such detailed constraints on the Commission’s authority to review contract rates, it would have done so itself in the FPA. Congress instead used the general words "just and reasonable" because it wanted to give FERC, not the courts, wide latitude in setting policy. As we explained in Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, 843–844 (1984):

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.’ Morton v. Ruiz, 415 U. S. 199, 231 (1974)."
If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” (Footnote omitted.)

Consistent with this understanding of administrative law, our cases interpreting the FPA have invariably “emphasized that courts are without authority to set aside any rate adopted by the Commission which is within a ‘zone of reasonableness.’” *Permian Basin*, 390 U. S., at 797. But see *ante*, at 19 (asserting that “a ‘zone of reasonableness’ test . . . fails to accord an adequate level of protection to contracts”). This deference makes eminent sense because “rate-making agencies are not bound to the service of any single regulatory formula; they are permitted, unless their statutory authority otherwise plainly indicates, ‘to make the pragmatic adjustments which may be called for by particular circumstances.’” *Permian Basin*, 390 U. S., at 776–777. Despite paying lip service to this principle, see *ante*, at 3, the Court binds the Commission to a rigid formula of the Court’s own making.

Having found no statutory text that supports its vision of the *Mobile-Sierra* doctrine, the Court invokes the “important role of contracts in the FPA.” *Ante*, at 22. But contracts play an “important role” in the FPA only insofar as the statute “departed from the scheme of purely tariff-based regulation.” *Verizon Communications Inc. v. FCC*, 535 U. S. 467, 479 (2002). In allowing parties to establish
rates by contract, Congress did not intend to immunize such rates from just-and-reasonable review. Both *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332 (1956), and *FPC v. Sierra Pacific Power Co.*, 350 U. S. 348 (1956), the supposed progenitors of the “Mobile-Sierra presumption,” make this point in no uncertain terms. See *Sierra*, 350 U. S., at 353 (“The Commission has undoubted power under §206(a) to prescribe a change in contract rates whenever it determines such rates to be unlawful”); *Mobile*, 350 U. S., at 344 (“[C]ontracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest”).

1 Accordingly, the fact that the FPA tolerates contracts does not make it subservient to contracts.

II

Neither of the eponymous cases in the “Mobile-Sierra presumption,” nor any of our subsequent decisions, substantiates the Court’s atextual reading of §§205 and 206.

As the Court acknowledges, *Mobile* itself says nothing about what standard of review applies to rates established by contract. See *ante*, at 3–4. Rather, *Mobile* merely held that utilities cannot unilaterally abrogate contracts with purchasers by filing new rate schedules with the Commission. See 350 U. S., at 339–341. The Court neglects to mention, however, that although *Mobile* had no occasion to comment on the standard of review, it did imply that Congress would not have permitted parties to establish rates by contract but for “the protection of the public

1 See also, e.g., *Arkansas Louisiana Gas Co. v. Hall*, 453 U. S. 571, 582 (1981) (*Arkla*) (“[T]he clear purpose of the congressional scheme for rate filing is to ‘grant[t] the Commission an opportunity in every case to judge the reasonableness of the rate’); *Permian Basin Area Rate Cases*, 390 U. S. 747, 784 (1968) (“[T]he Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests”).
interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.” Id., at 339.

In Sierra, a public utility entered into a long-term contract to sell electricity “at a special low rate” in order to forestall potential competition. See 350 U.S., at 351–352. Several years later the utility complained that the rate provided too little profit and was therefore not “just and reasonable.” The Commission agreed and set aside the rate “solely because it yield[ed] less than a fair return on the net invested capital.” See id., at 354–355. The Court vacated and remanded on the ground that the Commission had applied an erroneous standard. “[W]hile it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return,” the Court reasoned, “it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain.” Id., at 355. When the seller has agreed to a rate that it later challenges as too low, “the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.” Ibid. The Court further elaborated on what it meant by the “public interest”:

“That the purpose of the power given the Commission by §206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in §201 of the Act that the scheme of regulation imposed ‘is necessary in the public interest.’ When §206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either ‘unjust’ or ‘unreasonable’ simply be-
cause it is unprofitable to the public utility.” *Ibid.*

*Sierra* therefore held that, in accordance with the statement of policy in the FPA, 16 U. S. C. §824(a), whether a rate is “just and reasonable” is measured against the public interest, not the private interests of regulated sellers. Contrary to the opinion of the Court, see ante, at 23, n. 6, *Sierra* instructs that the public interest is the touchstone for just-and-reasonable review of all rates, not just contract rates. *Sierra* drew a distinction between the Commission’s authority to impose low rates on utilities and its authority to abrogate low rates agreed to by utilities because these actions impact the public interest differently, not because the public interest governs rates set bilaterally but not rates set unilaterally. When the Commission imposes rates that afford less than a fair return, it compromises the public’s interest in attracting necessary capital. The impact is different, however, if a utility has agreed to a low rate because investors recognize that the utility, not the regulator, is responsible for the unattractive rate of return.

*Sierra* used “public interest” as shorthand for the interest of consumers in paying “the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.” *Permian Basin*, 390 U. S., at 793 (quoting *Atlantic Refining Co. v. Public Serv. Comm’n of N. Y.*, 360 U. S. 378, 388 (1959)). Whereas high rates directly implicate this interest, low rates do so only indirectly, such as when the rate is so low that it “might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.” *Sierra*, 350 U. S., at 355. Nothing in *Sierra* purports to mandate a “serious harm” standard of review, or to require any assumption that high rates and low rates impose symmetric burdens on the public interest. Cf. ante, at 19–20. As we
later explained in \textit{FPC v. Texaco Inc.}, 417 U. S. 380, 399 (1974), the Commission cannot ignore even "a small dent in the consumer's pocket" because "the Act makes unlawful all rates which are not just and reasonable, and does not say a little unlawfulness is permitted."

Brushing aside the text of the FPA, as well as the holdings in \textit{Mobile} and \textit{Sierra} themselves, the Court cherry picks language from \textit{Verizon}, \textit{Arkla}, and \textit{Permian Basin}. Both \textit{Verizon} and \textit{Arkla} mentioned the \textit{Mobile-Sierra} line of cases only in passing, and neither case had anything to do with just-and-reasonable review of rates. See \textit{Verizon}, 535 U. S., at 479; \textit{Arkla}, 453 U. S. 571, 582 (1981). Furthermore, the statement in \textit{Permian Basin} about "unequivocal public necessity," 390 U. S., at 822, speaks to the difficulty of establishing injury to the public interest in the context of a low-rate challenge, not a high-rate challenge.\footnote{The Court repeatedly quotes the following snippet from the 75-page opinion in \textit{Permian Basin}: "The regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity." 390 U. S., at 822 (cited \textit{ante}, at 5, 22, 24). Like \textit{FPC v. Sierra Pacific Power Co.}, 350 U. S. 348 (1956), however, \textit{Permian Basin} made this statement in the course of rejecting a low-rate challenge. Read in context, the Court's reference to "unequivocal public necessity" is a loose restatement of \textit{Sierra}, which required "evidence of injury to the public interest," and which underscored how rarely a utility will be able to demonstrate that a "contract price is so 'low as to adversely affect the public interest.'" 390 U. S., at 820–821 (quoting \textit{Sierra}, 350 U. S., at 355). The Court's expansive reading of the "unequivocal public necessity" statement cannot be squared with \textit{Permian Basin}'s discussion of the Commission's authority to review rates set by contract: "Although the Natural Gas Act is premised upon a continuing system of private contracting, the Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests." 390 U. S., at 784 (citation omitted). Nor can it be reconciled with \textit{Permian Basin}'s rejection of the producers' arguments (1) that the Commission "wrongly invalidated existing contracts" by imposing a ceiling on rates, see \textit{id.}, at 781–784, and (2) that the Commission was compelled to adopt contract}
The Court’s reliance on these few stray sentences calls to mind our admonishment in *Permian Basin*: “The Commission’s exercise of its regulatory authority must be assessed in light of its purposes and consequences, and not by references to isolated phrases from previous cases.” *Id.*, at 791, n. 60.

III

Lacking any grounding in the FPA or precedent, the Court concludes, as a matter of policy, that the *Mobile-Sierra* presumption is necessary to ensure stability in volatile energy markets and to reduce regulatory costs. See *ante*, at 22–23. Of course, “the desirability of fostering market-stabilizing long-term contracts,” *ante*, at 25, plays into the public interest insofar as the “Commission’s responsibilities include the protection of future, as well as present, consumer interests,” *Permian Basin*, 390 U. S., at 798; see also *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div.*, 358 U. S. 103, 113 (1958) (“It seems plain that Congress . . . was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake”). But under the FPA, Congress has charged FERC, not the courts, with balancing the short-term and long-term interests of consumers. See *Permian Basin*, 390 U. S., at 792 (“The court’s responsibility is not to supplant the Commission’s balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors”).

Moreover, not even FERC has the authority to endorse the rule announced by the Court today. The FPA does not

prices as the basis for computing area rates, see *id.*, at 792–795.
indulge, much less require, a “practically insurmountable” presumption, see Papago Tribal Util. Auth. v. FERC, 723 F. 2d 950, 954 (CADC 1983) (opinion for the court by Scalia, J.), that all rates set by contract comport with the public interest and are therefore just and reasonable. Congress enacted the FPA precisely because it concluded that regulation was necessary to protect consumers from deficient markets. It follows, then, that “the Commission lacks the authority to place exclusive reliance on market prices.” Texaco, 417 U. S., at 400; see also id., at 399 (“In subjecting producers to regulation because of anticompetitive conditions in the industry, Congress could not have assumed that ‘just and reasonable’ rates could conclusively be determined by reference to market price”). For this reason, we have already rejected the policy rationale proffered by the Court today:

“It may be, as some economists have persuasively argued, that the assumptions of the 1930’s about the competitive structure of the natural gas industry, if true then, are no longer true today. It may also be that control of prices in this industry, in a time of shortage, if such there be, is counterproductive to the interests of the consumer in increasing the production of natural gas. It is not the Court’s role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process.” Id., at 400 (footnote omitted).

Balancing the short-term and long-term interests of consumers entails difficult judgment calls, and to the extent FERC actually engages in this balancing, its reasoned determination is entitled to deference. But FERC cannot abdicate its statutory responsibility to ensure just
and reasonable rates through the expedient of a heavy-handed presumption. This is not to say that the Commission should abrogate any contract that increases rates, but to underscore that the agency is “obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection by Congress.” Permian Basin, 390 U. S., at 791.

IV

Even if, as the Court holds today, the “Mobile-Sierra presumption” is merely a “differing application” of the statutory just-and-reasonable standard, FERC’s orders must be set aside because they were not decided on this basis.

The FERC orders repeatedly aver that the agency is applying a “public interest” standard different from and distinctly more demanding than the statutory standard. See, e.g., App. 1198a (“[T]he burden of showing that a contract is contrary to the public interest is a higher burden than showing that a contract is not just and reasonable. ... The fact that a contract may be found to be unjust and unreasonable under [§§205 and 206] does not in and of itself demonstrate that the contract is contrary to the public interest under the Supreme Court cases”). Indeed, the Commission’s misunderstanding of our cases is so egregious that the sellers, concerned that the orders would be overturned, asked the Commission for “clarification that the public interest standard of review does not authorize unjust and unreasonable rates.” Id., at 1506a, 1567a. FERC clarified as follows:

“If rates ... become unjust and unreasonable and the contract at issue is subject to the Mobile-Sierra standard of review, the Commission under court precedent may not change the contract simply because it is no longer just and reasonable. If parties’ market-based rate contracts provide for the public interest
standard of review, the Commission is bound to a higher burden to support modification of such contracts.” Id., at 1506a, 1567a.

Whereas in *Texaco* we faulted the Commission for failing to “expressly mention the just-and-reasonable standard,” 417 U. S., at 396, in these cases FERC refused outright to apply that standard.3

In addition to misrepresenting FERC’s understanding of the *Mobile-Sierra* doctrine as a presumption rather than a separate standard, the Court overstates the extent to which FERC considered the lawfulness of the rates. The Court recognizes, as it must, that the three factors identified in *Sierra* are neither exclusive nor “precisely applicable to the high-rate challenge of a purchaser.” See ante, at 20; Brief for Respondent FERC 41–42. Although FERC applied what it termed the “*Sierra* Three-Prong Test,” App. 1276a, the Court contends the agency did not err because it also evaluated the “‘totality of the circumstances,’” see ante, at 20. But FERC’s totality-of-the-circumstances review was infected by its misapprehension of the standard “dictated by the U. S. Supreme Court under the *Mobile-Sierra* doctrine.” App. 1229a.

Whereas the focus of §§205(a) and 206(a) is on the reasonableness of the rates charged, not the conduct of the contracting parties, FERC restricted its review to the contracting parties’ behavior around the time of formation. See id., at 1280a–1284a. FERC seems to have thought it was powerless to conduct just-and-reasonable review unless the contract was already subject to abrogation

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3 The Court contends that FERC’s application of the *Mobile-Sierra* doctrine “should be honored” because it represents the “settled understanding of the FPA.” Ante, at 23, n. 6. As explained above, however, FERC’s interpretation of the FPA (and of our cases construing the FPA) is “‘obviously indefensible,’” supra, at 3 (quoting ante, at 6), and is therefore not entitled to any deference.
STEVENS, J., dissenting

based on contract defenses such as fraud or duress. By including contracts within the scope of §206(a), however, Congress must have concluded that contract defenses are insufficient to protect the public interest. But see ante, at 19 (holding that the “Mobile-Sierra presumption” applies in all circumstances absent “traditional grounds for . . . abrogation” or “illegal action” by a contracting party). 4

Indeed, nothing in the FPA or this Court’s cases precludes FERC from considering circumstances exogenous to contract negotiations, including natural disasters and market manipulation by entities not parties to the challenged contract. 5  FERC’s error is obvious from the face of the orders, which repeatedly state the Commission’s belief that it could not consider evidence relevant to the reasonableness of the contract rates. 6

4 The Court quite sensibly instructs FERC that “if it is clear that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations, the Commission should not presume that the contract is just and reasonable”; and that the “mere fact that the unlawful activity occurred in a different (but related) market does not automatically establish that it had no effect upon the contract—especially given the Staff Report’s (unsurprising) finding that high prices in the one market produced high prices in the other.” Ante, at 25. I disagree, however, with the Court’s suggestion that the FPA restricts FERC’s review of contract rates to these limited criteria.

5 The FPA does not specify how market deficiencies should weigh in FERC’s review of contract rates. Depending on the circumstances and how one balances the short-term and long-term interests of consumers, evidence of “market turmoil” may, as the Court argues, support rather detract from a finding that contract rates are just and reasonable. See ante, at 18. Whether any given contract rate “ultimately benefits consumers,” ante, at 22, however, is a determination that Congress has vested in FERC, not this Court.

6 See, e.g., App. 1275a (“[A] finding that the unjust and unreasonable spot market prices caused forward bilateral prices to be unjust and unreasonable would be relevant to contract modification only where there is a ‘just and reasonable’ standard of review. As we have previously concluded, the contracts at issue in this proceeding do not provide
Although the Court and the Commission attempt to recast FERC’s orders as applying the statutory standard, see ante, at 13–14; Brief for Respondent FERC 21, under the doctrine set forth in SEC v. Chenery Corp., 318 U.S. 80 (1943), “we cannot accept appellate counsel’s post hoc rationalizations for agency action; for an agency’s order must be upheld, if at all, on the same basis articulated in the order by the agency itself,” Texaco, 417 U.S., at 397 (internal quotation marks omitted). Furthermore, even assuming FERC subjectively believed that it was applying the just-and-reasonable standard despite its repeated declarations to the contrary, each order must be deemed “so ambiguous that it falls short of that standard of clarity that administrative orders must exhibit.” Id., at 395–396.

In order to get around the Chenery doctrine, the Court not only mischaracterizes FERC’s orders, but also takes a more radical tack: It concludes that whatever the rationale set forth in FERC’s orders, Chenery does not apply because “the Commission was required, under our decision in Sierra, to apply the Mobile-Sierra presumption in its evaluation of the contracts here.” Ante, at 16. This point prompts the Court to comment that “FERC has lucked out.” Ibid. If the Commission has “lucked out,” it is not only a purely fortuitous victory, but also a Pyrrhic one.

for such a standard but rather evidence an intent that the contracts may be changed only pursuant to the ‘public interest’ standard of review. Under the ‘public interest’ standard, to justify contract modification it is not enough to show that forward prices became unjust and unreasonable due to the impact of spot market dysfunctions” (footnote omitted)); id., at 1527a (“Complainants were required to meet the public interest standard of review, not the just and reasonable standard of review which could have taken into account the causal connection between the spot market prices and forward bilateral market prices”); id., at 1534a (“The Staff Report did not make any findings regarding the justness and reasonableness of any contract rates and any such findings would not be relevant here because the just and reasonable standard is not applicable”).
Although FERC prevails in these cases despite having “offered a justification in court different from what it provided in its opinion,” ibid., it has paid a tremendous price. The Court has curtailed the agency’s authority to interpret the terms “just and reasonable” and thereby substantially narrowed FERC’s discretion to protect the public interest by the means it thinks best. Contrary to congressional intent, FERC no longer has the flexibility to adjust its review of contractual rates to account for changing conditions in the energy markets or among consumers. Cf. Permian Basin, 390 U. S., at 784 (“[A]dministrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances”).

V

The decision of the Court of Appeals for the Ninth Circuit deserves praise for its efforts to bring the freewheeling Mobile-Sierra doctrine back in line with the FPA and this Court’s cases. I cannot endorse the opinion in its entirety, however, because it verges into the same sort of improper policymaking that I have criticized in the Court’s opinion. Both decisions would hobble the Commission, albeit from different sides. Congress has not authorized courts to prescribe energy policy by imposing presumptions or prerequisites, or by making marginal cost the sole concern or no concern at all. I would therefore vacate and remand the cases in order to give the Commission an opportunity to evaluate the contract rates in light of a proper understanding of its discretion.

I respectfully dissent.
ON REMAND FROM THE UNITED STATES SUPREME COURT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1403
Consolidated with Nos. 06-1427 and 07-1193

MAINE PUBLIC UTILITIES COMMISSION,
RICHARD BLUMENTHAL, ATTORNEY GENERAL FOR CONNECTICUT, &
MARThA COAKLEY, ATTORNEY GENERAL FOR MASSACHUSETTS,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

SUPPLEMENTAL BRIEF FOR PETITIONERS

Dated: March 30, 2010

(Names, Addresses and Telephone Numbers of Counsel are provided in overleaf)
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1 All applicable statutes and regulations are contained in the brief for petitioners filed August 20, 2007.


## GLOSSARY

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>Commission</td>
<td>Federal Energy Regulatory Commission</td>
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<tr>
<td>Contested Settlement</td>
<td>The settlement agreement at issue in this proceeding, approved by FERC in <em>Devon Power, LLC, “Order on Rehearing and Clarification,”</em> 117 FERC ¶ 61,133 (October 31, 2006), JA 1149, and <em>Devon Power, LLC, “Order Accepting Proposed Settlement Agreement,”</em> 115 FERC 61,340 (June 16, 2006), JA 1129 (the “Devon Orders”).</td>
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<tr>
<td>CTAG</td>
<td>Richard Blumenthal, Attorney General for the State of Connecticut</td>
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<tr>
<td>FCA</td>
<td>Forward Capacity Auction; the descending clock auction that is to be held annually in accordance with the FCM as described in Section 11, Part III of the Contested Settlement</td>
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<td>FCM</td>
<td>Forward Capacity Market</td>
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<td>FERC</td>
<td>Federal Energy Regulatory Commission</td>
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<td>FPA</td>
<td>Federal Power Act</td>
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<td>ICR</td>
<td>Installed Capacity Requirement; a projection of the minimum amount of capacity required to serve load reliably in the New England region.</td>
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<td>LSE</td>
<td>Load Serving Entity; entities that deliver electricity to end-users and wholesale customers, typically utility companies.</td>
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<tr>
<td>MassAG</td>
<td>Martha Coakley, Attorney General for the Commonwealth of Massachusetts</td>
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<tr>
<td><strong>MPUC</strong></td>
<td>Maine Public Utilities Commission</td>
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<td><strong>Non-Settling Parties</strong></td>
<td>MPUC, MassAG, CTAG, NSTAR, NICC and others who did not sign the Contested Settlement</td>
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<td>A party to the Contested Settlement as listed in Appendix A to the June 16 Order</td>
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<tr>
<td><strong>Transition Payments</strong></td>
<td>Capacity payments to listed capacity resources during the Transition Period, the level of which was negotiated by the Settling Parties, as provided in Section 11, Part VIII.B of the Contested Settlement</td>
</tr>
<tr>
<td><strong>Transition Period</strong></td>
<td>The period of time commencing on December 1, 2006 and ending May 30, 2010 or as provided in Section 11, Part VIII.I of the Contested Settlement</td>
</tr>
</tbody>
</table>
QUESTION PRESENTED

The Supreme Court remanded this matter to this court to answer two related questions: Are New England’s forward capacity auction rates and transition payments—which are set by or developed in accordance with ISO New England’s tariff, following FERC’s approval of a contested settlement—“contract rates” subject to the Mobile-Sierra presumption? If not, does FERC have the discretion to apply a Mobile-Sierra presumption to non-contract rates? NRG Power Marketing v. Maine PUC, __ U.S. __, 130 S. Ct. 693, 701 (2010) (“NRG v. MPUC”). The answer to both questions is no.

SUMMARY OF ARGUMENT

The Federal Power Act (“FPA”) allows rates to be set either by contract or by tariff, but Mobile-Sierra presumptions apply only to the former. The Mobile-Sierra doctrine requires FERC to presume that contract rates freely negotiated by sophisticated buyers and sellers are “‘just and reasonable’ as between the two of them.” See Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 2 The Mobile-Sierra doctrine was named for two cases, United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 76 S. Ct. 373, 100 L. Ed. 373 (1956) (“Mobile”), and FPC v. Sierra Pacific Power Co., 350 U.S. 348, 76 S. Ct. 368, 100 L. Ed. 388 (1956) (“Sierra”).

3 NRG v. MPUC, 130 S. Ct. at 698 (The FPA “allows regulated utilities to set rates unilaterally by tariff; alternatively, sellers and buyers may agree on rates by contract. . . . Whether set by tariff or contract, however, all rates must be ‘just and reasonable.’”) (citing 16 U.S.C. § 824d(a), (c), (d)).
__, 128 S. Ct. 2733, 2746, 171 L. Ed. 2d 607 (2008) ("Morgan Stanley") (citations omitted). The doctrine has no application to rates imposed by tariff on non-consenting wholesale ratepayers.

In *NRG v. MPUC*, the Supreme Court clarified that this reasonableness presumption “is not limited to challenges to contract rates brought by contracting parties [but] applies, as well, to challenges brought by third parties.” The Court held that, where parties A and B agree to rates as between them giving rise to a *Mobile-Sierra* presumption, non-party C’s challenge to those rates must overcome the presumption. In other words, when *Mobile-Sierra* applies to a rate, its application does not depend on the contract challenger’s identity.

*Mobile-Sierra*’s applicability does depend, however, on the nature of the rates. In this case, parties A and B agreed to rates not only as between them but as between C, D, and the rest of the alphabet. While the settlement was a contract, it did not make the resulting rates contract rates. The contested settlement established rates of general applicability. Absent FERC’s approval of it, the settlement would have had no legal effect on non-settling parties’ rates. The settling parties conceded that FERC could not presume the contested settlement to be reasonable and properly reviewed it under the ordinary just and reasonable standard. JA 1695-96; Petition for a Writ of Certiorari, 8. In approving the settlement and accepting the later-filed market rules based on it, FERC determined
that the filed rates are *presently* just and reasonable. But that determination carried
with it no *Mobile-Sierra* presumption of future reasonableness. *Mobile-Sierra*
presumptions derive from contracting parties’ consent to the risk allocations in
freely negotiated contracts; they do not derive from a regulator’s approval of
unilaterally-imposed rates.

The Supreme Court remanded the matter to this court to determine “whether
the rates at issue qualify as ‘contract rates’ and, if not, whether FERC has the
discretion to treat them analogously. . . .” *NRG v. MPUC*, 130 S. Ct. at 701. The
answer to both questions is “no.” Before the Supreme Court, FERC conceded the
first question, acknowledging that the transition payments and the post-transition
capacity rates are tariff rates of general applicability throughout New England. It
therefore conceded that “neither of the two types of rates to which Section 4.C of
the settlement applies . . . is subject to the statutory *Mobile-Sierra* presumption,
and the Commission was not *required* to apply the public interest standard to its
review of those rates.” FERC Supreme Court Brief (“FERC Br.”) at 30
(Attachment A). We demonstrate below that FERC’s assessment was correct:
neither the transition rates nor the post-transition capacity prices are contract rates
to which *Mobile-Sierra* applies.

Contrary to the view the agency expressed before the Court, however, FERC
does *not* have the discretion to apply a *Mobile-Sierra* presumption to non-contract
To allow FERC to apply a Mobile-Sierra presumption to tariff rates would violate Morgan Stanley’s teaching that Mobile-Sierra derives from the consent of a public utility and a ratepayer, not from FERC’s acceptance of the resulting rate. It also would overturn decades of settled understanding regarding the operation of FPA Section 206 in the context of tariff rates.

ARGUMENT

I. Neither the Settlement Agreement Nor the Rates Generated Under the Agreement Fall Within the Mobile-Sierra Doctrine

The Supreme Court made abundantly clear that the Mobile-Sierra public interest presumption applies only to rates arising from freely negotiated private contracts. “The Mobile-Sierra doctrine originated in twin decisions . . . Both concerned rates set by contract rather than tariff.” NRG v. MPUC, __ U.S. __, 130 S. Ct. at 698. “By contrast, the statutory Mobile-Sierra presumption does not apply, of its own force, when the parties have not agreed to set rates wholly by private contract.” FERC Br. at 29-30. In the present case, because the rates at issue were set by tariff rather than contract and apply uniformly throughout New England, they are not subject to the Mobile-Sierra presumption.

The FERC agrees that “neither of the two types of rates to which Section 4(C) of the settlement applies—the rates resulting from the capacity auctions and the transition payments established by the settlement—is subject to the statutory Mobile-Sierra presumption, and the Commission was not required to apply the
public-interest standard to its review of those rates.” *Id.* at 30. It states that the auction results, “although possessing certain characteristics of contracts, do not constitute contracts between buyers and sellers,” FERC Br. 30, that would “require the Commission to apply the public interest standard.” FERC Br. 31. Similarly, with respect to the non-settling parties, “the transition payments do not resemble contractually negotiated rates at all.” *Id.*

FERC was correct that the *Mobile-Sierra* doctrine does not apply to either the transition rates or the auction rates because these rates were set by tariff not by contract.

**A. The Transition Payments are Not Contract Rates Subject To The *Mobile-Sierra* Doctrine**

The transition rates imposed on non-settling parties are not contract rates subject to *Mobile-Sierra*. As FERC explained to the Court, “[a]lthough the settlement represented an agreement among the signators, it was not a private contract of the sort at issue in *Mobile, Sierra*, and *Morgan Stanley*. It was, rather, the resolution of a disputed proceeding before the Commission . . . .” FERC Br. 31. In addition, “[t]he transition payments apply to all suppliers and purchasers of capacity — including the contesting parties and all future entrants into the market — not just to the settling parties. As to these other participants, the transition payments do not resemble contractually negotiated rates at all.” *Id.*
While the contested settlement was a contract among the settling parties, the generally applicable transition rates that were embodied in ISO’s tariff following FERC’s approval of the settlement are not contract rates vis a vis non-settling parties who: (1) must take service directly under the tariff; and (2) did not agree to the settlement rate. Before the Court, counsel for both FERC and the Petitioners appeared to concede as much. As FERC counsel acknowledged:

[T]here's something wrong about -- or there's something unfair about A and B getting together and deciding on the rate that C is going to pay. And to the extent that you're concerned about that situation, the answer to that is that when A and B set the rate that C has to pay, C is not paying a contract rate in the Mobile-Sierra sense, because C is not -- C is paying a rate it has not agreed to.

Transcript of Oral Argument at 21. Attachment B. When asked by Justice Scalia whether such as rate was “eligible for Mobile-Sierra treatment,” FERC counsel responded that it was not, “because C's rate in that scenario is not a rate that it has agreed to. It's being set unilaterally by people other than it, and so it's in our view more appropriately characterized as a tariff rate.” *Id.* at 21-22.

Chief Justice Roberts and counsel for NRG engaged in a similar question and answer on the same point:

CHIEF JUSTICE ROBERTS: It's a bit much to say that the importance is to preserve the stability of two parties' contract, and, therefore, a third party who didn't sign the contract is bound to the two parties' contract.
MR. LAMKEN: Well, the nonparty isn't actually paying the rate. The two parties are paying the rate. The nonparty is saying: I'm adversely affected by that rate indirectly. And we're all regularly adversely affected by contracts we didn't enter into...But the question is what's the standard for that outsider to abrogate a rate the two, a willing buyer and a willing seller, have entered into?

Tr., 6-7.

In short, counsel for both FERC and the Petitioners explained to the Court that there was a difference between third parties challenging rates as between two contracting parties (in which case, under NRG v. MPUC, Mobile-Sierra may apply) and third parties challenging rates that have been foisted upon them by a contested settlement and a public utility’s generally-applicable tariff. In the latter case, the challenged rates are not contract rates and are not subject to Mobile-Sierra. Consequently, the transition payments established under the contested settlement and implemented as against non-settling parties by means of ISO-NE’s tariff are not contract rates. Thus Mobile-Sierra does not apply.

B. The Forward Capacity Auction Results are Not Contract Rates Subject To The Mobile-Sierra Doctrine

The contested settlement approved by FERC in this matter is a negotiated agreement among the settling parties. The settlement provisions for transition period payments and for payments under the Forward Capacity Market (“FCM”)
were to be implemented through then yet-to-be-developed tariff revisions. *Order Accepting Proposed Settlement Agreement*, JA 2025, P33. The tariff rates resulting from the Forward Capacity Auction (“FCA”) are to be filed with the FERC under Section 205 of the FPA. *Settlement Agreement Resolving All Issues*, JA 1710.

A rate calculated by the operation of tariff rules and imposed on market participants whether they deem it reasonable or not is by definition not a contract rate. ISO-NE’s tariff provisions provide an auction mechanism for setting rates that will become the terms of service to all market participants in New England, regardless of whether they agreed to the settlement or opposed it and regardless of whether they believe the resulting capacity prices are reasonable.

FERC acknowledges that the auction results and the rates thereby generated are tariff rates not contract rates. The auction results “although possessing certain characteristics of contracts, do not constitute contracts between buyers and sellers,” FERC Br. 30, which would “require the Commission to apply the public interest standard.” FERC Br. 31. Because the FCM auction results are plainly tariff rates, no *Mobile-Sierra* presumption can apply.

The petitioners in the Supreme Court argued that New England’s post-transition capacity rates would be contract rates to which *Mobile-Sierra* applied, because those rates will result from auctions creating binding obligations on
willing buyers and sellers. NRG Supreme Court Reply Brief, 17-24. But that position glosses over major differences between ISO-NE’s administrative, tariff-based mechanism for determining capacity prices—an ostensibly auction-based process, but one in which both the inputs to and the outcomes of the auction are administratively controlled—and the freely negotiated, market-based rate agreements to which Mobile-Sierra applies under Morgan Stanley.

ISO-NE’s post-transition capacity price setting process has none of the hallmarks of negotiation, consent, or agreement that give rise to a Mobile-Sierra presumption in the first place. Indeed, the auction process is devoid of any negotiation or agreement among the buyers and sellers that is characteristic of a contract. First, ISO-NE, and not the buyers, administratively determines the overall installed capacity requirement (“ICR”) that must be procured in the auction as well as the quantity each LSE must purchase. The level of ICR that ISO-NE determines each LSE must purchase directly affects the clearing price of the auction and, therefore, the price that ISO-NE charges the LSE under the tariff.\(^5\) Not only does ISO-NE set the quantity of capacity that each LSE much purchase

\(^5\) The respective obligations of the suppliers to deliver capacity and the LSE to make payments are described fully in the Settlement Agreement. JA 1709-10. Each seller must offer its capacity during the commitment period. JA 1724-25. Each LSE participating in the auction is “required to pay for a share of ICR proportionate to its peak load.” JA 1672. The obligations of buyers and sellers were “negotiated” in the contested settlement by the settlement parties and not freely negotiated by the future auction participants.
but, even then, the buyers do not participate in the auction process in any meaningful sense. They do not bid, nor do they signal acceptance of bids. The buyers, therefore, are unable to affect or negotiate either the quantity or the price of the product they are required to purchase. There is no negotiation whatsoever among buyers and sellers. The buyers simply await the results of the auction, which are thereafter filed under Section 205 of the FPA. The outcome of the auction is the price that buyers must pay.

The auction prices are further constrained by floor and ceiling “price collars” to ensure that auctions results conform generally to the agreements embedded in the contested settlement. JA 1717-18. The auction results are never manifested or memorialized in contracts or any other “agreements” between the LSEs and the sellers, because there is no such contract. Instead, the results of the auction are filed at FERC and those results, absent a challenge within 45 days, become the rate charged by ISO-NE for capacity to all load-serving entities. As FERC

6 While customers may attempt to “self-supply” capacity instead of paying ISO-NE’s capacity rates, they may not choose to self-supply less than the quantity that ISO-NE requires them to have. Their freedom to self-supply also is constrained in that ISO determines administratively whether and to what extent self-supplied resources “qualify” to supply the obligation to pay ISO-NE’s rates. JA 1706. The auction offers no mechanism to negotiate bilaterally either reduced capacity requirements, less stringent qualification criteria, or changes in non-price terms.

7 If a capacity supplier were to “default” on its supply obligation, ratepayers would have no contract-based cause of action against the supplier.
conceded, “the prices to be set by the auction will not reflect the kind of negotiated agreement between buyer and seller to which Sierra and Morgan Stanley require the Commission to apply the public interest standard.” FERC Br. 30-31.

The Court should reject any attempt to transform tariff rates into contract rates or to treat them equivalently for Mobile-Sierra purposes. NRG’s suggestion, that a tariff rate can be treated like a contract rate when a load serving entity takes service under it (as opposed to going without the tariff service or finding an alternative), would subsume all tariff rates under the Mobile-Sierra doctrine. Such a construction would eviscerate the distinction between tariff rates and contract rates.

II. FERC Does Not Have “Discretion” to Apply The Mobile-Sierra Public Interest Standard Against Third Parties Outside the Contract Context

Although FERC properly acknowledged that the transition payment rates and auction results are not contracts subject to the Mobile-Sierra presumption, FERC argued for the first time before the Supreme Court that it somehow has the discretion to apply the Mobile-Sierra presumption to future challenges to those rates under its broad authority to approve contested settlement agreements that the Commission believes will produce just and reasonable rates. FERC Br. 32. FERC further argued that the regulatory structure for non-parties remains unchanged because the public interest standard is “simply one application of the more general just and reasonable standard.” Id. FERC is incorrect.
The *Mobile-Sierra* presumption restricts the realm of interests that FERC may consider when assessing the continued reasonableness of a challenged rate,\(^8\) and it requires a greater showing of harm to those interests that FERC may consider under the *Mobile-Sierra* public interest test.\(^9\) It is a limitation on FERC’s discretion to determine, upon later review, that an existing rate is no longer just and reasonable.\(^{10}\) The limitation was founded upon the notion that sophisticated parties entering freely negotiated agreements allocate the risks of future events through their contracts and that the parties should be held to those allocations unless the public interest requires otherwise. That premise simply has no application where the rates at issue are unilaterally imposed tariff rates. Nor is there any basis for limiting FERC’s future discretion to review tariff rates or allowing FERC to tie its own hands. The choices FERC makes today deserve no more discretion than the decisions it might reach in the future on the basis of different information or with the benefit of more experience.

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8 *Sierra*, 350 U.S. at 354-55 (“In such circumstances,” the Commission’s “sole concern” must be not with protecting the contracting parties’ private interests in reasonable rates—they are presumed to be able to look out for themselves—but in “whether the rate is so low [or high] as to adversely affect the public interest”).

9 *Morgan Stanley*, 128 S. Ct. at 2749 (requiring showing that the challenged rates would “severely harm[]” the public interest).

10 *See Morgan Stanley*, 128 S.Ct. at 2759 (Stevens, J., dissenting) (“The Court has curtailed the agency’s authority to interpret the terms ‘just and reasonable’ and thereby substantially narrowed FERC’s discretion to protect the public interest by the means it thinks best.”).
The Supreme Court made clear in *NRG v. MPUC* and *Morgan Stanley* that the *Mobile-Sierra*’s public-interest standard operates only in a contract context. *NRG v. MPUC*, 130 S. Ct. at 698; *Morgan Stanley*, 128 S.Ct. 2746. Because the rates at issue are not contract rates, *Mobile-Sierra* does not apply. Moreover, outside the context of a contract, the Commission has no authority to vitiate the right of non-contracting parties to challenge any tariff rate as unjust and unreasonable under Section 206 of the FPA. The rationale behind applying the public interest mode of review under the *Mobile-Sierra* doctrine is that this stringent standard of review is necessary to promote the stability of contractual arrangements. *NRG v. MPUC*, 130 S. Ct. at 701; *Mobile*, 350 U.S. at 344. There is no applicable contractual arrangement to protect in this case, and the generally applicable rates resulting from the FCM settlement or the FCA are indistinguishable from any ordinary filed rates. If, as FERC acknowledges, there is no contract, any review must be under the ordinary and statutory just and reasonable standard. *Mobile-Sierra*’s public-interest-only standard is not a universally-appropriate application of the FPA’s just and reasonable standard that FERC may choose to apply in its discretion.\(^{11}\) Rather, it is “the definition of what it means for a rate to

\(^{11}\) FERC’s mistake here is similar to the one corrected in *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937(1st Cir. 1993). In that case, FERC circumvented the *Mobile-Sierra* doctrine by conflating the just and reasonable and public interest standards by determining that it had the authority under the public interest standard to make modifications under “the traditional just and reasonable
satisfy the just-and-reasonable standard in the contract context,” *Morgan Stanley*, 128 S.Ct. 2746, a context the FERC expressly admits is not present.

FERC does not have discretion to establish rebuttable presumptions that form a barrier to Section 206 relief. There is nothing in Section 206 that provides for any shifting of burdens or presumptions other than placing the burden of proof on the complainant to show that a rate is unjust or unreasonable. The Commission has not been delegated authority to raise the barrier to a Section 206 review any higher than that established by Congress. FERC has no authority “to require the [] petitioners to cede rights expressly given to them in section 205 of the Federal Power Act.” *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002). That is the role of Congress, and the Commission may not overturn congressionally established provisions of the FPA. *See Federal Power Commission v. Texaco*, 417 U.S. 380, 400 (1974).

and non-discrimination standards.” *Id.* Here, FERC says that because “the Federal Power Act’s ‘just and reasonable’ standard leaves the Commission with considerable discretion in setting rates,” FERC “properly exercised that discretion in determining that the public-interest standard should be applied here [to the transition and auction rates].” FERC Br. at 15. FERC mistakenly conflates the just and reasonable standard and the application of that standard in the context of a contract to impermissibly expand its authority to apply the public interest presumption in a non-contract context.
CONCLUSION

For the foregoing reasons, the court should find that the FCA rates and transition payments are not “contract rates” subject to the Mobile-Sierra presumption and that FERC does not have the discretion to apply a Mobile-Sierra presumption to non-contract rates.

Respectfully submitted,

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Dated: March 30, 2010
CASE REMANDED JANUARY 13, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAINE PUBLIC UTILITIES COMMISSION,
RICHARD BLUMENTHAL, ATTORNEY GENERAL
FOR CONNECTICUT &
MARTHA COAKLEY, ATTORNEY GENERAL
FOR MASSACHUSETTS,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Case No. 06-1403
Consolidated with Nos. 06-1427 and 07-1193

ON PETITION FOR REVIEW OF ORDERS
OF THE FEDERAL ENERGY REGULATORY COMMISSION

SUPPLEMENTAL BRIEF OF INTERVENOR IN SUPPORT
OF PETITIONERS INDUSTRIAL ENERGY CONSUMER GROUP

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March 29, 2010
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I. STATEMENT OF THE ISSUE

Does the Mobile-Sierra provision in the Settlement Agreement, which bars third parties such as Intervenor Industrial Energy Consumer Group (“IECG”) from challenging rates paid by the Settling Parties, also apply to challenges by third parties to their own rates, to which they never agreed by contract?

II. SUMMARY OF THE ARGUMENT

The Settlement Agreement may be an enforceable contract as between the Settling Parties, binding them to accept Mobile-Sierra review of challenges to their own rates. Third parties must proceed under Mobile-Sierra to challenge rates paid by the Settling Parties. But the Settlement Agreement does not prevent third parties from asserting their own right to just and reasonable rates. Mobile-Sierra cannot be imposed on challenges by third parties to their own rates under a contract they never signed. Rates and market rules generated under the Settlement Agreement are not contracts, and the Commission does not have the discretion to act as if they were, as this would exceed its power and deprive non-signatories of their statutory right to just and reasonable rates.

III. ARGUMENT

A. SUPPLEMENTAL PROCEDURAL BACKGROUND

In Section 4.C of the Settlement Agreement, the Federal Energy Regulatory Commission (the “Commission”) sought to bar anyone from challenging rates and
market rules generated pursuant to the Settlement Agreement—which establishes a capacity pricing mechanism for all of New England for at least three-and-a-half years—under the statutory just-and-reasonable standard established in Section 206 of the Federal Power Act (“FPA”). Instead, Section 4.C purports to require that challenges to these rates and market rules proceed under the far more deferential Mobile-Sierra “public interest” standard of review. Section 4.C provides:

From the Effective Date, absent the agreement of all Settling Parties to the proposed change, the standard of review for: (i) challenges to the Capacity Clearing Prices derived through the FCA and prices resulting from reconfiguration auctions provided for in the Settlement Agreement and in the Market Rules addressing the terms of the Settlement Agreement that are approved or accepted by the FERC pursuant to Section 3, and (ii) proposed changes to Section 11, Part VIII below (Agreements Regarding Transition Period) and the Market Rules implementing that part, shall be the “public interest” standard of 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), whether the change is proposed by a Settling Party, a non-Settling Party, or the FERC acting sua sponte . . . .

[J.A. 1695-96.]

IECG, in a joint brief filed with other Intervenors in the case, objected to Section 4.C on two grounds. First, IECG argued that Mobile-Sierra applies to contracts, and that neither the Settlement Agreement nor rates or market rules generated thereunder are valid or enforceable contracts to the extent that they purport to bind non-signatories. Second, IECG argued that, at a minimum, Mobile-
Sierra does not apply to challenges by a third party that did not sign the Settlement Agreement to rates directly applicable to that third party.

This Court’s holding, as construed by the Supreme Court, went beyond the second argument IECG had made. In broad language suggesting that the Mobile-Sierra provision in the Settlement Agreement could be ineffective even as to challenges by third parties to rates paid by the Settling Parties themselves, this Court declared: “when a rate challenge is brought by a non-contracting third party, the Mobile-Sierra doctrine simply does not apply . . . .” Maine PUC v. FERC, 520 F.3d 464, 478 (D.C. Cir. 2008). Because IECG was not a party to the Settlement Agreement, the Court reasoned, it could not be bound by Section 4.C’s imposition of the Mobile-Sierra standard of review.

The Supreme Court narrowed this Court’s sweeping rejection of the Mobile-Sierra provision, holding that the Mobile-Sierra “public interest” standard may be applied to “challenges to contract rates brought by noncontracting as well as contracting parties.” NRG Power Marketing, LLC v. Maine PUC, 130 S. Ct. 693, 697 (2010). The Supreme Court then observed, however, that “[t]he objectors to the settlement appearing before us maintain that the rates at issue in this case—the auction rates and the transition payments—are prescriptions of general applicability rather than ‘contractually negotiated rates,’ hence Mobile-Sierra is inapplicable.” Id. at 701. The Supreme Court explained that “[w]hether the rates
at issue qualify as ‘contract rates,’ and, if not, whether FERC had discretion to treat them analogously are questions raised before, but not ruled upon by, the Court of Appeals. They remain open for that court’s consideration on remand.” *Id.*

This Court instructed the parties to file supplemental briefs “in light of the Supreme Court’s opinion in *NRG Power Marketing v. Maine Public Utilities*, No. 08, 674 (Jan. 13, 2010).” IECG argues that although the rates at issue may “qualify as ‘contract rates’” *as between the Settling Parties*, they are not contract rates *as to IECG*, and *Mobile-Sierra* therefore does not govern challenges by IECG to its own rates under a Settlement Agreement to which it never agreed.

**B. MOBILE-SIERRA CANNOT BE APPLIED TO CHALLENGES TO RATES PAID BY THIRD PARTIES UNDER THE SETTLEMENT AGREEMENT, OR TO CHALLENGES TO MARKET RULES BY THIRD PARTIES, BECAUSE THE SETTLEMENT AGREEMENT IS NOT AN ENFORCEABLE CONTRACT TO THE EXTENT THAT IT IS CONSTRUED TO BIND THIRD PARTIES, AND RATES AND MARKET RULES THEMSELVES ARE NOT CONTRACTS AT ALL**

The Commission itself concedes that the rates and auction mechanism that resulted from the Settlement Agreement are terms and conditions of general public application, not private contracts setting charges only between the Settling Parties. *See* Brief for the Federal Energy Regulatory Commission, filed with the Supreme Court in *NRG Power* (“FERC Supreme Court Brief”) at 29-31. The issue before the Court is whether the *Mobile-Sierra* doctrine expands the legal competence of the Settling Parties such that they may contract with each other to set, not just rates
or charges as between themselves, but rates and charges to be paid by everyone else, including non-contracting and non-consenting members of the public. Basic principles of contract law make clear that the *Mobile-Sierra* doctrine does not empower contracting parties to set the rates and charges applicable to the general public by agreement among themselves. No principle of contract law supports the private exercise of such untrammeled economic power to dispose of non-contracting and non-consenting third parties’ property or rights.

The premise of *Mobile-Sierra* is that, absent harm to the public interest, parties to a contract should be held to its terms. “The purpose of the *Mobile-Sierra* doctrine is to ‘preserve the benefits of the parties’ bargain as reflected in the contract, assuming that there was no reason to question what transpired at the contract formation stage.’” *Maine PUC v. FERC*, 520 F.3d at 477 (quoting *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002)). “[T]he situation *Mobile-Sierra* was designed to guard against” is “where one party to a rate contract . . . attempts to effect a unilateral rate change by asking FERC to relieve its obligations under a contract whose terms are no longer favorable to that party.” *Maine PUC v. FERC*, 454 F.3d 278, 284 (D.C. Cir. 2006).

The origins of *Mobile-Sierra* make clear that the conceptual starting point for its application has to be a challenge to a contract rate by a party that may be presumed to have deemed the rate to be just and reasonable when it agreed to it:
[Federal Power Commission v.] Sierra [Pacific Power Co., 350 U.S. 348 (1956) – the “Sierra” of Mobile-Sierra] . . . simply held that considerations as to what is “unjust” or “unreasonable” differ in the context of an established bilateral contract, not that the statutory standards no longer govern. The Supreme Court confirmed this understanding in Verizon [Communications Inc. v. F.C.C., 535 U.S. 467 (2002)], explaining that “[i]n wholesale markets, the party charging the rate and the party charged were often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a ‘just and reasonable’ rate as between the two of them.”

Public Utility Dist. No. 1 v. F.E.R.C., 471 F.3d 1053, 1075 (9th Cir. 2006). In NRG Power, the Supreme Court held that contracting parties may require even non-contracting parties to challenge rates set pursuant to their contract under Mobile-Sierra. But the logic of NRG Power, and the Mobile-Sierra line of cases generally, makes clear that imposition of Mobile-Sierra on non-contracting parties is limited to challenges to rates paid by the contracting parties, and does not extend to challenges to rates paid by the non-contracting parties themselves.

NRG Power holds that the Mobile-Sierra “public interest” standard may be applied to “challenges to contract rates brought by noncontracting as well as contracting parties.” 130 S.Ct. at 697. But the “contract” in question has to be a valid and enforceable contract. There are limits to what the parties to a contract may accomplish by their agreement. For example, X and Y may agree that X will sell her car to Y. What X and Y cannot do, however, is agree by contract that Z will sell his car to Y. If X and Y executed such a contract, it would be invalid and
unenforceable against Z. “[I]t goes without saying that a contract cannot bind a nonparty.” 1 EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002); see also Adams v. Unione Mediterranea Di Sicurta, 364 F.3d 646, 652 (5th Cir. 2004) (“[I]t is axiomatic that courts cannot bind a non-party to a contract, because that party never agreed to the terms set forth therein.”) (internal quotation marks omitted).

The point may seem obvious, but what the Settling Parties have purported to do in the Settlement Agreement is very much akin to agreeing among themselves to sell someone else’s car. The Settling Parties have executed an agreement that may constitute a valid and enforceable contract as between the Settling Parties, and thus may bind them to accept Mobile-Sierra review of challenges to their own rates. Under NRG Power, the Settling Parties may even agree that third parties may only challenge rates paid by the Settling Parties under Mobile-Sierra; such an agreement is valid and enforceable because it does not deprive third parties of their own statutory right to just and reasonable rates, but simply prevents them from seeking to assert the right of the Settling Parties to just and reasonable rates, which third parties have no statutory right to do in the first place.

1 The Supreme Court declared in NRG Power that the fact that “[c]ontracts bind parties, not nonparties” is “no doubt true, but hardly dispositive . . . .” 128 S. Ct. at 700 n.4. But the Court’s next sentence makes clear that the fact that contracts do not bind nonparties is “hardly dispositive” of whether nonparties are bound by Mobile-Sierra if they wish to challenge rates paid by the contracting parties, who “generally can be expected to negotiate just-and-reasonable rates . . . .” Id. (emphasis added). There is no reason to presume, however, that rates negotiated by contracting parties, to be paid by third parties, will be just and reasonable.
The Settlement Agreement is not, however, a valid and enforceable contract as to a third party such as IECG, to the extent that it bars IECG from asserting its own right to just and reasonable rates. Just as an agreement between X and Y to sell Z’s car is not an enforceable contract as to Z, the agreement of the Settling Parties to terminate IECG’s right to just and reasonable rates is not an enforceable contract as to IECG. The Settling Parties may agree to waive their own statutory rights, and to prevent IECG from asserting their right to just and reasonable rates, but they do not have the power to waive IECG’s right to just and reasonable rates.

**NRG Power** is not to the contrary. In *NRG Power*, the Supreme Court held that contracting parties may impose *Mobile-Sierra* review on challenges to contract rates paid by the contracting parties, including challenges by non-contracting parties to rates paid by the contracting parties. It would take the Supreme Court’s reasoning a step too far, however, to conclude that contracting parties may impose *Mobile-Sierra* review on challenges by non-contracting parties to their own rates.

The rationale of *NRG Power* is straightforward: *Mobile-Sierra* review of rates set by contract is consistent with the just and reasonable standard because FERC must presume that the rate set out in a freely negotiated wholesale-energy contract meets the just and reasonable requirement imposed by law. . . . And if FERC itself must presume just and reasonable a contract rate resulting from fair, arms-length negotiations, how can it be maintained that noncontracting parties nevertheless may escape that presumption?
130 S. Ct. at 700 (internal quotation marks omitted). This reasoning is sound with respect to a challenge being advanced by a contracting party to its own rates, as it may be presumed that a contracting party would not have agreed to the contract unless it expected it to produce just and reasonable rates. But if the contracting parties agree to set the rates third parties must pay, there is simply no basis for presuming that “fair, arms-length negotiations” between the contracting parties will have produced rates that are just and reasonable as to third parties, who were not at the bargaining table and who never agreed to the rate-setting contract in the first place. *NRG Power* permits the Settling Parties to require *Mobile-Sierra* review for challenges by third parties to rates paid by the Settling Parties, but it does not permit the Settling Parties unilaterally to impose rates on third parties, and then to preclude them from challenging those rates except under *Mobile-Sierra*.

To illustrate the point, under *NRG Power*, X may agree by contract to pay a rate to Y, and provide that if Z wishes to challenge that rate, it must do so under *Mobile-Sierra*. As a non-party to the contract between X and Y, Z’s interests are protected by this rule, as Z would have no reason to challenge the rate X pays to Y unless it is contrary to the public interest (the *Mobile-Sierra* standard), and thus is detrimental to Z as a member of the public. If Z’s complaint is merely that the rate X is paying to Y is unjust or unreasonable, but the rate is not contrary to the public interest, that is X’s problem, not Z’s, and Z has no statutory right to challenge it.
If, however, X and Y agree by contract to a rate to be paid by Z, the analysis changes, because now relegating Z to the Mobile-Sierra standard would deprive Z of its statutory right to challenge rates that are unjust or unreasonable. While Z’s interest in rates paid by X to Y is limited to the situation envisioned by Mobile-Sierra—rates that are contrary to the public interest—Z’s interest in rates paid by Z is that such rates be just and reasonable as to Z, even if they do not affect the general public interest and thus cannot be overturned under Mobile-Sierra.

In sum, the Settlement Agreement is not a valid and enforceable contract to the extent that it purports to impose rates and market rules directly upon IECG and to deny IECG the right to challenge those rates and market rules under the statutory just and reasonable standard. Because such provisions cannot be valid and enforceable as a matter of contract law, the Mobile-Sierra provision in Section 4.C cannot foreclose IECG from challenging the rates applied directly to IECG and its members under the just and reasonable rate standard.

As for the actual rates and market rules generated under the Settlement Agreement, these are not contracts, period, as to anyone, and Mobile-Sierra, a standard grounded in contract principles, therefore has no application (beyond the agreement of the Settling Parties that challenges to their rates must proceed under Mobile-Sierra). Rates generated under the market mechanisms established by the Settlement Agreement are rates; they are not contracts. Nor are market rules
promulgated pursuant to the Settlement Agreement contracts. The Commission itself has acknowledged as much. See FERC Supreme Court Brief at 29-31.

Because general rates and market rules are not contracts, the Commission should not be permitted to impose Mobile-Sierra review on challenges to them filed by IECG. The parties to the Settlement Agreement may agree that challenges to their own rates are to be governed by Mobile-Sierra, but they cannot impose Mobile-Sierra review on challenges by third parties to rates and market rules that are not contracts. The Commission erred in permitting the Settling Parties to deprive IECG of its right under Section 206 to object to rates that are unjust and unreasonable by characterizing them as “contracts” to be shielded by a deferential standard of review designed to prevent parties to a contract from escaping the consequences of their bargain—not to prevent ratepayers who have made no bargain from challenging unjust or unreasonable rates.

In upholding Section 4.C, the Commission asserted: “there is no . . . precedent that supports a finding that a non-signatory may unilaterally seek changes to a Mobile-Sierra ‘public interest’ contract under the ‘just and reasonable’ standard of review.” October 31 Order P 92 [J.A. 2373]. But any objection by IECG to a rate or market rule is not an objection to “a Mobile-Sierra ‘public interest’ contract”—it is an objection to a rate or market rule of general application. The only possible “contract” here is the agreement of the Settling
Parties not to challenge rates or market rules under the just-and-reasonable standard, which is not an enforceable contract as to IECG, a non-signatory. The Commission thus erred in characterizing IECG’s participation in this proceeding to defend its right to challenge rates and market rules of general application as a challenge to “a Mobile-Sierra ‘public interest’ contract,” and in imposing the Mobile-Sierra standard on challenges filed by IECG under Section 206.

C. THE COMMISSION DOES NOT HAVE DISCRETION TO APPLY MOBILE-SIERRA TO RATES OR MARKET RULES THAT ARE NOT CONTRACTS, AS THIS WOULD DEPRIVE THIRD PARTIES OF THEIR STATUTORY RIGHT TO JUST AND REASONABLE RATES

If the rates and market rules generated under the Settlement Agreement are not contracts, the Commission does not have the discretion to act as if they were, because to do so would deprive IECG of its statutory right to just and reasonable rates under Section 206 of the FPA.

Although the Commission has acknowledged that the transition payment rates and auction results are not contracts subject to Mobile-Sierra, it claims to have the discretion to apply Mobile-Sierra to challenges to them under its authority to approve contested settlement agreements. See FERC Supreme Court Brief at 31-32. According to the Commission, it has the statutory authority to import Mobile-Sierra into a non-contractual context, because the public interest standard is “simply one application of the more general just and reasonable standard.” Id.
at 32. The argument that the Commission has the discretion to import Mobile-Sierra into a non-contractual context is incorrect, and the Court should reject it.

It is undisputed that the Commission has general authority to approve settlement agreements. This authority is necessarily circumscribed, however, by the statutory requirement that the Commission “shall fix” rates that are “unjust, unreasonable, unduly discriminatory, or preferential”:

Whenever the Commission . . . shall find that any rate, charge, or classification . . . or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract . . . and shall fix the same by order.

16 U.S.C. § 824e(a) (Section 206). “As a federal agency, FERC is a creature of statute, having no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.” Atlantic City, 295 F.3d at 8 (emphasis in original) (internal quotation marks omitted). “Thus, if there is no statute conferring authority, FERC has none.” Id. “In the absence of statutory authorization for its act, an agency’s ‘action is plainly contrary to law and cannot stand.’” Id. (quoting Michigan v. EPA, 268 F.3d 1075, 1081 (D.C. Cir. 2001); see also Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”).
For the Commission to apply the deferential *Mobile-Sierra* public interest standard outside of the contract context—where the public interest standard captures what the just-and-reasonable standard requires *in that specific situation*—would be contrary to the congressional directive that all rates must be just and reasonable, and beyond the power vested in the Commission by Congress. *See Atlantic City*, 295 F.3d at 9-11 (Commission cannot require parties to give up statutory right to just and reasonable rates). Parties may agree by contract to be bound by rates that, absent their agreement, might be found to be unjust or unreasonable; this is the point of *Mobile-Sierra*, which shields contract rates from challenge unless they are contrary to the general public interest. The Commission may not, however, impose rates that are unjust or unreasonable on parties who never agreed to the rates in the first place. *See Sierra*, 350 U.S. at 354-355.

To be clear, the Supreme Court has held that *Mobile-Sierra* “defines what it means for a rate to satisfy the just-and-reasonable standard *in the contract context,*” where the contracting parties may be presumed to have deemed the agreed-upon rates just and reasonable. *NRG Power*, 130 S. Ct. at 700 (emphasis added)(internal quotation marks omitted). But with respect to challenges to rates and market rules that are *not* contracts, no such presumption is warranted, and *Mobile-Sierra* has no application. To import *Mobile-Sierra* into a non-contractual context is to deprive IECG of its statutory right to just and reasonable rates under Section 206. If there
is no contract, the Commission’s review must be under the statutory just-and-reasonable standard, not the contract-based *Mobile-Sierra* standard.

In sum, for the Commission to apply *Mobile-Sierra* in a non-contractual context would be at odds with the plain language of Section 206 that permits a party to seek modification of its own rates if they are unjust or unreasonable, unless the party has agreed to the rates by contract. The Commission does not have discretion to disregard the rights Congress created. *See Atlantic City*, 295 F.3d at 8. *Mobile-Sierra* establishes what it means for a rate to be just and reasonable “in the contact context” alone. *See NRG Power*, 130 S. Ct. at 700.

**IV. CONCLUSION**

The Court should rule that the *Mobile-Sierra* provision in the Settlement Agreement does not apply to challenges by third parties such as IECG to their own rates or to market rules imposed on IECG under the Settlement Agreement.

Respectfully submitted,

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*Attorneys for Industrial Energy Consumer Group*
ON REMAND FROM THE UNITED STATES SUPREME COURT

In the United States Court of Appeals for the District of Columbia Circuit

____________________
Nos. 06-1403, 06-1427 and 07-1193

____________________
MAINE PUBLIC UTILITIES COMMISSION, et al., PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT.

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ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

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SUPPLEMENTAL BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

____________________
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FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

MARCH 30, 2010
WASHINGTON, D.C. 20426
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STATEMENT OF THE ISSUES

Pursuant to this Court’s Order of March 1, 2010, this Supplemental Brief addresses issues raised on remand by the U.S. Supreme Court in *NRG Power Mktg. v. Maine Pub. Utils. Comm’n*, 130 S. Ct. 693 (2010). Specifically, the Supreme Court remanded for this Court’s consideration the following two issues:

1. Whether the auction results and transition payments arising from a contested settlement approved by the Federal Energy Regulatory Commission (FERC or Commission) constitute contract rates that must be reviewed by the Commission under the *Mobile-Sierra*¹ public interest standard.

2. If the auction results and transition payments are not contract rates, whether FERC acted within its discretion in approving a settlement provision imposing the *Mobile-Sierra* public interest standard of review on certain future challenges to the auction results and transition payments.

As explained below -- and as explained in the Commission’s brief to the Supreme Court in *NRG* -- the settlement rates at issue are not contract rates that, under *Mobile-Sierra*, require a presumption that the rates are just and reasonable. Rather, they more closely resemble tariff rates than contract rates; as such, the Commission has full discretion to consider whether they meet the just and reasonable standard (the only statutory standard) under the Federal Power Act.

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(FPA). Here, FERC reasonably found that a particularly stringent application of the just and reasonable standard (whether the rates remain consistent with the public interest), while not otherwise binding on the Commission and would-be rate challengers, was nevertheless appropriate under the circumstances.

**STATEMENT OF FACTS**

In the orders challenged in this appeal, *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) (Settlement Order), *on reh 'g*, 117 FERC ¶ 61,133 (2006) (Rehearing Order), FERC accepted a contested settlement agreement redesigning the New England market for installed electric generation capacity (Settlement). The Settlement established a Forward Capacity Market, which would use annual auctions to set the price of capacity. Settlement Order PP 15-29, JA 2022-24. In these auctions, capacity is procured three years in advance of its use, with the first auction procuring capacity for the one-year period beginning June 1, 2010. *Id.* P 30, JA 2024. To address the period between December 1, 2006 -- the Settlement effective date -- and June 1, 2010, the Settlement included a transition mechanism which provided fixed payments to capacity suppliers. *Id.* PP 30-31, JA 2024.

Of the 115 parties to the Settlement proceedings, eight opposed the Settlement. *Id.* P 15, JA 2022. In the challenged orders, the Commission approved the Settlement because, “as a package, it present[ed] a just and reasonable outcome for this proceeding consistent with the public interest.” *Id.* P 2, JA 2019. The
Settlement provided a necessary solution to serious deficiencies in the New England market that were impairing critical infrastructure development and threatening reliability. *Id.* PP 62-65, JA 2030-31. Of particular interest here, section 4.C of the Settlement imposed the *Mobile-Sierra* public interest standard of review on certain future challenges to the auction results and transition payments. The Commission found that this provision was fully consistent with Commission policy and that it appropriately balanced the need for rate stability with the requirement that rates be just and reasonable. Settlement Order PP 182-186, JA 2051-52; Rehearing Order PP 88-95, JA 2372-74.


The Supreme Court reversed that determination, finding that “the public interest standard is not, as the D.C. Circuit presented it, a standard independent of, and sometimes at odds with, the ‘just and reasonable’ standard, *see* 520 F.3d at 478; rather, the public interest standard ‘defines what it means for a rate to satisfy
the just and reasonable standard in the contract context.”” NRG, 130 S. Ct. at 700 (quoting Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Washington, 128 S. Ct. 2733, 2746 (2008)). Thus, Mobile-Sierra “is not limited to challenges to contract rates brought by contracting parties. It applies, as well, to challenges initiated by third parties.” Id. at 701.

The Supreme Court remanded for further consideration, however, the question of whether the auction results and transition payments subject to the Mobile-Sierra clause in the Settlement are contract rates to which the Commission is required to apply the Mobile-Sierra standard. Id. at 701. If not, this Court is to consider whether FERC has discretion, under the circumstances, to approve the Settlement provision imposing the Mobile-Sierra standard on future challenges to those results and payments. Id.

SUMMARY OF ARGUMENT

This is not a case in which the FPA itself, as construed over 50 years ago by the Supreme Court in Mobile and Sierra, and recently in Morgan Stanley and NRG, requires application of the public-interest standard. The auction results and transition payments at issue here were set not by contract, but pursuant to a tariff that was contained in a contested settlement approved by the Commission. The Commission therefore was not required to prescribe the public-interest standard for future challenges to those results and payments.
However, the Commission properly acted within its broad discretion in choosing to approve the *Mobile-Sierra* clause. The Commission’s determination represents a permissible application of the FPA’s “just and reasonable” standard in the circumstances of this case, because the transition payments and auction mechanisms were found just and reasonable in the challenged orders, and because the interests in promoting market stability and assuring an adequate supply of energy which underlie the *Mobile-Sierra* requirement are also present here. The Settlement -- of which the *Mobile-Sierra* clause was simply one non-severable piece -- advanced the public interest, and was acceptable under the Commission’s just and reasonable review, because it offered a package of initiatives that worked together to the overall benefit of all New England market participants, including petitioners and any future challengers to the settlement rates.

**ARGUMENT**

I. **FERC WAS NOT REQUIRED TO APPLY THE *MOBILE-SIERRA* STANDARD OF REVIEW TO FUTURE CHALLENGES TO THE AUCTION RESULTS AND TRANSITION PAYMENTS.**

Under *Mobile* and *Sierra*, the Commission is required to apply the public-interest standard in reviewing rates set by contracts that are freely negotiated between the contracting parties. *See Morgan Stanley*, 128 S. Ct. at 2737 (*Mobile-Sierra* presumption applies to “a freely negotiated wholesale-energy contract”); *id.*
at 2746 (Mobile-Sierra applies to a “mutually agreed-upon contract rate”). The more stringent public interest standard is based on “the commonsense notion that ‘[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a “just and reasonable” rate as between the two of them.’”  Id. at 2746 (quoting Verizon Commc’ns, Inc. v. FCC, 535 U.S. 467, 479 (2002)).

By contrast, the Mobile-Sierra presumption does not apply, of its own force, when the parties have not agreed to set rates by contract.  See Morgan Stanley, 128 S. Ct. at 2750. For that reason, neither of the two types of rates to which section 4.C of the Settlement applies -- the auction results or transition payments -- is subject to the Mobile-Sierra presumption, and the Commission was not required to apply the public-interest standard to its review of those rates.

The results of the capacity auctions, although possessing certain contractual characteristics, do not constitute contracts between buyers and sellers. The “demand” side of each auction is set not by the load-serving entities that ultimately pay for the capacity, but by the Independent System Operator (ISO) New England, which determines the estimated amount of capacity -- known as the installed capacity requirement (ICR) -- that the system as a whole will require for reliability three years in the future.  See Connecticut Dep’t of Pub. Util. Control v. FERC,
569 F.3d 477, 480 (D.C. Cir. 2009) (describing the auction mechanism), cert. denied, 130 S. Ct. 1051 (2009). The ISO then announces the auction starting price, which is initially twice the estimated cost of new entry, and capacity providers state how much capacity they would offer at that price. \textit{Id.} If more capacity is offered than required to meet the ICR, the ISO employs a “descending clock” process, lowering the offering price until the quantity of capacity offered equals the ICR. \textit{Id.} The ISO then assesses each utility a capacity charge equal to the utility’s share of the ICR multiplied by the market clearing price. \textit{Id.}

Thus, while a conventional auction may result in a contract between the buyer and seller, \textit{see, e.g.}, \textit{In re GWI PCS 1 Inc.}, 230 F.3d 788, 807 (5th Cir. 2000) (the close of the auction creates a binding contract between the seller and the highest bidder), the forward capacity auctions bear little resemblance to a conventional auction. The utilities “buying” capacity in the forward capacity market have no role in the auction at all, and cannot be said to be “contracting” with the capacity sellers. Rather than agreeing to pay a specific seller an amount set by a voluntary bid for a particular property -- as in a conventional auction -- the “buyers” in the capacity auction are assessed a standard rate, based upon the intersection of the ICR set by the ISO and the offers made by the capacity sellers. While the bids of the capacity sellers commit them to supply the amount they offer
at the clearing price, there are no voluntary agreements of any sort between them and the buyers of the capacity provided. To the contrary, the standard capacity charge paid by each utility in the system for its share of the ICR more closely resembles a conventional cost-based tariff rate.

Similarly, the transition payments apply to all suppliers and purchasers of capacity -- including contesting parties and future entrants into the market -- not just to the settling parties. As to these non-settling participants, the transition payments do not resemble contractually negotiated rates at all. A contractual obligation can only arise from a promise, see Restatement (Second) of Contracts § 1 (1981), and therefore a non-settling party’s obligation to make a transition payment -- an obligation to which it has never agreed -- cannot be said to be based on a contract. Instead, non-settling parties have an obligation to make transition payments because the Commission has approved the Settlement prescribing those payments, which therefore are properly viewed as tariff rates. See NRG, 130 S. Ct. at 698 (FPA differentiates between rates set “unilaterally by tariff” and rates set “by contract” between a seller and a buyer).

Even if the auction results and transition payments were considered to be contract rates, it still would not follow that the Commission was required to approve section 4.C of the Settlement, imposing the public interest standard of review on future challenges to those results and payments. As it was contested, the
Settlement could not become effective until the Commission determined that it was just and reasonable. *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 312-314 (1974); 18 C.F.R. 385.602(h). Had the Commission believed that the overall Settlement was not just and reasonable, it could have refused to approve it. Alternatively, the Commission could have approved the Settlement on the condition that it be modified in some way, such as by requiring that all future challenges to rates be subject to the ordinary just-and-reasonable standard of review.

Indeed, following the *Maine PUC* remand, the Commission issued an order approving the Settlement on the condition that the settling parties revise the standard of review applicable to non-settling third parties consistent with *Maine PUC*. *Devon Power LLC*, 126 FERC ¶ 61,027 (2009). The settling parties complied, but reserved the right to advocate as they deem appropriate with regard to the standard applicable to non-settling parties in the event that *Maine PUC* was reversed or vacated by the Supreme Court. *See Devon Power LLC*, Docket No. ER03-563-065, Report of Compliance, filed February 17, 2009 at 3-4.

**II. FERC HAD DISCRETION TO APPROVE APPLICATION OF MOBILE-SIERRA TO FUTURE CHALLENGES TO THE AUCTION RESULTS AND TRANSITION PAYMENTS.**

In the challenged orders, FERC did not expressly address whether the auction results and transition payments were contract rates. A second remand to
the agency, however, is not appropriate, and this Court can (and should) act on the
issues remanded by the Supreme Court, because FERC recognized that it was not
compelled by the Mobile-Sierra doctrine (or the presence of Mobile-Sierra
contracts) to apply the public-interest standard to those results and payments.

Instead, FERC found that it had “broad authority and discretion . . . to
address contested settlements,” Settlement Order P 58, JA 2029; Rehearing Order
P 31, JA 2363, and approved the Settlement after finding that it was “consistent
with the public interest,” Settlement Order P 62, JA 2030, and “achieve[d] an
overall just and reasonable result,” id. PP 69-71, JA 2032. With respect to section
4.C, the Commission stated that application of the public-interest standard of
review to future challenges to rates would be “fully consistent with current
Commission policy.” Id. P 183, JA 2051; see id. P 184, JA 2051 (“[W]e find this
Mobile-Sierra provision reasonable.”) See also Morgan Stanley, 128 S. Ct. at
2745 (where FERC has provided a rationale, there is no need for a remand that
“could be an idle and useless formality” and that would “convert judicial review of
agency action into a ping-pong game”) (quoting NLRB v. Wyman-Gordon Co., 394
U.S. 759, 766-67 n.6 (1969)).

In approving section 4.C, the Commission specified the standard of review
applicable to future complaints about the auction results and transition payments.
Settlement Order P 172, JA 2049. Because such complaints would invoke the
Commission’s authority under FPA § 206, 16 U.S.C. § 824e(a), to set aside rates that are “unjust, unreasonable, unduly discriminatory or preferential,” as well as its authority under FPA § 205, § 16 U.S.C. 824d(a), to ensure that “[a]ll rates and charges . . . shall be just and reasonable,” FERC’s approval of section 4.C represents an interpretation and application of § 205 and § 206.

Neither § 205 nor § 206 speaks directly “to the precise question at issue” in this case -- the standard of review that FERC must apply to future complaints about the auction results or transition payments -- and thus FERC’s interpretation of the just and reasonable standard must be upheld as long as it is reasonable. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842 (1984). Indeed, because “[t]he statutory requirement that rates be ‘just and reasonable’ is obviously incapable of precise judicial definition,” courts “afford great deference to the Commission in its rate decisions.” *Morgan Stanley*, 128 S. Ct. at 2738.

Such deference to the Commission’s reasoned judgment in approving this limited application of the *Mobile-Sierra* standard is appropriate here. The FPA requires only that rates be just and reasonable; it does not specify the manner in which that general formulation will be implemented in any particular context. Under the “just and reasonable” standard, the Commission is not “bound to any one ratemaking formula.” *Morgan Stanley*, 128 S. Ct. at 2738; accord *Permian*

Given the flexibility inherent in the just and reasonable standard, the Commission may require varying types and degrees of justification for challenges to particular rates or practices, depending on the circumstances. When rates are set by contract, Sierra requires application of the public-interest standard. Nothing in the FPA or in this Court’s cases precludes the Commission from applying a similar standard of review to other rates as a matter of discretion, if considerations relevant to what is “just and reasonable” make that approach appropriate.

III. APPLICATION OF THE MOBILE-SIERRA STANDARD TO FUTURE CHALLENGES TO THE AUCTION RESULTS AND TRANSITION PAYMENTS WAS REASONABLE.

FERC reasonably approved section 4.C’s application of the public-interest standard to any challenges to the auction results brought after an initial 45 day period when the results are subject to ordinary just and reasonable review. ²

Although these auctions will not result in contracts between buyers and sellers, see

² Under the settlement, the ISO is required to make a § 205 filing with the auction results, to which parties can object under the ordinary just and reasonable standard for 45 days. Settlement Order PP 179, 185, JA 2050-51.
section I *supra*, they share with freely negotiated contracts certain market-based features that tend to assure just and reasonable rates. The Commission reviewed the design of the proposed auctions and found that they would produce just and reasonable prices. Settlement Order PP 109-171, JA 2038-48; *see id.* P 71, JA 2032. This Court has recognized that rates set by a market are consistent with FPA requirements. *See, e.g.*, *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (“[W]hen there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a ‘just and reasonable’ result.”). *See also Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); *Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 176, 179, 180 (D.C. Cir. 1994). Accordingly, FERC reasonably could presume that capacity auctions would result in just and reasonable rates. *See Morgan Stanley*, 128 S. Ct. at 2746.

In addition, the Commission determined that application of the public-interest standard to auction results would promote rate stability. “Stability is particularly important in this case, which was initiated in part because of the unstable nature of [capacity] revenues and the effect that has on generating units, particularly those who are critical to maintaining reliability.” Settlement Order P 186, JA 2051; *see Rehearing Order P 95, JA 2373* (“[P]rice certainty is important
to ensure that the [forward capacity market] achieves its goals of attracting and retaining generators needed for reliability.”). See also Morgan Stanley, 128 S. Ct. at 2749 (the Mobile-Sierra public-interest standard is “a key source of stability”). That finding, coupled with the presumptively just and reasonable nature of the auction results, amply supports FERC’s discretion to assess the auction results under the public-interest standard, after the initial 45-day period during which those results may be challenged under ordinary just and reasonable principles.

The Commission also reasonably approved application of the public-interest standard to any future challenges to the transition payments. The Commission reviewed the transition payments in the challenged orders and found them just and reasonable, Settlement Order PP 75-108, JA 2033-38, a finding that this Court upheld, Maine PUC, 520 F.3d at 470-75. The Commission could reasonably determine that, given the interest in the stability of the Settlement and its provision for prompt transition to capacity auctions, Settlement Order P 186, JA 2051, a party seeking to alter the transition payments should have to show that they were impairing the public interest.

Significantly, the transition payments last only for a limited time, with the final payment to be made in May 2010. Settlement Order P 30, JA 2024. The short duration of the payment regime makes it unlikely that the transition payments will become unjust or unreasonable. Indeed, the parties challenging the Settlement
have not indicated that they are likely to bring a renewed challenge to the transition payments. They surely have not shown that circumstances in the New England capacity market are likely to change in a way that would undermine FERC’s initial determination that the transition payments are just and reasonable.

CONCLUSION

For the reasons stated, this Court should find that the Commission properly exercised its discretion in approving Settlement section 4.C, and affirm the Commission orders on that one remaining issue.

Respectfully submitted,

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March 30, 2010
BRIEF ON REMAND, AND MOTION TO DISMISS PETITION FOR LACK OF JURISDICTION, OF INDICATED INTERVENORS SUPPORTING FERC

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

All parties, intervenors, and amici appearing before the Federal Energy Regulatory Commission (FERC or Commission) and in this court are listed in the Brief for the Petitioners.

II. RULINGS UNDER REVIEW

Petitioners sought judicial review of the following orders:

Devon Power LLC, Docket Nos. ER03-563-030 and ER03-565-055, 115 FERC ¶ 61,340 (June 16, 2006), JA2019 (June 16 Order).

Devon Power LLC, Docket No. ER03-563-060, 117 FERC ¶ 61,133 (Oct. 31, 2006), JA2357 (Rehearing Order).


III. RELATED CASES

Part IV of this Court’s prior decision in Maine Public Utilities Commission v. FERC, 520 F.3d 464, 476-79 (D.C. Cir. 2008) (MPUC), was reversed in NRG Power Marketing, LLC v. Maine Public Utilities Commission, ___ U.S. ___, 130 S. Ct. 693 (2010), and certain unresolved issues have been sent back on remand. Part
V of this Court’s decision in **MPUC**, 520 F.3d at 479-80, reserved judgment with respect to a jurisdictional argument unrelated to this remand that this Court later resolved in **Connecticut Department of Public Utility Control v. FERC**, 569 F.3d 477 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. (2010).

Counsel are not aware of any other petitions for review of the same FERC orders pending in this or any other court.
CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 the Federal Rules of Appellate Procedure and Circuit Rule 26.1, undersigned counsel certify as follows:

NextEra Energy Resources, LLC (formerly FPL Energy, LLC) is an indirect subsidiary of its parent, FPL Group, Inc., a publicly held, publicly traded holding company. No other parents, affiliates or subsidiaries of FPL Energy, LLC are publicly held or publicly traded.

Entergy Nuclear Generation Company, LLC and Entergy Nuclear Vermont Yankee, LLC, are indirect wholly-owned subsidiaries of Entergy Corporation, a publicly held, publicly traded company. No other parents, affiliates or subsidiaries of Entergy Nuclear Generation Company, LLC and Entergy Nuclear Vermont Yankee, LLC are publicly held or publicly traded.

Mirant Energy Trading, LLC, Mirant Kendall, LLC and Mirant Canal, LLC are each indirect wholly-owned subsidiaries of Mirant Corporation, a publicly held, publicly traded company. No other parents, affiliates or subsidiaries of Mirant Energy Trading, LLC, Mirant Kendall, LLC, or Mirant Canal, LLC are publicly held or publicly traded.

NRG Power Marketing, LLC is a Delaware corporation with its principal office in Princeton, New Jersey, that engages in wholesale for capacity, energy, and ancillary services in the New England region. Connecticut Jet Power LLC,
Devon Power LLC, Norwalk Power LLC, Middletown Power LLC, Montville Power LLC, and Somerset Power LLC are Delaware limited liability companies that own and operate power generation facilities in the State of Connecticut and the Commonwealth of Massachusetts. Each of these corporations is a subsidiary, with no public shares outstanding, of NRG Energy, Inc, a publicly held corporation (NYSE: NRG), with its principal place of business located at 211 Carnegie Center, Princeton, New Jersey 08540. No other publicly held company has a 10% or greater ownership interest in NRG Energy, Inc.

Boston Generating, LLC is an indirect, wholly-owned subsidiary of US Power Generating Company, a privately held Delaware corporation. Through its three wholly-owned privately held subsidiaries, Mystic I, LLC, Mystic Development, LLC, Fore River Development, LLC, and Boston Generating, LLC owns five operational generating units located in Massachusetts. No publicly held company has a 10% or greater ownership interest in US Power Generating Company or any of its subsidiaries.

International Power America, Inc. (IPA), participates in the NEPOOL marketplace through its indirect subsidiary, ANP Funding I, LLC, which performs the trading and market functions on behalf of IPA’s three New England generating resources, ANP Bellingham Energy Company, LLC, ANP Blackstone Energy Company, LLC, and Milford Power Limited Partnership.

Bridgeport Energy LLC, a Delaware limited liability company, is an indirect wholly-owned subsidiary of Port River, LLC. Port River is owned by LS Power Equity Partners II, L.P. and (through wholly-owned intermediaries) by LS Power Equity Partners PIE II, L.P. and LS Power Partners II, LP. Each of LS Power Equity Partners II and LS Power Equity Partners PIE II is owned by LS Power Partners II, as sole general partner, and by various limited partners. LS Power Partners II is owned by LS Power Development, LLC, as sole general partner, and by various limited partners. None of Bridgeport Energy or any of its parent companies has issued securities to the public, and no publicly-held company has a 10% or greater ownership interest in any of these entities.
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*Authorities upon which we chiefly rely are marked with an asterisk.
This case comes back before this Court on remand from the Supreme Court’s decision in *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, ___ U.S. ___, 130 S. Ct. 693 (2010). This Court lacks jurisdiction to consider the questions remanded because they were not raised by the petitioners on rehearing before the Federal Energy Regulatory Commission (FERC) or in their initial brief to this Court. See 16 U.S.C. § 825l(b); Fed. R. App. P. 28(a)(9); see, e.g., *Cal. Dep’t of Water Res. v. FERC*, 306 F.3d 1121, 1126-27 (D.C. Cir. 2002); *Platte River Whooping Crane v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989) (*Platte River I*). We thus move to dismiss the petitions for review on remand.
QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to consider any of the issues remanded for this Court’s consideration by the Supreme Court.

2. Assuming arguendo that this Court has jurisdiction:

   (a) whether forward capacity prices set by auction are contract rates;

   (b) whether transition rates established in a contested settlement agreement are contract rates; and

   (c) whether FERC has discretion to apply Mobile-Sierra review to non-contract rates.

STATEMENT OF THE CASE

In its orders below, FERC approved a contested settlement concerning the administration of a “Forward Capacity Market” in the wholesale energy market administered by ISO-New England, Inc. (ISO-NE). See Devon Power LLC, 115 FERC ¶ 61,340 (2006), JA2019 (June 16 Order). The petitioners in this case—Maine Public Utilities Commission (MPUC), and the Attorneys General for the State of Connecticut and the Commonwealth of Massachusetts—along with other parties, including the Industrial Energy Consumers Group (IECG), sought rehearing of the June 16 Order on various grounds.

As pertinent here, the MPUC (a petitioner in this case) and the IECG (an intervenor in this case) requested rehearing on the ground that Section 4.C of the
Settlement Agreement unlawfully adopted the *Mobile-Sierra* standard of review for future challenges to capacity auction results and transition payments. MPUC and IECG argued that the *Mobile-Sierra* public interest standard cannot apply to non-contracting third parties. See JA2102-04; 2076-80. IECG also argued that the capacity auction outcomes and transition payments “are not contracts.” JA2074-75. The other petitioners did not address *Mobile-Sierra* on rehearing.

FERC denied all requests for rehearing of the June 16 Order, including the *Mobile-Sierra* issue raised by the MPUC and IECG. See *Devon Power LLC*, 117 FERC ¶ 61,133 at PP 88-95 (2006), JA2372-74 (Rehearing Order). FERC expressly “reject[ed] IECG’s contention that market rules and tariffs are not contracts to which *Mobile-Sierra* can apply.” Id. at P 90, JA2373.

The petitioners timely filed separate petitions for review of FERC’s orders, which were later consolidated. IECG intervened on January 11, 2007, twelve days after petitions for judicial review are foreclosed by statute.

In their opening brief, the petitioners advocated the “third-party exception” to the public interest standard. Pet Br. at 51-54. They did not make the alternative “contract rate” argument, which debuted instead in the brief for intervenors supporting petitioners. In our brief as intervenors supporting FERC (at 24-25), we argued that the “contract rate” argument was twice barred due to the petitioners’ failure to raise it either on rehearing before FERC or in their opening brief. In their
reply brief, the petitioners incorporated the intervenors’ contract rate argument by reference, Pet. Rep. Br. at 24, but did not respond to our jurisdictional challenge.

This Court upheld FERC’s orders in nearly all respects, but rejected FERC’s application of the *Mobile-Sierra* standard to future challenges by non-settling parties against the capacity auction rates and transition rates. *See Maine Pub. Utils. Comm’n v. FERC*, 520 F.3d 464, 476-79 (D.C. Cir. 2008) (MPUC). The Court held that applying the *Mobile-Sierra* standard to challenges by third parties would “deprive them of their statutory right to challenge rates under the ‘just and reasonable’ standard.” *Id.* at 476; *see id.* at 477 (quoting 16 U.S.C. § 824e(a)). The Court thus ruled that “when a rate challenge is brought by a non-contracting third party, the *Mobile-Sierra* doctrine simply does not apply.” *Id.* at 478. The Court did not reach the contract rate argument, or our jurisdictional challenge to it.

FERC and several intervenors requested rehearing and rehearing en banc of this aspect of the Court’s opinion. Those requests were denied. NRG Power Marketing, LLC then petitioned for a writ of certiorari, which was granted.

The Supreme Court “reverse[d] the D.C. Circuit’s judgment to the extent that it rejects the application of *Mobile-Sierra* to noncontracting parties.” *NRG*, 130 S. Ct. at 696. As Justice Ginsburg explained, the Supreme Court’s decision in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1*, 554 U.S. ___, 128 S. Ct. 2733 (2008), “announced three months after the D.C. Circuit’s
disposition, made clear that the *Mobile-Sierra* public interest standard is not an exception to the statutory just-and-reasonable standard; it is an application of that standard in the context of rates set by contract.” *NRG*, 130 S. Ct. at 696. Thus, “the *Mobile-Sierra* presumption does not depend on the identity of the complainant who seeks FERC investigation.” *Id.* at 701. “To retain vitality, the doctrine must control FERC itself, and . . . challenges to contract rates brought by noncontracting as well as contracting parties. *Id.* at 696-97.

The Supreme Court declined to address the argument urged by respondents and the Solicitor General that “the rates at issue in this case—the auction rates and the transition payments—are prescriptions of general applicability rather than ‘contractually negotiated rates.’” *Id.* at 701. The Court also declined to address the government’s position that FERC has discretion to impose *Mobile-Sierra* review even in the absence of contract rates: “Whether the rates at issue qualify as ‘contract rates,’ and, if not, whether FERC had discretion to treat them analogously are questions raised before, but not ruled upon by, the Court of Appeals. They remain open for that court’s consideration on remand.” *Id.* This Court directed supplemental briefing.

*SUMMARY OF THE ARGUMENT*

This Court does not have jurisdiction to consider the questions the Supreme Court declined to address because those arguments were not raised by the
petitioners in their request for rehearing at FERC or in their opening brief to this Court. In addition, the question whether the transition payments are contract rates will soon be moot because the transition payment regime ends in May 2010.

If this Court nevertheless decides to address these questions for the first time on remand, it should hold that rates set by auction are quintessential contract rates entitled to *Mobile-Sierra* protection. Certainly the same policy foundation—contractual certainty to support infrastructure investment—applies fully here. The transition rates are likewise contract rates, at least insofar as they represent a contract between the overwhelming majority of capacity buyers and sellers who agreed to the underlying settlement. And none of the petitioners are capacity buyers or sellers; they all are third parties under *NRG*, 130 S. Ct. at 701.

Because the auction rates and transition rates are contract rates, the question whether FERC has discretion to apply *Mobile-Sierra* review to non-contract rates is not properly before this Court. That argument only exists as a response to claims that are jurisdictionally barred. We agree that FERC has discretion to “ratchet up” its protection of market outcomes from retroactive attack, outside of the *Mobile-Sierra* doctrine, counseled by principles of finality and the need for certainty, but caution that FERC has no discretion to “ratchet down” the protection that the *Mobile-Sierra* doctrine gives to contract rates.
ARGUMENT

I. THIS COURT HAS NO JURISDICTION TO ADDRESS THE ISSUES PRESENTED ON REMAND

The Supreme Court identified two issues that “remain open for [this] court’s consideration on remand.” NRG, 130 S. Ct. at 701. The first is whether the capacity auction rates and transition payments “qualify as ‘contract’ rates.” Id. The second is whether FERC has discretion to apply Mobile-Sierra public interest review even where the rates at issue are not contract rates. See id. Notwithstanding the Supreme Court’s remand of these unresolved questions, this Court does not have jurisdiction to address them.

Only one of the petitioners in this case—MPUC—requested rehearing of FERC’s orders on the ground that FERC could not lawfully apply Mobile-Sierra public interest review to the auction rates and transition rates. That short discussion never contends that the capacity auction rates or transition rates are not contract rates. See JA2102-04. Nor is there any discussion of the derivative question whether FERC would have discretion to apply Mobile-Sierra review to rates that are not set by contract. Instead, the only Mobile-Sierra argument the petitioners preserved on rehearing—though barely, at best—was the “third party exception” argument. See id.

In their opening brief before this Court, the petitioners kept the same focus, pressing the “third-party exception” to Mobile-Sierra. The petitioners not only
never made the alternative “contract rate” argument, they contradicted it. The gravamen of the petitioners’ argument was that a contract existed, and provided for the public interest standard, but that this standard applied only to the contracting parties, not non-contracting parties. Pet. Br. at 52 (“a contract binds those who sign it and does not bind those who do not”). Eventually, in their reply brief, the petitioners stated, without any elaboration, that they “adopt the arguments presented by Intervenors In Support of Petitioner at I.B.” Pet. Reply Br. at 24. These steps are insufficient to support this Court’s jurisdiction.

Only IECG, an intervenor here, argued on rehearing at FERC, and in its briefs before this Court, that this case did not involve contract rates. See JA2074-75, Int. Supp. Pet. Br. at 18-20; Int. Supp. Pet. Reply Br. at 9. But as we explained in our prior brief, “a petitioner must itself preserve the issue below by raising the issue in its own petition for rehearing before FERC, and cannot rely on rehearing requests filed by another party to do so.” Int. Supp. Rep. Br. at 24 & nn. 16-17. And that may be why this Court declined to address the “contract rate” argument in its prior opinion or to discuss it at oral argument.

This Court therefore has no jurisdiction to consider the “no contract rate” argument, which is barred from judicial review under section 313(b) of the Federal Power Act, 16 U.S.C. § 825l(b) (“No objection . . . shall be considered by the court unless such objection shall have been urged before the Commission in the
application for rehearing . . . ”). It is well-settled that “[p]arties seeking review of FERC orders must petition for rehearing of those orders and must themselves raise in that petition all of the objections urged on appeal,” and that “[n]either FERC nor this court has authority to waive these statutory requirements.” *Platte River I*, 876 F.2d at 113 (citing, *inter alia*, ASARCO, Inc. v. FERC, 777 F.2d 764, 773-75 (D.C. Cir. 1985) (construing identical provision of the Natural Gas Act)); accord, *e.g.*, *Platte River Whooping Crane v. FERC*, 962 F.2d 27, 34-35, 37 n.4 (D.C. Cir. 1992); *Wabash Valley Power Ass’n v. FERC*, 268 F.3d 1105, 1114 (D.C. Cir. 2001). In particular, *California Department of Water Resources* squarely governs here, holding that neither a petitioner nor an intervenor may raise an issue on review that only the intervenor raised on rehearing at FERC, unless the intervenor also files a timely petition for judicial review. *See* 306 F.3d at 1126-27. Thus, 16 U.S.C. § 825l(b) requires dismissal of the petition for review on remand. Moreover, the petitioners’ failure to raise the contract rate argument in their opening brief independently waived the issue. *See* Fed. R. App. P. 28(a)(9); *see*, *e.g.*, *Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996).

Because the contract rate argument is jurisdictionally barred, there no longer is any basis for disturbing the orders on review. And because the FERC discretion argument offers an alternative ground for affirmanace (a post hoc one at that), there no longer is any basis for reaching it.
II. THE FORWARD CAPACITY AUCTION RATES AND TRANSITION PAYMENTS ARE CONTRACT RATES

No one contests the fact that a contract exists between the parties who signed the underlying settlement. That contract established (i) a mechanism to create future contracts in forward capacity auctions and (ii) a schedule of transition payments to bridge the gap until the rates set through the auction mechanism (or substitute bilateral contracts) could take effect. The initial questions presented on remand—assuming this Court has jurisdiction to reach them—are whether the forward capacity auction rates and transition payments are “contract rates.” NRG, 130 S. Ct. at 701. The answer to both questions is yes. And FERC correctly determined, under the ordinary just and reasonable standard, that they are entitled to Mobile-Sierra protection under the particular facts of this case.

A. Mobile-Sierra Review Attaches to the Contracts Created in the Forward Capacity Auction

auctions are “reverse auctions” in which sellers alter their offers in response to the auctioneer’s prices, but the results still are contracts. See, e.g., Restatement (Second) of Contracts § 28(1)(b) (describing auctions “without reserve”). And here the resulting contracts—which support billions of dollars in infrastructure investment—require the same certainty Mobile-Sierra was designed to create.

The petitioners contend that they should be allowed to challenge capacity auction rates under the ordinary just-and-reasonable standard because they opposed the settlement agreement that established the auction mechanism. But the petitioners’ opposition to the settlement does not alter the black-letter conclusion that subsequent capacity auctions produce contracts, not unilateral tariffs. And because the petitioners themselves—all governmental entities—are prototypical third parties, any complaint they might file challenging auction outcomes would be subject to the public interest standard under NRG, 130 S. Ct. at 696-97, 701.

Our opponents may argue, in response, that participation in the capacity auctions is not voluntary because load lacks the option simply not to procure capacity. This Court observed, however, that load has various options for meeting this requirement. See Conn. Dep’t of Pub. Util. Control v. FERC, 569 F.3d 477, 481-82 (2009). Any given load-serving entity can build or buy capacity outside of the auction. There are options to procure capacity separately on financial terms (for example, contracts for differences) that make the buyer indifferent to the
auction outcomes. There also is a “self-supply” provision whereby utilities can “meet [their] capacity obligations without paying the auction clearing price.” June 16 Order at P 20, JA2023. But even if participation were mandatory, that would not erase the underlying contractual obligation. The government requires hospitals to hire licensed physicians. That does not mean agreements between hospitals and doctors are not contracts.

Our opponents also may argue that because many of the terms governing the provision of capacity are found in ISO-NE’s tariff, the auction somehow does not create a contract. But this is akin to arguing that because a contract to sell something is governed in part by the Uniform Commercial Code, or by New York law, that there is no underlying contract. The fact that some terms are set by tariff does not mean that there is no contractual agreement reached through the auction.

In addition, we may see questions raised about the identity of counterparties to suppliers in an effort to cast confusion on the contractual character of the auctions. One could view ISO-NE as the counterparty itself or as the agent for load. See, e.g., JA1672. Either way, a contract is formed. See Restatement (Second) of Contracts § 52 cmt. c; Restatement (Third) of Agency § 6.01 (2006).

Finally, if the auctions were held in the absence of any settlement agreement, the resulting rates would unquestionably be contract rates entitled to Mobile-Sierra protection. FERC cannot have erred in approving a settlement provision that
merely recites the standard that would apply to auction results even absent a settlement. Nor does it matter that the settling parties agreed to insert a 45-day initial period of ordinary just and reasonable review. See Rehearing Order at P 93, JA2373; June 16 Order at P 185, JA2051. That is merely an agreed-upon variant of the public interest protection that otherwise would apply.

**B. The Transition Rates Are Contract Rates**

Unlike the contract rates separately established in forward capacity auctions (or bilateral “self-supply” capacity contracts), the transition payments are a creature of the settlement itself. The petitioners urge that Mobile-Sierra cannot apply to the transition payments because they opposed the settlement. As an initial matter, this contention is purely academic. The petitioners and their allies already challenged the transition payments under the ordinary just and reasonable standard. FERC rejected the petitioners’ arguments and this Court sustained FERC’s judgment. See MPUC, 520 F.3d at 470-74. Absent a substantial change in circumstances, res judicata would bar a subsequent challenge to the transition payments. Here, where the petitioners lost their initial attack under the ordinary just and reasonable standard, they were hardly injured by FERC’s approval of Mobile-Sierra review for hypothetical complaints that never materialized. In any event, the practical significance of this dispute will presently evaporate because the transition payments end on May 31, 2010. See JA1737.
Apart from the impending mootness of the petitioners’ argument, the notion that the transition payments are not “contract rates” is simply wrong. The transition-payment obligations of the settling parties are clearly “contract rates.” The settlement sets forth a fixed schedule of rates that settling buyers agree to pay sellers for capacity for specified periods—a classic Mobile-Sierra contract. See JA 1737. A settlement that resolves pending litigation is a contract and its approval by an agency or court can only augment that status, not diminish it. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381 (1994); Int’l Ass’n of Firefighters v. Cleveland, 478 U.S. 501, 515-24 (1986); Cajun Elec. Power Coop., Inc. v. FERC, 924 F.2d 1132, 1135 (D.C. Cir. 1991) (noting “public interest gloss” of FERC approval) (citing cases). For that reason, “[t]he policies underlying the Mobile-Sierra doctrine apply with equal force to settlement agreements.” Cities of Newark v. FERC, 763 F.2d 533, 546 (3d Cir. 1985) (citing Cities of Bethany v. FERC, 727 F.2d 1131, 1139 (D.C. Cir. 1984)). And petitioners, as governmental entities that do not buy or sell capacity under the transition payment regime, are third parties subject to the public interest standard. See NRG, 130 S. Ct. at 701.

This does not, however, mean that the “Mobile-Sierra presumption” described in Morgan Stanley, 128 S. Ct. at 2745-46, applies to the initial review of a contested settlement agreement. So long as a contested settlement is itself subject to ordinary just and reasonable review, contracting parties should be able to
request *Mobile-Sierra* protection against later challenges to their agreements as a condition of settlement, and FERC should be able to approve such requests in appropriate circumstances.  *See Rehearing Order* at PP 92-94, JA2373; *id.* at JA2379-80 (Kelly and Wellinghoff, Comm’rs, concurring) (explaining why approval of *Mobile-Sierra* review was appropriate in this instance).

C. **FERC’s Rehearing Order Should Stand**

In its orders below, FERC expressly “reject[ed] IECG’s contention that market rules and tariffs are not contracts to which *Mobile-Sierra* can apply.” *Rehearing Order* at P 90, JA2373. It emphasized that it has “routinely permitted the use of [*Mobile-Sierra*] provisions in settlement agreements, including contested settlements.” *Id.* at P 92 & n.103 (citing cases). Before the Supreme Court, the government changed course, contending that this case did not involve contract rates. On remand, this Court should hold FERC to its original position, *see Morgan Stanley*, 128 S. Ct. at 2745 (rejecting FERC’s similar attempt to “change[] its tune” in that case), and allow the agency to refine its policies through some other vehicle. There is no reason to reach the “discretion” issue because it only exists as a response to the “contract rate” argument that is jurisdictionally barred.

**CONCLUSION**

For the reasons set forth above, this Court should dismiss the petitions for review, or alternatively deny them.
Respectfully submitted,

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 06-1403
Consolidated with Case Nos. 06-1427 & 07-1193

MAINE PUBLIC UTILITIES COMMISSION, RICHARD BLUMENTHAL,
ATTORNEY GENERAL FOR CONNECTICUT, AND MARTHA COAKLEY,
ATTORNEY GENERAL FOR MASSACHUSETTS
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

SUPPLEMENTAL BRIEF OF INTERVENOR ISO NEW ENGLAND INC.
IN SUPPORT OF RESPONDENT

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* None of the cases cited are chiefly relied upon in comparison to the others.
I. INTRODUCTION

The instant case is before this Court on remand in light of the Supreme Court’s opinion in *NRG Power Marketing v. Maine Public Utilities*, No. 08-674 (Jan. 13, 2010), reversing the judgment of this Court to the extent that it rejects the application of *Mobile-Sierra*¹ to noncontracting parties. The court remanded the following issues: Whether the rates at issue qualify as “contract rates,” and, if not, whether the Federal Energy Regulatory Commission (“Commission”) had discretion to treat them analogously. If the Court determines that the rates are contract rates or may be treated analogously, then application of *Mobile-Sierra* is appropriate.

ISO New England does not take a position on whether the rates at issue are “contract rates” or should be treated in an analogous manner. Instead, it will address one point that is relevant to the Court’s consideration of these issues, namely, that *Mobile-Sierra* should be applied in this case because the electric capacity market in New England depends on market certainty. As explained further below, the same need exists here for market certainty as was shown in the *Morgan Stanley* case and others.² Within the facts of this case, the protection

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afforded by the “public interest” standard is justified. Accordingly, ISO New England urges the Court to reject arguments that the rates are entitled only to the deference provided by the Federal Power Act’s just and reasonable standard and that Mobile-Sierra cannot apply.

II. SUMMARY OF ARGUMENT

ISO New England is the independent entity that administers New England’s bulk power markets and plans for the needs of the system to serve electric customers in the region. It is responsible for protecting the reliability of the New England Control Area and operating the system according to established reliability standards. Accordingly, it must ensure that sufficient capacity exists, i.e., the ability to generate or import energy or implement demand response to assure reliability.

As the independent entity administering New England’s bulk power markets, ISO New England fully supports the application of Mobile-Sierra protection to the auction clearing prices in the Forward Capacity Market. As explained further in Section III, below, the Commission’s approval of Section 4.C of the Forward Capacity Market Settlement, which applies Mobile-Sierra protection to the final clearing prices in each auction, is essential for market certainty.
III. ARGUMENT

The Supreme Court noted that whether the rates at issue qualify as “contract rates” for *Mobile-Sierra* purposes, and, if not, whether the Commission had discretion to treat them analogously are questions that were raised before, but not ruled upon, by the D. C. Circuit. ISO New England respectfully submits that this Court on remand should uphold the application of the *Mobile Sierra* “public interest” standard to the Forward Capacity Market auction prices because such protection fosters price finality that is essential for market certainty.

Promoting “the stability of supply arrangements” is a critical purpose of the *Mobile-Sierra* doctrine.\(^3\) This Court recently in *Morgan Stanley* recognized that the public interest standard of review is “a key source of stability.”\(^4\) Application of the limited *Mobile-Sierra* protection provided in the Forward Capacity Market Settlement balances the need for stability – critical “to the health of New England’s electricity infrastructure” – with the


\(^4\) *Morgan Stanley*, 128 S. Ct. at 2749.
legal requirement that rates be just and reasonable.\textsuperscript{5} Thus, application of

\textit{Mobile-Sierra} in this case is sound and should be upheld.\textsuperscript{6}

Section 4.C of the Forward Capacity Market Settlement applies \textit{Mobile-Sierra} protections only in the narrow circumstances of: (1) the transition charge, which is due to expire on May 31, 2010, and is for all intents and purposes moot; and (2) the final clearing prices in each auction. Thus, the public interest standard applies to challenges regarding the \textit{final} prices produced by the auctions which are only final after ISO New England has made filings with the Commission both before each primary auction regarding qualification to participate, and after each primary auction regarding prices resulting therefrom.\textsuperscript{7} Parties have the opportunity to challenge these pre- and post-Forward Capacity Auction filings, which the Commission will review under Section 205 of the Federal Power Act.\textsuperscript{8}

Specifically, ISO New England is required to file the results of each auction with the Commission, and parties are afforded 45 days to challenge the auction results under the “just and reasonable” standard. Thus, Section 4.C of the Forward

\textsuperscript{5} \textit{Devon Power LLC}, 115 FERC ¶ 61,340 at P 186 (2006), JA 2051 (“Settlement Order”).

\textsuperscript{6} Settlement Order at P 186, JA 2051.

\textsuperscript{7} Section II.G.3.b of the Settlement requires the ISO to “promptly file the FCA results including the detail of the awards and the price, . . . with the FERC under Section 205, or make such other filing as is necessary to establish the FCA results as filed rates.” JA 1710.

\textsuperscript{8} Settlement Order at P 185, JA 2051; 16 U.S.C § 824d.
Capacity Market Settlement applies the high *Mobile-Sierra* “public interest” standard of review to the final auction prices after those prices have been reviewed initially by the Commission under the Federal Power Act’s just and reasonable standard. The narrow carve-out in Section 4.C invokes the *Mobile-Sierra* standard of review only with regard to subsequent objections to Forward Capacity Auction clearing prices raised after the Commission has entertained all challenges and ruled under the just and reasonable standard. As discussed further below, allowing challenges under the just and reasonable standard to the clearing price well after the auction (*i.e.*, after the 45-day period set forth in the Forward Capacity Market Settlement for challenging the final auction clearing prices) will undercut this goal.

In both orders under review, the Commission correctly recognized that market certainty is critical to the construction of needed capacity. The Commission stated:

> [P]rice certainty is important to ensure that the [Forward Capacity Market] achieves its goals of attracting and retaining generators needed for reliability. As we stated in the June 16 Order, stability is of particular importance in this case, given that these proceedings were initiated in part because of the unstable nature of [installed capacity] revenues and the negative effect that it has had on New England’s infrastructure.  

The Commission correctly found that stability is particularly important in this case, given that the genesis of the case was, in part, the uncertain nature of revenues raised after the Commission has entertained all challenges and ruled under the just and reasonable standard. As discussed further below, allowing challenges under the just and reasonable standard to the clearing price well after the auction (*i.e.*, after the 45-day period set forth in the Forward Capacity Market Settlement for challenging the final auction clearing prices) will undercut this goal.

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9 *Devon Power LLC*, 117 FERC ¶ 61,133 at P 95 (2006), JA 2373.
available to generators, and the negative impact this revenue unpredictability has on wholesale markets.\textsuperscript{10}

Price certainty is vital to capacity suppliers who must make immediate investments but who will not actually deliver capacity at the rates set by the auctions until three years in the future. Because one purpose of the Forward Capacity Market is to permit new capacity suppliers to set the price, the Forward Capacity Market is a forward-looking market that includes approximately three years between the auction and the time when the capacity resource supplier is obligated to produce. If a potential capacity resource is selected in the auction, it has more than three years to build the necessary infrastructure needed to fulfill its capacity obligation. If the potential capacity is not selected, it can abandon the project or put the project on hold to bid again in the next annual auction. Thus, the three-year timeframe is intended to provide a planning period for new supplier entry into the wholesale market, so that potential new capacity resources can participate in the auction and compete with incumbent resources. The forward-looking nature of the Forward Capacity Market thus provides appropriate signals to investors when new infrastructure resources are necessary with sufficient lead time to allow the infrastructure to be put into place before reliability is sacrificed.\textsuperscript{11}

\textsuperscript{10} Settlement Order at P 186, JA 2051.

\textsuperscript{11} Id. at P 65, JA 2031.
However, investor confidence will diminish if well after the fact the capacity prices can be changed because those prices have become undesirable after a change in circumstances subsequent to the auction, thus creating regulatory uncertainty and increasing the risk premium that new entrants may require.

Price certainty is also important to existing resources bidding in the Forward Capacity Market. For example, existing resources that are selected in the Forward Capacity Market may need to undertake investments to fulfill their capacity supply obligations. These investments are made based upon the expectation of a specific level of revenue flow. Allowing challenges after the auction, however, negates the price certainty that is vital to the Forward Capacity Market.

Section 4.C of the Forward Capacity Market Settlement was designed to ensure price certainty after the auctions were run and the Commission has approved the prices under the just and reasonable standard. It was designed to lower investment risk, and thereby lower costs to consumers. Price certainty is important to ensure that the Forward Capacity Market achieves its goals of attracting and retaining resources needed for reliability. This provision reduces regulatory uncertainty, thereby encouraging investment in New England and reducing the risk premium that may be required from new market entrants. Ultimately, price certainty will better ensure just and reasonable rates. As the independent entity administering New England’s bulk power markets, ISO New
England fully supports the application of *Mobile-Sierra* protection to the auction clearing prices.

**IV. CONCLUSION**

For the reasons stated, the Commission's orders should be upheld in all respects.

Respectfully submitted,

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Dated: March 30, 2010
Transmission Planning & Cost Allocation
Alternatives Under Order 890
Transmission Policy

“Today, Tomorrow, and Beyond”

A. Karen Hill
Vice President Federal Regulatory Affairs
Exelon Corporation

April 29, 2010
About Exelon Corporation

✓ Holding company formed in 2000 by merger of Commonwealth Edison and PECO Energy
  • Commonwealth Edison Company – T & D company with 3.8 million electric retail customers in Northern Illinois
  • PECO Energy Company – T & D company with 1.6 million electric retail customers and nearly 500 thousand gas retail customers in Philadelphia area
  • Exelon Generation – separate subsidiary took ownership of ComEd’s and PECO’s generation and now owns/controls over 31,000 MW of generating capacity
    – 17 nuclear power units, 17,589 MW, the largest fleet in the U.S., operating at nearly a 94% capacity factor
    – Over 12,000 MW of that capacity is in Northern Illinois

✓ Exelon’s transmission facilities are within PJM and most of its generation is within PJM
Illinois May be the Crossroads of our Energy Future

Billions of dollars in transmission expansion is needed to create a crossroads and not a conjunction of congestion
Current Policy on Transmission Expansion For Reliability and Economics in PJM

✓ PJM Regional Transmission Expansion Planning Process (RTEPP)
  • Identifies upgrades needed to meet NERC and PJM reliability and operational requirements
  • Developed in coordination with transmission owners
  • Costs of RTEPP projects borne by customers
    – Costs of existing and new < 345 kV facilities are allocated according to benefits
    – Allocation methodology for new facilities > 345 kV is on remand to the Commission from 7th Circuit and a paper hearing proceeding is underway

✓ Generators and merchant transmission developers may build transmission for economic reasons
  • Costs are borne by the generator or transmission developer
Problems with Applying Current Policy to Integrate Large Additions of Wind Generation

- RTO transmission planning does not cover sufficiently broad geographic areas
  - Wind capacity is usually located in remote areas far from population centers
  - Large amounts of wind is planned for areas west of PJM that cannot be absorbed by load in those zones
  - Substantial transmission expansion will be needed to move energy east across a number of RTOs

- Traditional cost allocation creates inequitable results
  - Load in high wind zones does not need capacity and does not want to pay for transmission to load
  - Wind resources do not want to pay costs for transmission upgrades to move power to population centers
  - Influx of substantial wind into ComEd zone creates reliability issues, but it is unfair for ComEd’s customers to bear the costs of sending wind energy further east
Exelon Transmission Policy

✓ Wind generation fulfills national priority to reduce greenhouse gas emissions
  • Wind energy is aimed at providing broad benefits to citizenry as a whole
  • Infrastructure required to integrate wind will cross a number of regions
✓ Zone-by-zone planning and cost allocation is anachronistic
  • High voltage transmission, centralized security-constrained economic dispatch, organized market administration has overtaken isolated balancing authorities
  • Coordination among organized markets is essential for efficient transmission and dispatch
  • Traditional cost-benefit assessment is inapplicable to clean energy that benefits literally everyone who breathes the air
Exelon Transmission Policy

✓ Comprehensive, multi-region transmission planning is best to develop optimal grid expansion
  • Ensure that all cost and policy factors are taken into account in determining the most cost-effective grid expansion

✓ Broad benefits of developing renewable energy to reduce greenhouse gas emissions justify broad allocation of costs

✓ Exelon Position
  • Interconnection-wide planning for new transmission capacity 345 kV and above, and any feeder lines 100 kV and above, that connect new non- or low-emitting generation resources (“High Priority National Transmission Projects”)
  • Interconnection-wide cost allocation for that infrastructure needed to integrate renewable resources to the grid
  • If not across the entire interconnection, then planning and cost allocation should be across as many regions as practicable
Good afternoon. I appreciate the opportunity to speak with you today about Exelon’s views on important policies for electric transmission planning and cost allocation. We applaud the Commission for taking the steps to explore new ways to plan the high voltage transmission grid and new ways to allocate the costs.

We believe the electric industry is facing an unprecedented challenge in the need to build infrastructure to support the national effort to deal with climate change. Exelon has been an early and vocal advocate of climate change legislation. We are pleased that the U.S. House of Representatives passed a comprehensive climate and energy bill and we are working with the Senate to pass a bill this year. This House-passed bill would mandate a reduction in the national carbon footprint and establish a federal Efficiency and Renewable Electricity Standard (ERES) to be overseen by this Commission. The ERES required starts at 6% in 2012, increasing to 20% by 2020. The Senate Energy and Natural Resources Committee has approved a similar requirement; its Renewable Electricity Standard (RES) would require utilities to obtain 6% of their electricity from renewables or efficiency by 2014, increasing to 15% by 2021. The Senate bill also establishes a comprehensive federal policy on transmission infrastructure development and requires this Commission to coordinate a comprehensive interconnection-wide plan for transmission development.

I recognize that these bills are not yet public law, but they clearly set the tone for the issues this Commission is addressing today. How do we decrease the Nation’s carbon footnote in the most cost-effective way? And how can this Commission facilitate comprehensive transmission planning and transmission infrastructure development to help achieve that goal?

Developing the nation’s potential for low- and zero-emitting electric generation – especially wind in the near term – is central to reducing carbon emissions nationwide. But interconnecting new wind generation resources to the grid
presents unprecedented issues involving transmission planning and cost allocation. Meeting the challenge to resolve those issues fairly and efficiently demands that the Commission develop a new paradigm for planning and paying for transmission infrastructure.

I testified before the Commission in March on policy advancements we believe Congress and the Commission should make to facilitate integrating renewable generation into the grid. I made four recommendations that I'll briefly revisit here because they are related to these issues.

1. Federal Transmission Siting Authority

Congress should pass Federal transmission siting legislation giving this Commission plenary authority, based on the Natural Gas Act model, to site all new high voltage transmission, 345kV and above, plus any 100kV or above feeder lines that connect new low- or zero-emitting generation resources (“New High Voltage Transmission”). Clearly explicit authority from Congress makes the mandate unambiguous and paves the political path for the Commission. But pending action by Congress, we urged members of the Commission to formally voice their support for such legislation and to push forward within current authority to enhance the prospects for siting new transmission.

2. Interconnection-wide Planning

The Commission should require interconnection-wide transmission planning using economic planning criteria. To smoothly integrate renewable generation into the grid, planning cannot stop at one RTO’s or utility’s border, but rather should encompass an integrated, efficient whole.

3. Interconnection-wide Cost Allocation

The Commission should require interconnection-wide cost allocation for major grid upgrades. Enhancing the Nation’s transmission infrastructure is a national priority and the costs should be borne by all load in the interconnection.

4. Competitive Process for Transmission

The Commission should require a competitive process to build the most cost-effective transmission system – utilities and merchant investors should have equal opportunity to finance and build grid enhancements.

This afternoon I would like to address the points I made in March about interconnection-wide planning and cost allocation. First let me describe the problem.
A huge amount of wind generating capacity is seeking to interconnect to the RTO systems in the Eastern Interconnection. According to American Wind Energy Association statistics, 63,000 MW is in the queue in the Midwest ISO with MidAmerican’s membership; 43,000 MW is pending in PJM; 50,000 MW is pending in SPP. In the Western Interconnection, major solar and wind generation projects have been proposed. The Department of Energy recently announced over $1 billion in grants and loan guarantees for new renewable generation under the provisions of the American Recovery and Reinvestment Act of 2009.\(^1\) Even though some projects are queued in multiple RTOs and it’s clear not all of that wind capacity will be developed, the shear magnitude of the potential demonstrates the challenge for planning transmission.

Which resource will be developed given its capacity factor, location, and access to markets, among other concerns? How will that decision be made? By the market? By regulators? By inaction and default?

For example, more than 30,000 MW of wind capacity is in the PJM queue to connect to ComEd, the Exelon utility that serves Chicago and Northern Illinois. Yet the ComEd peak load is less than 24,000 MW and the minimum load is less than 7,500 MW. Obviously, without major transmission enhancements, including New High Voltage Transmission to deliver wind energy to load centers east and south of Chicago, the ComEd system, as well as other systems, simply could not continue to be operated in a reliable manner.

We believe this challenge should be addressed as comprehensively as the nation addressed rural electrification and the interstate highway system. Developing large amounts of renewable generation to meet state, regional, and national mandates is not a local effort for local benefits. It is nothing less than a necessary and central part of a national initiative to reduce our carbon emissions to address the global problem of climate change.

Because renewable resources like wind generation tend to be located in remote areas and are not evenly distributed throughout the country, it would be unfair to burden just the customers in those locations with the costs of transmitting these nationally important resources to the grid. This national priority calls for a new approach to planning and funding. Just as the nation has answered the call in the past for broadly based investment in infrastructure with broad benefits to the citizenry as a whole, we believe the Commission should approach investment in new transmission infrastructure in a similar broadly-based way.

As I indicated, we support passage of Federal transmission siting authority. But even without such authority, the Commission nonetheless can have a powerful influence over how transmission planning and siting are handled. But the

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Commission must recognize that interconnecting renewables calls for a new approach to transmission planning and cost allocation.

The Commission’s focus in Order No. 890 has been overtaken by events. The Commission’s concerns there are ensuring comparable access and service to “reliability” expansions, which is well and good. But the Commission went to great lengths to make sure that each transmission provider had flexibility to adopt its own planning process and cost allocation method as long as it met the nine principles - coordination, openness, transparency, information exchange, comparability, dispute resolution, regional participation, economic planning studies, and cost allocation for new projects. These principles are important, for sure, but for the New High Voltage Transmission needed to meet the national goal of developing renewable generation, the Commission needs to adopt generic rules rather than flexible ones. We believe that the Commission needs to require planning on an interconnection-wide basis, to facilitate interconnection of wind and other low-carbon resources, and to spread the costs of the new construction broadly.

The Commission should highlight the inadequacy of piecemeal transmission planning and the need for a paradigm shift in planning for integration of renewables. The Commission should require the parties to engage in the comprehensive, interconnection wide planning needed to ensure economically smooth integration of renewables.

We are pleased to note that various initiatives have begun to address transmission planning and cost allocation across RTO boundaries. Exelon has joined with a number of other utilities in the Midwest and commissioned an independent study by Quanta Technology to identify technically and economically sound solutions for integrating Midwestern wind resources. In addition, the Upper Midwest Transmission Development Initiative was launched last year by five Midwestern governors and is considering transmission planning and cost-allocation issues related to developing a regional transmission system spanning the upper mid-west. While Exelon applauds this initiative as a good start, planning across five states simply is not sufficient. The states involved are rich in wind resources. Any successful planning effort must be expanded to encompass a wider area to achieve smooth integration of the rich wind resources in the upper Midwest into and across the grid.

In addition, the Eastern Interconnection Planning Collaborative (EIPC) could be an important vehicle for inter-connection wide planning. However, to succeed, it must go beyond simply stapling together regional plans across the entire interconnection but perform a comprehensive examination of how best to integrate the location constrained renewable resources, as well as other resources, that the nation seeks to exploit. The EIPC also needs to open up its process. The only utilities allowed to participate in the EIPC process today are those that are NERC Planning Authorities. Consequently, almost all utilities
located in RTOs – including ComEd and PECO – have not been allowed to participate, while those outside of RTOs could. That already has led to a lack of confidence in the process among those of us who are excluded. Now that the EIPC has submitted its proposal to DOE, we look forward to full participation by the transmission owners in the governance and planning process because without widespread participation, the process simply will not be successful.

Similarly, the Commission’s traditional methods of allocating costs of transmission are not appropriate in the new paradigm needed for integrating state and federally mandated renewable energy sources into the grid. Under traditional allocation, costs are assigned to the local electric customers who “benefit from,” i.e., receive the electricity from, the new generating capacity. This local focus has allowed an inconsistent patchwork of cost calculation and allocation methodologies to develop across the RTOs and transmission zones. Trying to use this patchwork of methods to allocate costs of interconnecting renewable resources fairly would be unnecessarily confusing and inefficient.

Bringing renewable generation to the grid does not serve just local interests in reliable supply, as is the case typically under the old paradigm. Rather, developing our Nation’s renewable energy resources simply must be recognized as a broad national policy goal aimed at limiting greenhouse gas emissions by reducing our dependence on fossil fuels. Thus, it is not the local customers of the new electric capacity that, in fact, are the only beneficiaries who should bear the costs integrating wind energy. It is the entire nation of citizens who will enjoy a lower carbon environment who are the beneficiaries of wind energy. Moreover, reinforcing the grid with New High Voltage Transmission will enable even more efficient dispatch of existing generation resources. Funding this investment on an efficient, fair and rational basis calls for developing a comprehensive, transparent and fair method that will distribute the costs broadly across the interconnection.

To summarize, in our view, integrating renewable generation capacity into the grid is a national goal with benefits that are national in scope. The 1930’s mindset of 500 little grids is anachronistic. A comprehensive, economically based, interconnection-wide plan should be developed to identify generation and transmission capacity that will most effectively and efficiently develop wind and other low- or zero-carbon emitting generation resources. Such a plan could be used to support a finding by the Commission that the costs of New High Voltage Transmission should be allocated broadly across the interconnection.

We urge the Commission to undertake a rulemaking to update its policies governing transmission planning and cost allocation as described above. Failure to do so will result in a continued haphazard approach to integrating wind and other low-carbon generation resources. Absent a comprehensive approach, the Commission will continue to struggle case-by-case, and the need to provide an evidentiary record on who will benefit from new resources. Development will be
stifled, which is not in our Nation’s best interest. I would also add that we believe that the Commission, as in Order Nos. 888 and 890, can ensure that the planning and cost allocation policies apply to all transmission owners by requiring reciprocity by non-public utilities.

**Responses to Specific Questions for the Panel Members**

The Commission asked panelists to prepare answers to the following questions:

**Are there regional cost allocation methodologies outside RTOs, and broader regional cost allocation within RTOs, that should be considered or established? If so, how should this be done? What considerations should be used?**

Exelon believes that costs of New High Voltage Transmission, as defined, should be allocated across the entire interconnection. A sound methodology would be to consider the full economic impact of proposed new generation capacity and to allocate transmission costs to all transmission owners on the basis of load share of their customers. This would simply expand the current methodology over a wider number of customers. The Commission would need to develop and carefully consider and explain an evidentiary record to support such a decision, but we believe the basis for such a decision is sound.

**Should processes be established to help stakeholders address cost allocation matters over larger geographic regions? Are there opportunities for stakeholders to address cost allocation matters by tariff or contracts?**

As the Commission well knows, what one party doesn't pay, another does. Thus cost allocation for new transmission infrastructure is perennially an issue that is difficult to settle without application of pre-existing rules. I believe it is incumbent on the Commission to develop and issue rules updating its cost allocation policies to require that the costs of New High Voltage Transmission are shared by all utilities in the interconnection on a load ratio share. RTOs and utilities not in RTOs could be required to submit compliance tariffs implementing the new requirements.

**Should each transmission provider hold an open season solicitation of interest for needed transmission projects identified through the transmission planning process in order to assist in cost allocation determination? Should identified non-transmission alternatives also be held to an open season solicitation?**

An open season solicitation of interest for needed transmission projects will not be successful until transmission providers know what the cost allocation rules are. In addition, open season solicitations will not be effective because merchants are not likely to sign up to pay when they can be free riders if the
transmission is built and paid for by another. The merchant transmission model is as yet unproven for AC lines in the middle of an interconnection.
Transmission Planning and Cost Allocation in the Renewable World:

Does that Old Dog Still Hunt?

Jonathan D. Schneider
Stinson Morrison Hecker, LLP

Energy Bar Association Annual Meeting
April 29, 2010
The Vision

Animating Idea: We know where the resources are; all we need is the transmission.
AEP/AWEA Green Superhighway Map

Composite Wind Resource Map

- Existing 765 kV
- New 765 kV
- AC-DC-AC Link

Wind Power Classification

<table>
<thead>
<tr>
<th>Wind Power Class</th>
<th>Resource Potential</th>
<th>Wind Power Density at 50 m</th>
<th>Wind Speed @ 50 m m/s</th>
<th>Wind Speed @ 50 m mph</th>
</tr>
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<tbody>
<tr>
<td>1. Marginal</td>
<td>200 - 300</td>
<td>5.6 - 6.4</td>
<td>12.5 - 14.3</td>
<td>25 - 26.5</td>
</tr>
<tr>
<td>2. Fair</td>
<td>300 - 400</td>
<td>6.4 - 7.0</td>
<td>14.3 - 16.7</td>
<td>27 - 28.5</td>
</tr>
<tr>
<td>3. Good</td>
<td>400 - 600</td>
<td>7.0 - 7.5</td>
<td>15.7 - 18.8</td>
<td>31 - 35.3</td>
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<tr>
<td>4. Excellent</td>
<td>600 - 800</td>
<td>7.5 - 8.0</td>
<td>16.8 - 19.1</td>
<td>34 - 37.5</td>
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<tr>
<td>5. Outstanding</td>
<td>800 - 1000</td>
<td>8.0 - 8.8</td>
<td>17.9 - 19.7</td>
<td>38 - 43.2</td>
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<tr>
<td>6. Superior</td>
<td>1000 - 1500</td>
<td>8.5 - 9.0</td>
<td>18.9 - 21.9</td>
<td>40 - 44.0</td>
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<tr>
<td>7. Exceed</td>
<td>1500 - 2000</td>
<td>9.0 - 11.1</td>
<td>19.7 - 23.8</td>
<td>42 - 47.4</td>
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</tbody>
</table>

*Wind speeds are based on a Wallis' f value of 2.0

The remaining states use data from the 1987 “Wind Energy Atlas of the United States”.

Transmission Lines

- 345 - 469 kV
- 500 - 699 kV
- 700 - 799 kV
- 1000 (DC)

Source: PUDG/Deep, prepared with the assistance of the McGraw-Hill Companies

U.S. Department of Energy National Renewable Energy Laboratory
Eastern Wind Integration And Transmission Study
(National Renewable Electric Laboratories)

(20 - 30% Wind)
The Cost of the “Green Superhighway”

- Initial AEP Estimate: $60 – 100 Billion (nationwide)
- Joint Coordinated System Plan: $80 Billion (Eastern Interconnect)
- Eastern Wind Integration and Transmission Study: $93 Billion (Eastern Interconnect)
- Christensen Associates: $220 Billion (nationwide)
Legislative Status – Senate Committee on Energy and Natural Resources – S. 1462 Reported out on June 15, 2009

• Planning
  • FERC will coordinate regional planning to ensure the development of interconnection-wide plans with respect to and “High Priority National Transmission Projects” (i.e., above 345 kV AC; 300 kV DC; and renewable feeder lines)

• Siting
  • FERC may certificate High Priority Nat’l Transmission Projects if states fail to act within one year.

• Cost Allocation (next slide)
Legislative Status – Senate Committee on Energy and Natural Resources – S. 1462 Reported out on June 15, 2009

• Cost Allocation

  • FERC shall establish a rule providing for the allocation of costs for High Priority National Transmission Projects in a manner that ‘s J&R and non-discriminatory
  • FERC may permit allocation of costs for HPNT Projects to all LSEs in all or part of a region, “except that costs shall not be allocated to a region, or subregion, unless costs are reasonably proportionate to measurable economic and reliability benefits.” (Corker Amendment)
    • (note: earlier draft specified default allocation to all LSEs in the interconnection)

• The authority to allocate costs to LSEs regardless of their contractual relationship with the project developer would be a dramatic change in the law.
  • The FPA now authorizes FERC to set rates that utilities charge their customers. A mechanism permitting the allocation of costs regardless of that relationship is unprecedented.
Legislative Status - Waxman-Markey Bill

- **Waxman-Markey Transmission Title**
  - Planning
  - Siting
  - No Cost Allocation Provision

- **Kerry-Lieberman?**
Meanwhile, back at the ranch

- FERC Docket No. AD09-8 – Notice of Request for Comments (October 8, 2009)
  - Planning Questions (excerpts)
    - Are existing processes adequate to identify and evaluate solutions to needs affecting multiple transmission providers?
    - Will interconnection-wide processes adopted with funding from the American Recovery and Reinvestment Act of 2009 (i.e. EIPC) be adequate to the extent designed to address issues identified on a sub-regional and regional basis?
FERC Docket No. AD09-8 – Cost Allocation

“The Commission’s best remaining opportunity to eliminate barriers to new transmission construction may therefore be to provide greater certainty in its policies for allocating the cost of new transmission facilities, particularly for facilities that cross multiple transmission systems.”

• FERC’s Cost Allocation Questions (excerpts):
  – Should processes be established to help stakeholders address cost allocation matters over larger geographic regions?
  – Are there regional cost allocation methodologies outside RTOs, and broader regional cost allocation within RTOs, that should be considered or established?
  – How can customers that benefit from a particular facility be determined, and should benefits be recalculated over time?
Docket No. AD09-8 Positions

• Everyone thinks planning is great!
  – Differences: Should the resulting architecture follow from a “bottom up” evaluation or “top down” direction with an EHV end game in mind.

• Cost Allocation – Hot button issue: Allocation of costs across a region, and possibly across the interconnection.
  • I.e., Should the cost of the superhighway be allocated to all LSEs, such as S 1462 would provide.
  • Can FERC do this?
Docket No. AD09-8 - Cost Allocation

- AEP: Argues for interconnection-wide postage stamp allocation for an EHV overlay, citing combined economic, environmental and reliability benefits. (No specific mechanism proposed.)

- AWEA: Argues for region-wide (or interconnection-wide) rates, on ground that the grid is a single, integrated, machine, that all users benefit from all upgrades, and that there is no distinction between new and existing users.
  - “...many cost allocation methodologies, as they are applied today, are flawed, not because they attempt to assign costs to those who benefit from the transmission that is to be constructed, but because they too narrowly define the beneficiaries....”
  - “...the cost of all transmission upgrades within a region [preferably interconnection-wide] (whether constructed for purposes of reliability, economics, renewable access, or satisfying generator interconnection requests) and that lead to these broad benefits should be subject to pricing that reflects the costs of all such transmission facilities within that region.....”
Docket No. A09-8 – Cost Allocation

• Exelon: Presses for Interconnection-wide cost allocation.
  • “The benefits of new high voltage transmission cannot be linked to specific users of the transmission system in the same way as in the past. To attempt to apply the old ways of analyzing costs and benefits would be an artificial contrivance.”
    – (I.e., that old dog don’t hunt.)
  • “Thus, the beneficiaries are not the traditional consumers of electricity, but rather all citizens who benefit from the greenhouse gas reduction environmental policies.”
Does FERC have the Authority to Allocate Costs Interconnection-Wide
   - No, if the superhighway provider is simply sending a bill to entities with which it has no contractual privity.
      - Contract is fundamental to FERC Authority. (Mobile-Sierra)

Can/Should FERC simply average all rates?
FERC Precedent (The Old Ways)

- FERC Policy has generally followed “Cost Causation” theory (assessing costs to “cost causers”)
  - On Existing Systems:
    - Gas Precedent
      - Incremental/Roll Policy Statement (88 FERC 61,227 (1999)) – ensures no subsidization of new service by incumbent load
    - Electric Precedent
      - “Or” Pricing Policy – no subsidization of new service by incumbent load
  - Greenfield developments
    - Natural Gas Pipeline - Greenfield Developments (Anchor tenants/Precedent Agreements) - All rates are incremental (Iroquois; Portland-Maritimes)
    - Merchant Transmission – All rates are incremental (Chinook/Zephyr, 126 FERC 61,134 (2009))
  - There are certainly exceptions (O 2003; ISO cases).
Judicial Consideration of The Old Ways

- *Illinois Commerce Commission v. FERC*, 576 F.3d 470 (7th Cir. 2009)
  - Court remands FERC’s decision approving the ISO-wide allocation of costs for transmission facilities of 500 kV and above.
    - “FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are only trivial in relation to the costs sought to be shifted to its members.”
    - “To the extent a utility benefits from the costs of new facilities, it may be said to have ‘caused’ a part of those costs to be incurred, as without the expectations of contributions the facilities might not have been built, or might have been delayed.”
    - “A claim of generalized system benefits is not enough to justify requiring existing shippers to subsidize [new shippers].” *Citing Transcontinental Gas Pipe Line Corp.* 112 FERC 61,170 at 61,925-25 (2005).
ICC v. FERC is not an Outlier

• KN Energy, Inc. v. FERC, 968 FERC 1295, 1300 (D.C. Cir. 1992)
  – “All approved rates [must] reflect to some degree the costs actually caused by the customer who must pay them.”

• Midwest ISO Transmission Owners v. FERC, 373 F.3d 1361, 1368 (D.C. Cir. 2004).
  – “Not surprisingly, we evaluate compliance with this unremarkable principle [rates must reflect customer-caused costs] by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party.”
Is It Time to Abandon the Old Ways?

• I.e., are all customers the beneficiaries of all transmission investments on an interconnection-wide basis (AWEA);
  – Should we determine that all customers enjoy the broad environmental benefits that follow from facilitating renewable integration through cost socialization (Exelon)?
• Maybe not
  – The genius of cost causation pricing is that it tells customers what things cost – and based on that information, they make intelligent decisions.
    • Like where to locate generation; what resource mix is most efficient; whether demand response is a better, more economical alternative than building transmission or generation.
• There is no cost discipline or an incentive to efficient investment without an assessment of costs to cost causers. To use the economic jargon, by allocating costs to the “best cost avoiders,” we provide an incentive to make the right economic decisions.
A Note on “Benefits”

• Do “Benefits” legitimately include environmental externalities under the FPA?
  – Maybe not. “Just and Reasonable” is not an infinitely plastic term.
    • It encompasses antitrust concerns; it can be used to promote competition.
    • But how about employment benefits of new construction?
    • How about rolling in the cost of new construction because it provides economic benefits to certain parts of the country? To unionized workers?
    • There is a limit to this: See: *NAACP v. FERC*, 425 U.S. 662 (1976)
What are our options for meeting the Climate Challenge?

• Generation Options for meeting Waxman-Markey Goals

<table>
<thead>
<tr>
<th>Resource</th>
<th>McKinsey 2030</th>
<th>EPRI 2030</th>
</tr>
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<tbody>
<tr>
<td>Coal</td>
<td>33%</td>
<td>28%</td>
</tr>
<tr>
<td>Coal w/CCS</td>
<td>9%</td>
<td>10%</td>
</tr>
<tr>
<td>Natural Gas</td>
<td>9%</td>
<td>13%</td>
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<td>Nuclear</td>
<td>24%</td>
<td>28%</td>
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<tr>
<td>Renewables</td>
<td>23%</td>
<td>21%</td>
</tr>
<tr>
<td>Other</td>
<td>2%</td>
<td></td>
</tr>
</tbody>
</table>

– By 2050, EPRI sees 30% natural gas; Coal only with CCS; DR substantially reducing load.
– Studies performed prior to developments in shale fracturing for natural gas supply

• Bottom Line: All options require an investment. The transmission superhighway calls for a massive subsidy for one option: intermittent generation
And how loveable is a Superhighway, anyway?

- The heavy subsidization of automobile traffic was responsible for suburban sprawl, lack of mass transit investment and the collapse of urban centers.
Eastern Interconnection Transmission Planning Initiative – the EIPC

Energy Bar Association
64th Annual Meeting
April 29, 2010
EIPC Status

• EIPC structure in place
• 25 Planning Authorities signed (U.S. and Canada) with approximately 95% of the Eastern Interconnection customers covered
• Website launched – www.eipconline.com
• Stakeholder dialog on formation of Stakeholder Steering Committee (SSC) continues
• DOE announced $16M funding of interconnection studies proposal
DOE Project – Primary Tasks

• Establish an open and inclusive Stakeholder process with participation by all industry segments and state representatives (Topic B)
• Complete an integration of existing Regional plans to form an interconnection-wide model suitable for studies of the interconnection as a whole
• Develop potential “resource futures” through economic analyses conducted at the macro-level
• Complete interconnection-wide analyses of Stakeholder postulated resource scenarios including a transmission topology that supports those scenarios
DOE Project - Stakeholders

• Stakeholder process includes participation by states and industry segments, e.g. TOs, GOs, Alternative Resource Providers, NGOs, Consumer Advocates, ...

• Stakeholder Steering Committee - straw proposal includes:
  – Sectors based on regional stakeholder structures
  – Size - 20 to 30 range w/ 7 or 10 state and 1 Canadian seat
  – Caucus approach to selecting sector members
So, does anyone else feel that their needs aren’t being met?
DOE Project - Stakeholders

• Results of the April 22-23, 2010 Stakeholder Meeting ...
DOE Project – Study Results

- Roll-up and integration of regional plans for 2020
- 8 Macroeconomic resource “futures”
  - Input assumptions determined by states/stakeholders
  - Up to 9 sensitivities of input variables on each “future”
  - Provides useful information on future resource scenarios that are of interest for future transmission analyses
- 3 Future resource scenarios with fully developed transmission build-out options that meet reliability requirements
  - States agreement with resource scenarios to be studied
- 2 Project reports – June, 2011 and June, 2012
How EIPC Work Will Mesh with Regional Planning

- Analysis Team Refines Existing Models for EIPC Use
- Determine Scenario Proposals
- Workshop
- Study Scenarios
- Analysis Team Completes Work
- Develop Draft Summaries and Reports
- Public Input on Draft Reports
- Publish Final Reports

Sub-Process
Regional Planning Processes
EIPC Response in AD09-8

• **Question:** Whether additional reforms are necessary in these areas ... [regarding interconnection-wide studies]?

• **EIPC Response:** “The EIPC initiative is intended to provide the expertise and resources to utilize (“roll-up”) those Commission-accepted regional planning processes for the first ever, systematic effort to advance an Eastern Interconnection-wide transmission analysis and planning process. The EIPC initiative is in the early stage of development, but it will progress rapidly over the next year. As a result, the Analysis Team believes that additional reforms beyond Order No. 890 are not needed ... The Analysis Team believes that the Commission staff should support the EIPC effort and allow it time to mature.”
Questions and Discussion
ENERGY BAR ASSOCIATION MEETING

Washington, DC
April 29, 2010

Bob Pauley
Indiana Utility Regulatory Commission

The author’s views expressed herein do not necessarily represent the views of the Indiana Utility Regulatory Commission
Energy Bar Association
Events that Helped Shape the Current Discussion on Transmission Policy

1978 Second OPEC Oil Embargo and passage of Public Utility Regulatory Policies Act:
Required utilities to purchase power from non-utility generators at “avoided cost” prices.

1992 Energy Policy Act – Expressly permits the FERC to require utilities to transmit power through their systems for the benefit of other parties.

1996 California enacts “Retail Competition.” Several states follow over 4 years.

1996 FERC Order 888 & 889 – Creating Open “Fair” Access

1999 FERC - Regional Transmission Organizations


2005 Energy Policy Act: Intended to promote construction of new transmission, intended to have enforceable reliability standards, requires states to consider rate design, smart meters, and other matters.
Energy Bar Association Meeting
Transmission for State and U.S. Policy Goals

- Reliability
- Economic Efficiency
- Climate Change / Environmental
- Renewable Resources
- Demand / Price Response
- Energy Efficiency
- Energy Storage
- Smart Grid
Bar Association Meeting
Eastern Interconnection Study – A Midwest State’s Perspective
The Need For Prior Proper Regional Planning

• Reliability, Economy, and Policy Requirements such as energy efficiency, integration of variable resources, environmental constraints, smart grid,

• Coordinated Planning Across Planning Authority Seams

• Cost Allocation

• The Role of Third-Party Developers of Transmission and other Resources
"Everything that can be invented has been invented."

"I think there's a world market for about five computers."
Thomas J Watson, Chairman of the Board, IBM.

"There is no reason for any individual to have a computer in their home."

"Computers in the future may perhaps only weigh 1.5 tons"
Popular Mechanics, forecasting the development of computer technology, 1949.

"What use could this company make of an electrical toy?"
Western Union president William Orton, rejecting Alexander Graham Bell's offer to sell his struggling telephone company to Western Union for $100,000.

“The concept is interesting and well-formed, but in order to earn better than a "C," the idea must be feasible.”
A Yale University management professor in response to Fred Smith's paper proposing reliable overnight delivery service. Smith went on to found Federal Express Corp.

"The horse is here to stay, but the automobile is only a novelty...a fad."
A president of the Michigan Savings Bank advising Horace Rackham (Henry Ford's Lawyer), not to invest in the Ford Motor Co., 1903. Rackham ignored the advice, bought $5,000 worth of stock and sold it several years later for $12.5 million.
Energy Bar Association
Integration of Wind Resources
DOE’s View of Smart Grid

The Smart Grid Can Deliver

Benefits:
- Enhanced energy security
- Reduced greenhouse gases
- Improved urban air quality
- Increased grid asset utilization

"Valve Filling" (Energy for PHEVs)
Thou shalt have **Accurate pricing**

– Prices should reflect the costs to provide service to customers.

Thou shalt have **Efficient pricing**

– Rates should encourage utilities to provide service in an economically efficient manner and encourage efficient energy use.

Thou shalt have **Fair pricing**

– Customers should pay for the prudently incurred cost that the utility incurs on their behalf and customers should not have to subsidize other customers.

Thou shalt have **Simplicity in pricing**

– Rates should be as simple as possible so customers understand them but as complex as necessary to assure that the pricing is fair and accurate.

Thou shalt have **Non-Controversial pricing**

– To the extent possible, rates should be as non-controversial as possible.

Thou shalt have pricing that is **Administratively easy and enforceable.**

Thou shalt have pricing that provides an **Ability to Recover Adequate Revenue**

– The utility needs to have sufficient revenue to attract capital from investors.

Ok, it’s not on par with the 10 Commandments but developing “objective criteria” for evaluating the appropriateness of specific rate design and cost allocation is important.
Investment in Interstate Natural Gas Facilities and Regulatory Risk
Energy Bar Association

Interstate Natural Gas Facilities: Investment & Regulatory Risk

Chris Helms, Executive VP and Group CEO

April 29, 2010
Project Feasibility Factors

- Customer-driven
- Competitive advantage
- Financeable
- Regulatory framework
Case Study: Millennium Pipeline

- 1997 FERC filing for new, large diameter pipeline
  - Proposed new interconnect with TransCanada at Lake Erie border
  - Meet increasing demand in Northeast

- 2002 FERC approved

- 2005 Project reconfigured at FERC proposing interconnects in NY
  - Lengthy environmental review
  - Changed marketplace
  - Reduced length and size
Case Study: Millennium Pipeline
- 2007 FERC authorized construction
- 2008 Pipeline in service
Millennium Pipeline – Phase 1 & Phase 2
Case Study: Millennium Pipeline
- 2007 FERC authorized construction
- 2008 Pipeline in service
Traditional Flow of Gas - 2008
Major Shale Play Growth

![Shale Play Growth - 2025](Image)

- Fayetteville
- Marcellus
- Haynesville
- Barnett

BCFD

2005 2010 2015 2020
Change in Flow Due to Shale Supply
NG T&S Interconnectivity with Shale Supply
What External Factors Influence our Bias?

- 79 drilling rigs in the region now
  TPH Jan 2010 report
- Rigs estimated to increase to 200 by 2012
  TPH Jan 2010 report
- Between 250 and 500 Tcf estimated recoverable reserves
  250: DOE April 2009, 500: Penn State July 2009 study
- 9.8 million Acres estimated to be under lease
- 6 Bcf/day in pipeline expansions announced
- Significant processing and fractionation development under way
- Range’s technology is transforming drilling methods and cost

Estimated Marcellus Corridor Production
Bcf/day

Today’s U.S. Dry Production is 55 Bcf/day
Recent Columbia Gas Appalachian Expansions
Developing Columbia Gas Appalachian Expansions
Regulatory Risk

- FERC
  - Rate uncertainty
  - Climate change legislation uncertainty

- State level
  - Forced turn back of capacity
Balancing Risk, Reward and Regulation

The Impact of FERC Regulation on Natural Gas Infrastructure Development, Expansion and Management

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Disclaimer

- The views expressed in this presentation are those of the author only, and do not necessarily reflect the views of any particular client or of the author’s law firm.
Does FERC Regulation Help or Hinder Development of Natural Gas Infrastructure?

- Since the development of the Mobile-Sierra doctrine, natural gas regulation has recognized the role of private contracts in natural gas infrastructure development.
- For its part, FERC has presented potential shippers and new project developers with a broad array of tools to identify and manage the costs of new infrastructure and to minimize the potential impact of traditional cost of service regulation, particularly where prospective shippers have competitive alternatives.
Market Based Rates for New Storage Projects

- Following the mandate of the Energy Policy Act of 2005, FERC has acted to liberalize the standards applied to new natural gas storage projects seeking market-based rates.
Negotiated/Recourse Rates

- Many new pipeline projects have taken advantage of FERC’s policies regarding negotiated/recourse rates to establish rate stability and predictability.
- Even significant mainline expansion projects have been managed with anchor shippers paying negotiated rates.
- Negotiated recourse rates create a balance between pipelines and their customers and incorporate by definition an element of assumption of risk by pipelines.
The Effect of These Regulatory Initiatives is to Permit New or Expansion Project Developers to Anticipate and Manage Risk, Including Regulatory Risk

- Given the broad range of tools made available by the Commission, it cannot be said that developers and customers face “unpredictable” risks of changes in regulatory policy.
Is That The Whole Story?

- No major interstate natural gas pipeline providing transportation service has ever qualified for market-based rates, and with good reason.
- Many interstate pipelines wholly or in part face little risk of competition.
- Customer choice on traditional cost of service based systems is minimal.
- The unfinished regulatory initiatives of the unbundling era have left a legacy of inflated rates based on recovery of the costs of facilities long since abandoned, depreciated or otherwise made irrelevant.
Is That The Whole Story? (Cont’d)

- In some cases, pipeline rates have not been reviewed for a decade or more, resulting in returns that bear little resemblance to those available to other investments in current capital markets.
- Windfall profits based on stale rates can be the result.
Is Section 5 of the NGA the Answer?

- Currently, customers of electric transmission system have the right to file complaints against jurisdictional rates. When they do so, the Commission establishes a refund effective date.
- Section 5 of the Natural Gas Act does not extend this protection to natural gas shippers.
The Last Clean Rate Paradox

- How are shippers structurally disadvantaged by Section 5 of the Natural Gas Act?
- Assume the Commission reviews a pipeline’s annual Form No. 2 and concludes that the pipeline is attaining a 40% return on equity, using traditional cost of service regulation.
- The Commission initiates a Section 5 proceeding.
- Three months into the proceeding, the pipeline files a Section 4 rate increase, which is suspended for the maximum period, subject to refund.
- Unless the Commission grants interim rate relief in the Section 5 case prior to the expiration of the suspension period, when the new Section 4 rate increase takes effect, the prior rates become the last clean rates for refund purposes, thereby mooting the effectiveness of the Section 5 proceeding.
Translation

- This creates a “heads we win; tails you lose” advantage for interstate pipelines.
What Can Be Done?

- Unless the Commission reevaluates its approach to interim rate reductions, the primary action to create a level playing field would be to seek modification to Section 5.
- This would ensure that wholesale electric and natural gas markets play under the same rules.
Climate Change:
What Will the Future Bring?
The Congressional Debate on Climate Change Policy

Energy Bar Associations's Sixty-Fourth Meeting
Washington, DC
April 29, 2010

Manik Roy, Ph.D.
Vice President, Federal Government Outreach
Pew Center on Global Climate Change
www.pewclimate.org
Overview of presentation:

- Climate Policy 101
- US climate policy state-of-play
- Copenhagen Accord
Pew Center on Global Climate Change

Founded in May 1998
Independent, non-profit, non-partisan
Divided into five major program areas:
Scientific Studies/Analyses
Domestic and International Strategies
Outreach Activities
  • Business
  • States
Solutions
Communications
Climate Policy 101
80% of US greenhouse gas emissions are carbon dioxide from combustion of fossil fuels.

Therefore climate policy and energy policy are inextricably linked.
US energy policy must meet three interrelated challenges:

- To power continued economic growth
- To reduce US vulnerability to energy-related security threats
- To reduce risk of climate change and other environmental threats
Must pursue all energy options:

- Coal with carbon capture and storage
- Nuclear power
- Natural gas
- Renewable energy
- Energy efficiency and conservation
Climate policy measures

Options for reducing greenhouse gas emissions:

• Voluntary reduction programs
• Subsidies and tax cuts for R&D and deployment
• Command-and-control
• Tax
• Cap-and-trade
The Pew Center believes that cap-and-trade is a key element of an All-of-the-Above energy policy that meets our economic, security and environmental challenges.

Under cap-and-trade, industry and the private market – not the government – pick the winning energy sources and technologies.
U.S. Climate Action Partnership Partnership (USCAP)


- NGOs: Pew Center, Environmental Defense Fund, Natural Resources Defense Council, Nature Conservancy, World Resources Institute

- Calls for GHG cap-and-trade and other measures
Why would businesses want urgent enactment of climate legislation?

- Regulatory uncertainty inhibits investment
- Supreme Court has ordered EPA to regulate GHGs
- Avoid nuisance law suits
- State action
- Operating with cap-and-trade in Europe since 2005
- Want US to influence post-2012 international climate negotiations
- Convinced by climate science, concerned by increasing risk from climate impacts
US Climate Policy
State of Play
Federal policy progress to date

Not obvious even a year ago:

• Climate change a top priority of President Obama and Congressional leadership
• House passage of bill with GHG cap-and-trade
• Major GHG regulatory actions
• Major businesses (e.g., USCAP) advocating for GHG cap-and-trade
Key challenges:

• Much of U.S. public appreciates importance of climate action, but not urgency
• Climate change, and cap-and-trade in particular, have become tied up in partisan politics
• The economy
• Obama and Congressional attention on health care and wars
Waxman-Markey bill

House situation:

- Simple majority required for House passage
- Waxman committee has jurisdiction over most climate and energy regulation
- Waxman committee representative of full House
- 2008 Dingell-Boucher cap-and-trade bill a strong foundation
- Overwhelming Democratic majority in the House
- Powerful Speaker of the House
- Started early in the 2-year Congressional term
House-passed Waxman-Markey bill:

- Covers 85% of US emissions through cap-and-trade
- 17% below 2005 levels by 2020; 83% below by 2050
- 85% of allowances allocated (not auctioned), including to utilities, manufacturers
- 2 billion tons domestic & international offsets;
- Strategic reserve of allowances available if allowances prices rise above trigger price
- GHGs not regulated as criteria pollutants or hazardous air pollutants under Clean Air Act
- State GHG cap-and-trade programs on hold for 5 years
- Massive investment in coal future
Senate situation:

- 60 out of 100 votes required for Senate passage
- 59 Democrats in Senate, 20+ from states with strong manufacturing, fossil energy sectors
- Never was a partisan option for climate action
- 6 committees have jurisdiction over climate and energy
- Limited time left in Congressional term
Kerry-Graham-Lieberman framework (from reports):

• Electricity covered in 2012, manufacturing phased in, starting in 2016; linked fee for transportation fuel
• 17% below 2005 levels by 2020; 80% below by 2050
• Hard price collar controlling access to strategic reserve
• Pre-emption of EPA GHG regulations, state laws
• Drilling with state revenue sharing
• Massive investment in coal CCS
• Massive investment in nuclear power
Temporary relief will lead to bigger headaches:

• Regulatory uncertainty inhibits business investment

• China aiming to take lead in global clean energy market

• Continued foreign oil dependency

• State, court and regulatory action on GHG emissions

• Increasing risk from climate impacts
Final action

Four essential ingredients for success:

1. Successful resolution of EPA regulatory issue (Murkowski, Rockefeller)
2. Scope of program
3. Obama Administration leadership of legislative process
4. Re-engage broader Republican leadership
After Copenhagen
Copenhagen Process

15th Conference of the Parties to the UN Framework Convention on Climate Change (December 7-18, 2009):

• Pivotal issues in Copenhagen Accord were brokered directly by President Obama and key developing country leaders.
• Objections from a few governments kept the leaders' deal from being formally adopted.
• COP decided only to “take note” of the political accord, opening the way for governments to individually sign on.
• Also agreed to continue negotiating under UNFCCC and Kyoto Protocol toward a fuller agreement in late 2010 in Cancun.
• Struggle underway now over whether and how to integrate the Accord into the negotiations.
• Modest expectations for Cancun: operational decisions, no binding outcome.
Key elements of Copenhagen Accord:

- Aspirational goal of limiting global temperature increase to 2 degrees Celsius;
- Process for countries to their mitigation pledges by January 31, 2010;
- Terms for reporting and verification of countries’ actions;
- Commitment by developed countries for $30 billion in “new and additional” resources in 2010-2012 to help developing countries reduce emissions, preserve forests, and adapt to climate change;
- Goal of mobilizing $100 billion a year in public and private finance by 2020 to address developing county needs.
- Separate agreement to continue negotiating toward fuller agreement in late 2010 in Mexico.
50+ countries, including all major economies, have submitted pledges for 2020 targets/actions.

A few are unconditional:
- China and India “will endeavor” to reduce their carbon intensity by 40-45 percent and 20-25 percent
- Australia, Norway & the EU offered reduction targets (5 percent below 2000, and 30 percent and 20 percent below 1990, respectively), and pledged to go further if there is a stronger deal

However, most countries’ pledges are conditional:
- US target “in the range of” 17% below 2005 contingent on legislation
- Other countries’ targets are contingent on reaching an ambitious international agreement
- Most developing country pledges are contingent on support from developed countries
www.pewclimate.org
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I. INTRODUCTION

For at least a decade, states have exercised de facto national leadership on climate change policy development. Through comprehensive planning, intensive fact-finding, and stakeholder based consensus building, they have developed and refined a broad range of laws and policies intended to advance climate, energy and economic policy objectives simultaneously. The recommended portfolios of actions derived from this work, involving more than half of all U.S. states and all regions and the formal participation of more than 1,500 stakeholders and technical experts, show the potential of appropriately crafted measures to expand the economy and create jobs, reduce energy conflicts and improve energy security, build businesses and stimulate new investment, foster new technologies and management practices, protect households and businesses from high and fluctuating energy prices, and reduce emissions of greenhouse gases as well as other pollutants.

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At the federal level, we are now in the middle of a congressional debate about how to craft a national climate change program. Depending on its final resolution, that program could displace this state leadership and stakeholder consensus or enhance it. Proposed federal cap-and-trade legislation, combined with other national measures, could substantially reduce greenhouse gas emissions by 2050. The House narrowly passed a bill based on this policy architecture, the American Clean Energy and Security Act, in 2009, without Republican support. Several months later, the Senate Environment and Public Works Committee approved a similar bill along partisan lines.

Later, Senators John Kerry, Joseph I. Lieberman, and Lindsey O. Graham announced that they would introduce a completely new bill that significantly departs from previous legislation approved in the House and the Senate Environment and Public Works Committee. And Senator Bingaman introduced comprehensive energy legislation without a cap and trade system based on action taken by the Senate Energy and Natural Resources Committee. As of this writing, the passage of any of these bills is possible. All have in common the desire to find alternate approaches to the Waxman-Markey bill and or US EPA regulation, but do not provide for a continued or enhanced role for sub national policy.

The Waxman-Markey bill and Senate bills are based on recognition of the urgency of the need to reduce greenhouse gas emissions, the responsibility of the U.S to do its fair share, and the opportunity to capture low cost, high co-benefit opportunities that could advance economic, energy and environmental security in the United States. Until 2009, this country was the major historical contributor to the increased atmospheric concentrations of greenhouse gas emissions since the pre-industrial era. The United
States is also expected to play a key international role in addressing this issue, as evidenced by its lead role at the December 2009 meeting of the conference of the parties to the United Nations Framework Convention on Climate Change in Copenhagen. China has now become the major world emitter of greenhouse gases, and developing nations are expected, in aggregate, to contribute 90 percent of the future growth in total greenhouse gas emissions under business as usual projections. This trend heightens the perceived need in the U.S. Senate for all nations to reduce their greenhouse gas emissions, and also for the U.S. to demonstrate leadership.

Proactive bills in the Congress, as well as actions by the President, indicate that the need for a strong federal role for emissions management. However, the need to maintain and expand a meaningful role for states and localities is not nearly as evident, and could be an Achilles heel for a federal program. The current focus on the federal government as the means for managing climate change responses departs from the way Congress proceeded in the 1970s in response to environmental improvement needs. The “cooperative federalism” legislation of that period—the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Surface Mining Control and Reclamation Act, among others—did not federalize environmental law or create a federal environmental agency with plenary authority over rulemaking, program administration, permitting, and enforcement. Rather, it crafted a balanced compromise between state and federal authority borne of the practical need for institutional cooperation. The federal government was given the authority to promulgate national standards, to provide financial incentives to the states to improve the quality of their programs, and to authorize the states to keep implementing their programs as long as they met federal
standards. Frequently the federal statutes of this era were modeled on existing state programs and were developed to preserve those programs and expand them to cover the nation.\(^2\) As a result, states increased the number and quality of personnel enforcing their environmental programs, and created a legal system in which the vast majority of permit decisions and enforcement actions are made by the states in coordination with both federal and local governments.

We have previously demonstrated that Congress could employ a comprehensive approach to climate change that integrates all sectors of the economy and all levels of government (particularly the states), and uses a variety of price and non-price policy instruments to address climate change at the lowest possible cost and with the greatest co-benefits (including energy, economic and environmental security).\(^3\) In this article, we elaborate on and clarify two aspects of this observation. Section II explains why states and localities need to be full partners in a national climate change effort to achieve these goals. A large share of the lowest cost and highest co-benefit reduction actions are in areas that a federal cap-and-trade program or other purely federal measures will not easily reach, and where the states have traditionally exercised their powers—including land use, building construction, transportation, and recycling. The economic recovery and

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expansion will require direct state and local management of climate and energy actions to reach full potential and efficiency. And, the need for continuity and flexibility in a decades-long national climate change effort that will require localized innovation and implementation.

Section III describes in detail a proposed state climate action planning process. We conclude that this state planning process – based on a proven template from actions taken by many states -- provides an opportunity to achieve cheaper, faster, and greater emissions reductions than federal legislation or regulation alone would achieve. It would also realize macroeconomic benefits and noneconomic co-benefits, and would mean that the national program is more economically sustainable. We could optimize national commitments by effecting a transition from the states as leaders to the states as partners with the federal government.

Comprehensive new federal legislation is not the only avenue available to the federal government on climate change. With the Supreme Court’s 2007 decision in *Massachusetts v. Environmental Protection Agency*, EPA has the authority to regulate greenhouse gases as air pollutants under the Clean Air Act. EPA has begun to use that authority for both motor vehicles and stationary sources. On December 15, 2009, EPA finalized findings that are necessary to regulate motor vehicle emissions under Section 202(a): 1) current and projected concentrations of six key greenhouse gases in the atmosphere threaten the public health and welfare of current and future generations, and 2) the combined emissions of greenhouse gases from new motor vehicles and motor vehicle engines contribute to the atmospheric concentrations of these gases and hence to the threat of climate change. The findings require EPA to regulate greenhouse gases from motor vehicles, but do not establish regulatory standards for motor vehicles. On Sept. 28, 2009, EPA and the Department of Transportation proposed a regulation to increase corporate average fuel efficiency (CAFE) standards to a fleetwide average of 35.5 miles per gallon by 2016. The government estimates that these proposed standards would reduce GHG emissions from the U.S. light-duty fleet by 21 percent by 2030 over

\[ \text{549 U.S. 497 (2007).} \]
\[ \text{52 U.S.C. § 7401 et seq.} \]
\[ \text{On December 15, 2009, EPA finalized findings that are necessary to regulate motor vehicle emissions under Section 202(a): 1) current and projected concentrations of six key greenhouse gases in the atmosphere threaten the public health and welfare of current and future generations, and 2) the combined emissions of greenhouse gases from new motor vehicles and motor vehicle engines contribute to the atmospheric concentrations of these gases and hence to the threat of climate change. The findings require EPA to regulate greenhouse gases from motor vehicles, but do not establish regulatory standards for motor vehicles. \text{74 Fed. Reg. 66,496 (Dec. 15, 2009) (Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act).} \text{On Sept. 28, 2009, EPA and the Department of Transportation proposed a regulation to increase corporate average fuel efficiency (CAFE) standards to a fleetwide average of 35.5 miles per gallon by 2016. The government estimates that these proposed standards would reduce GHG emissions from the U.S. light-duty fleet by 21 percent by 2030 over} \]
agencies, could expand use of existing authority to provide assurance of broad-based greenhouse gas management even if comprehensive federal legislation directed specifically at the issue of climate change is not passed. However, federal agency actions would not necessarily bring states and localities into full partnership with the federal government or optimize the use of jurisdictional capacity.

A national climate change program -- whether it occurs through comprehensive legislation, piece-by-piece legislation, and/or application of the existing Clean Air Act

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7 Under the Clean Air Act, new and modified major sources must undergo Prevention of Serious Deterioration (PSD) permitting. PSD permit requires application of “best available control technology” (BACT) to limit emissions of “regulated new source review (NSR) pollutants.” 40 C.F.R. § 52.21(b)(50). EPA does not consider GHG emissions to be “regulated NSR pollutants” under the PSD program because GHG emissions have not, thus far, been subject to regulation requiring control under the Clean Air Act. But when EPA finalizes the light-duty motor vehicle rule, that rule will trigger PSD applicability for GHG emissions. New power plants and major modifications of existing plants will then be subject to BACT requirements for carbon dioxide and other greenhouse gases. On Oct. 27, 2009, EPA proposed a “tailoring rule” to establish a 25,000-ton threshold for applying PSD rules to stationary sources of greenhouse gas emissions. 74 Fed. Reg. 55,292 (Oct. 27, 2009) (Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule). EPA says the 25,000-ton threshold is needed to prevent thousands of sources—including schools, hospitals, and small businesses—from having to undergo PSD permitting because their emissions are greater than the 250-ton-per-year threshold that would otherwise apply for PSD. For sources emitting fewer than 25,000 tons, EPA proposes to delay a decision on applying PSD requirements for six years. After that, EPA could apply streamlined permitting requirements. Id. More recently, EPA Administrator Lisa Jackson announced that the final rule would likely apply initially only to facilities with significantly higher emissions than 25,000 tons. Steven D. Cook and John Sullivan, Jackson Expects Tailoring Rule Threshold To Be ‘Substantially Above’ 25,000-Ton Level, Daily Environment Rep. (BNA), Feb. 23, 2010, http://0-news.bna.com.libcat.widener.edu/deln/DEL_NWB/split_display.adp?fedfid=16337280&vname=dennotallissues&fn=16337280&id=a0c2d2x5n2&split=0. In response, Senator Murkowski has introduced a “resolution of disapproval” to vacate the endangerment finding by US EPA, and Senator Rockefeller introduced a bill placing a two year moratorium on US EPA authority to regulate greenhouse gases. While these resolutions and bills are not likely to be enacted, they appear to be motivated more by concern over the impact of the endangerment finding on stationary sources than its impact on mobile sources. Steven D. Cook, House Republicans to Introduce Measure To Reverse EPA on Greenhouse Gases, Daily Environment Rep. (BNA), March 2, 2010, http://0-news.bna.com.libcat.widener.edu/deln/DEL_NWB/split_display.adp?fedfid=16359563&vname=dennotallissues&fn=16359563&id=a0c2e4p7t9&split=0.


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and other federal agency authority -- will occur in a context in which the most progressive states on climate change issues are already exhibiting greater technical sophistication and willingness to take serious action than they likely exhibited before the environmental statutes of the 1970s were adopted. The high level of state action on climate change over more than a decade is commonly explained is a response to the weak federal effort -- a necessary effort to fill a vacuum. When the federal government finally intervenes in a comprehensive way, many have said, the state role can and should recede. However, states and localities have acted with the intent of forging federal cooperation and to advance their own interest in moving to the new clean energy economy and attain valued co-benefits such as human health protection. As a result, it is not clear why states drop out of their major role in climate policy development and implementation. After all, if the state role did not recede with the adoption of federal environmental laws at an earlier time -- when the states were less willing to take action, more prone to regulatory capture, and less sophisticated -- it is even more difficult to see why the state role should recede with significant federal action on climate change.

II. WHY STATES SHOULD CONTINUE TO PLAY A MAJOR ROLE IN THE NATIONAL CLIMATE CHANGE EFFORT

State actions relating to climate change are growing in sophistication and importance. They are redirecting their economies toward new energy development and job creation, using comprehensive climate change action plans to identify and implement cost-effective measures that reduce greenhouse gas emissions and create other co-benefits. Some are requiring the direct reduction of greenhouse gas emissions while
others couple greenhouse gas reduction as byproduct of other policies. California’s Global Warming Solutions Act sets a goal of reducing the state’s greenhouse gas emissions to 1990 levels by 2020, and the state is working toward an ambitious economy-wide cap-and-trade program to implement that law. Thirty-four states that cover two thirds of the nation’s population and economy have developed or are in the process of developing comprehensive climate change plans, calling for a balanced portfolio of measures to reduce greenhouse gas emissions in all economic sectors, using a combination of policy instruments. Many states are encouraging energy efficiency and conservation through tax incentives, home and business weatherization programs, new building codes, and other programs and many others are advancing clean and renewable energy supplies, transportation improvements, and natural resource conservation through these plans.

Several states have been involved in regional cap and trade initiatives intended to script federal cap and trade policy. Ten northeastern and mid-Atlantic states participate in the Regional Greenhouse Gas Initiative (RGGI), which has developed a model rule to establish a cap-and-trade program for electric utilities. The Western Climate Initiative

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9 Cal Health & Safety Code § 38500 (2007). The task of choosing legal and policy tools to meet that goal generally is assigned to the California Air Resources Board. Id.
11 These plans are collected and can be accessed through the website of the Center for Climate Strategies. http://www.climatestrategies.us/
13 Regional Greenhouse Gas Initiative, Model Rule and Amended Memorandum of Understanding, http://www.rggi.org/modelrule.htm (last visited Sept. 21, 2007). The ten states are: Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, Vermont, Massachusetts, Rhode Island, and Maryland. The overall environmental goal for RGGI is for each state to adopt a carbon dioxide trading
(WCI) involves seven states and four Canadian provinces in a regional emissions cap for multiple economic sectors and a cap-and-trade system.\(^{14}\) The Florida legislature has directed that state’s Department of Environmental Protection to develop a cap-and-trade program for carbon dioxide emissions\(^{15}\) from power plants and the State Climate Plan has recommended that this policy be implemented by joining either WCI or RGGI.\(^{16}\)

The Midwestern Greenhouse Gas Reduction Accord is a 2007 agreement among six Midwestern states and one Canadian province to establish a cap-and-trade program to reduce greenhouse gas emissions along with a series of other regional policies and measures.\(^{17}\) Finally, thirty-nine states, the District of Columbia, all twelve Canadian provinces, six Mexican states, and four Indian tribes are members of The Climate Registry, which is developing a common set of criteria for registering measures to reduce emissions in anticipation of a cap-and-trade program.\(^{18}\)

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\(^{14}\) Western Climate Initiative, http://www.westernclimateinitiative.org/Index.cfm (last visited Feb. 28, 2010). The WCI is comprised of seven western States (Arizona, California, New Mexico, Montana, Oregon, Utah, and Washington) and four Canadian provinces (British Columbia, Manitoba, Ontario, and Quebec). The goal of the WCI is to reduce greenhouse gas emissions by 15% from 2005 levels by 2020. The Governor of Arizona recently announced her intention to have Arizona withdraw from the cap-and-trade part of the WCI. Sindya N. Bhanoo, *Arizona Quits Western Cap-and-Trade Program*, NEW YORK TIMES, Feb. 11, 2010, http://www.nytimes.com/2010/02/12/science/earth/12climate.html. Six other states, two Canadian provinces, and six Mexican states are observers to WCI.

http://www.westernclimateinitiative.org/Index.cfm (last visited Feb. 28, 2010).

\(^{15}\) FL HB 7135.


The scope of state climate change actions is also expanding beyond clean energy and reduction of greenhouse gas emissions. States are beginning to create legal structures and programs for long term carbon storage (or carbon sequestration), including both terrestrial (forestry and agriculture) and geological sequestration. Conscious of the risks they face as the climate changes, many states are engaged in adaptation planning. State insurance regulators are beginning to take climate change risks into consideration. And many ongoing efforts that have had other goals, such as land use and smart growth as well as waste reduction and recycling, are being reframed to include greenhouse gas reductions and adaptation as additional objectives.

These efforts will almost certainly continue and intensify in the absence of a national climate change program. Yet a federal program, either through legislation or regulation, is necessary for several reasons in order to achieve a full level of national effort that addresses economic and energy needs. To begin with, a serious effort requires national goals for greenhouse gas emissions reduction to guide that effort. National goals cannot be set by states, whether they act individually or regionally. In addition, a serious

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19 Montana is the first state to have adopted carbon sequestration legislation. 2009 Montana Laws ch. 474. Other states are studying options and considering appropriate legal structures and institutions. See, e.g., PENNSYLVANIA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, GEOLOGIC CARBON SEQUESTRATION OPPORTUNITIES IN PENNSYLVANIA (2009) available at http://www.dcnr.state.pa.us/info/carbon/mastercstareport2.pdf.


21 The National Association of Insurance Commissioners, which represents state insurance regulators, has adopted a requirement that larger insurances describe the climate change risks to which they are exposed and how they are addressing those risks. National Association of Insurance Commissioners, Insurance Regulators Adopted Climate Change Risk Disclosure (March 17, 2009), http://www.naic.org/Releases/2009_docs/climate_change_risk_disclosure_adopted.htm. There is also growing awareness of the potential for considerable litigation over insurance coverage for climate change related risks. Jeffrey W. Stempel, Insurance and Climate Change Litigation, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 230 (William C.G. Burns & Hari M. Osofsky eds. 2009).

22 See, e.g., Patricia Salkin: Blending Smart Growth With Social Equity and Climate Change Mitigation, in AGENDA FOR A SUSTAINABLE AMERICA 349, 350 (John C. Dernbach ed. 2009).
effort to address climate change requires an economy-wide price on carbon through a cap and trade program or a national carbon tax that can only be achieved through federal action. A national program also is needed to prevent “leakage” or negative displacement effects -- where reductions in emissions in one state are offset by corresponding increases in a second state with no cap or other regulatory program. Finally, because climate change is a global problem, because the United States is a party to the United Nations Framework Convention on Climate Change, and because the United States is expected to play an international leadership role in addressing this issue, a national program is needed to give the U.S. a credible foundation for its negotiating position. While these objectives can be achieved using existing Clean Air Act authority, legislative action is preferable because it will reduce uncertainties, short-cut litigation and provide added legitimacy to the federal action.

Senators Kerry, Lieberman, and Graham, in their work toward a bipartisan legislative approach to climate change, have reached a similar conclusion:

By failing to legislate, Congress is ceding the policy reins to the EPA and ignoring our responsibility to our constituents….The absence of national greenhouse gas emissions standards has invited a patchwork of inconsistent state and regional regulations. Since it is not reasonable to expect businesses to comply with fifty different standards, it is imperative that a federal pollution control system be meaningful and be set by federally elected officials.23

On many issues (such as fuel economy standards for motor vehicles, greenhouse gas emission standards from motor vehicles and stationary sources, energy efficiency standards for appliances and equipment), federal rules applicable to the entire country

will be more effective and efficient than the business-as-usual alternative--of climate change rules that can vary from state to state\textsuperscript{24} and no rules in other states. Still, even with a strong national climate change program, the states will need to play a continued and growing role on climate change. This is so for at least seven reasons:

1. \textit{To increase the effectiveness of a federal climate change program, especially in reducing greenhouse gas emissions.} A great deal of climate change mitigation will need to occur in areas where the state (and local) governments have historic police power or economic development responsibilities -- including “land use regulation; building codes; transportation infrastructure and management; utility regulation; and the regulation of agriculture, forestry, and non-hazardous waste handling and reduction, and other sector based programs.”\textsuperscript{25} Federal regulation of stationary sources and motor vehicles, or even a broader price signal for carbon represented by cap-and-trade legislation or a carbon tax, is not likely to address all of these areas since many of the most cost effective approaches require non-price mechanisms typically used or formulated through state or local authority.

In addition, a price signal provided by cap-and-trade or carbon tax legislation would not address some major sources of greenhouse gas emissions. A cap-and-trade or carbon tax system would lead to a price on carbon that would have ripple effects

\footnotesize{\textsuperscript{24} The Senators’ fear of businesses being unable to operate under varied state standards is overblown. The states’ formation of regional efforts and attempts to coordinate their efforts has resulted in a convergence of state programs. In addition, in virtually every environmental program and in many other realms, such as banking and consumer credit, states are allowed to adopt their own sets of regulations, which can differ from the federal regulations. Nevertheless, without federal oversight, some states will adopt no regulation at all. A federal floor is also necessary to prevent the problem of leakage. And it is almost certainly true that a federal program will result in greater national uniformity on matters relevant to interstate business, even with the state planning process proposed in this article, than the current approach.}

\footnotesize{\textsuperscript{25} \textit{New Climate World, supra} note 9, at 779.}
throughout the economy and lead to greater use of energy efficiency, energy conservation, and renewable energy in areas that are price responsive. Yet because of market imperfections, many mitigation actions are not responsive to price due “split incentives” and other behavioral barriers.

For example, consumers often do not purchase more energy efficient products or invest in energy conservation in their homes because they undervalue the economic savings of those products or they lack the capital to purchase these products and improvements. A carbon price by itself is not likely to change that. In addition, the person with the ability to achieve greater energy efficiency (e.g., landlord) is frequently not the person who pays the energy bills (e.g., tenant) – a split incentive. The incentive, in other words, is not directed at the person with the ability to make decisions that will reduce greenhouse gas emissions and may not lead to efficient responses. States and localities have considerable experience with, and authority over, many of these policy tool issues.

Many states, including but not limited to California, have enjoyed considerable success in increasing the efficiency with which electricity is used. Even if cap-and-trade or carbon tax policy is supplemented with federal efficiency standards (e.g., a requirement for more energy-efficient state building codes for new buildings), many state and local governments have considerable experience with renovation and upgrade of existing buildings. States also have the ability to address the landlord-tenant incentives

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27 Id. at 30.

28 Id.
problem by redirecting or modifying the incentives in various ways. Finally, the transition from the status quo to a major federal program needs to be handled so as to prevent a loss of continuity and momentum from existing state programs. The best way to do that is maintain as much of the existing state law and program infrastructure as possible.

2. To reduce the cost of the regulatory program for greenhouse gas emissions. State programs can reduce the cost of a cap-and-trade or carbon tax program, especially through energy efficiency and conservation. Energy conservation and efficiency, and resolution of the split incentive issue, do not simply provide greater greenhouse gas emission reductions; they also reduce costs. In California, for example, per capita electricity consumption has been nearly flat since the early 1970s, and is now 40 percent below the national average, thanks to a range of energy efficiency measures that saved households $56 billion between 1972 and 2006.29 By allowing California households to redirect their expenditures toward other goods and services, the state has also helped create about 1.5 million full-time-equivalent jobs that have a total payroll of $45 billion.30

States can also reduce the cost of a cap-and-trade or carbon tax program because the higher level of detail in policy analysis available at the state level enables them to identify and implement specific policies that would likely be missed by Congress. Because Congress and even EPA tend to look for the largest sources and problems, states can address a variety of climate change problems that may each be small but that would

30 Id. at 4.
cumulatively be significant in reducing greenhouse gas emissions and that would have a low or even negative cost (that is, there economic benefits outweigh their costs). State climate change planning processes also have the ability to examine all sector areas for a particular state—transportation and land use; agriculture, forestry, and waste; residential, commercial, and industrial; and heat and power—\(^{31}\) in light of the particular circumstances of that state—something that is virtually impossible to do at the national level. Because of their greater sensitivity to local behavior and customs, state governments can engage their citizens to reduce their own greenhouse gas emissions in ways that would be more difficult for the federal government alone.\(^{32}\)

States can also reduce costs by modifying laws in ways that will make the price signal from cap-and-trade or carbon tax more effective. In many cases, existing state laws make it harder to use energy more efficiently, discourage energy conservation, impede the development of renewable energy, and in other ways make it harder to reduce greenhouse gas emissions. These include, for example, land use laws that foster single-use zoning, tax laws that keep tax revenues (including property tax revenues) within the municipality in which they were generated, and the proliferation of many virtually autonomous local governments in metropolitan areas—all of which contribute to unsustainable land use and transportation patterns and reduce economic opportunities for low income people.\(^{33}\) State and local governments can help remedy this by modifying

\(^{31}\) New Climate World, supra note 9, at 825. This analysis by the Center for Climate Strategies scaled up the cost effectiveness analysis conducted in 20 state climate planning processes from states representing all regions of the nation.


\(^{33}\) Jonathan D. Weiss, Local Governance, in STUMBLING TOWARD SUSTAINABILITY 683 (John C. Dernbach ed. 2002).
their laws to promote multiple-use zoning, smart growth and greater regional governance.\textsuperscript{34}

Similarly, state public utility laws tend to reward utilities for the amount of electricity that they sell without providing incentives to either the buyer or the utility to implement measures to encourage conservation.\textsuperscript{35} Because of such laws, greenhouse gas reductions will have a higher cost than they would otherwise, and will be smaller than they would otherwise be. States can modify these laws in many ways. States can require, for example, that utilities provide more information to the consumer, or require utilities to promote energy conservation and efficiency. States can also adopt net metering laws that would require utilities to compensate providers of additional energy (e.g., the excess electricity generated by a home solar system) the same price for this energy as they charge utility customers. In addition, states can require billing to be based on time of use coupled with use of smart meters. These modified laws would allow emissions associated with electric generation to be reduced at a very low or zero cost. Without these modifications, much higher allowance prices and correspondingly high electric prices would likely be required to achieve the same level of emissions reduction.

States can also adopt mechanisms to assist in the financing of building energy efficiency improvements or alternative energy generation facilities. For example, the states of Vermont\textsuperscript{36} and Delaware\textsuperscript{37} have both created sustainable energy utilities ("SEUs"). SEUs provide funding for energy efficiency and conservation and sustainable

\textsuperscript{34} Jonathan D. Weiss, \emph{Local Governance and Sustainability: Major Progress, Significant Challenges, in AGENDA FOR A SUSTAINABLE AMERICA}, supra note 23, at 43, 52.

\textsuperscript{35} Hethie Parmesano, \emph{Rate Design Is the No. 1 Energy Efficiency Tool}, \emph{ELECTRICITY J.}, July 2007, at 18.

\textsuperscript{36} See, e.g., Efficiency Vermont, About Us, \url{http://www.efficiencyvermont.org/pages/Common/AboutUs/} (last visited March 2, 2010) (explaining that Efficiency Vermont “is the nation’s first statewide provider of energy efficiency services,” and is funded through a charge in everyone’s electricity bill.

\textsuperscript{37} See 29 Del. Code § 8059 (creating the Delaware Sustainable Energy Utility); see also, Delaware Sustainable Energy Utility website, \url{http://www.energizedelaware.org/about-us} (last visited Feb. 28, 2010).
energy investments for homes, businesses, nonprofit organizations and municipalities that might not otherwise be able to obtain the needed capital.\footnote{For example, municipalities might be unable to generate capital because of bond caps. Pooling financing can make investments feasible where financing costs for individual investments might be excessive. Frequently, homeowners sell homes before investments in energy efficiency and alternative energy can be paid back and neither real estate markets nor mortgage approval protocols adequately reflect the cost savings of energy efficiency investments.} The loans made by the SEU on these cost effective investments can be repaid through energy savings and can be secured by obligations to pay the utility, just as other utility charges are paid. A growing number of municipalities have established property assessed clean energy ("PACE") programs. In a PACE program, a public entity provides the financing for a solar roof or another renewable energy investment. The obligation to repay the costs is secured by a voluntary tax assessment, a utility charge, or another mechanism that establishes a lien that will run with the property.\footnote{See, e.g., Cal Health & Safety Code § 38500 (2007) (authorizing PACE program); http://www.bootsontheroof.com/blog/2010/02/11/pace-program-approved-san-francisco/ (San Francisco, collecting examples of other programs).} These mechanisms rely upon tax and utility assessments, which are matters exclusively within the traditional purview of local governments. By reducing market barriers, these mechanisms facilitate investments that will produce emissions reductions at a negative cost. Like modification of state laws that create barriers to greenhouse gas reductions, these mechanisms would reduce the cost of greenhouse gas emissions reductions and the price of allowances.

3. To maximize the other benefits of greenhouse gas emission reductions. It has been known for some time that state actions to address climate change create jobs, contribute to economic development, improve the quality of life in communities, protect both the poor and business from impact of high and fluctuating energy prices, improve human health and environmental quality by reducing other pollutants (such as sulfur
dioxide) that are emitted with greenhouse gases, and foster energy independence.\(^{40}\) States have a particular interest in creating those co-benefits because they are experienced at the state or local level, which means that state officials may be rewarded politically for creating them. The benefits of reducing greenhouse gas emissions, by contrast, are diffused throughout the entire planet. Thus, maintaining state programs is a powerful way to maximize the co-benefits of a national climate change effort that includes the states as strong partners.

In addition, while a cap-and-trade or carbon tax program can reduce the costs of emissions control for price responsive actions, such a program is less likely to lead to more immediate environmental, social, and economic co-benefits. As experience with the Clean Development Mechanism under the Kyoto Protocol shows, buyers of emissions allowances are primarily interested in reducing their costs, not in fostering or capturing the other benefits that may come from a use of a particular policy or measure.\(^{41}\) Put differently, the price reduction mechanism in cap-and-trade does not effectively capture non-price and non-carbon values. These limitations in a stand-alone cap-and-trade program strengthen the case for maintaining and enhancing state authority to adopt policies and measures that would generate substantial co-benefits.

4. To provide a continued source of legal and policy innovations that could be employed at the state, regional, or national level. Many of the most thoughtful and effective policy innovations in climate change in recent years, including renewable electricity portfolio standards, net metering, SEUs, and PACE programs, have been

\(^{40}\) Moving the Climate Debate from Models to Proposed Legislation: Lessons from State Experience, supra note 2.

demonstrated and refined at the state level, and state innovation continues to occur. The complexity, scope, and long duration of the climate change issue make it essential that state (and local) government efforts continue. As Professor William Buzbee has observed, “[r]etaining a diversity of actors and latitude for diverse regulatory arrangements can...serve to foster ‘democratic experimentalism’ and ‘learning by monitoring,’ with others able to learn from benchmarked best practices.”42 As already noted, state regulatory programs have served as models for many of our most far-reaching federal environmental statutes.43

The idea that states should serve as laboratories for social and economic policy is often traced back to the famous dissenting opinion of Justice Louis Brandeis in the 1932 case of New State Ice v. Liebmann.44 In that case, the court overturned, on substantive due process grounds, an Oklahoma law that established a licensing system for ice manufacturers and distributors. As Kirsten Engel and Mark Miller have pointed out, the dissent was not based on state autonomy but rather reflects a theory on the role of knowledge in solving difficult social problems.45 The case was decided during the Great Depression, a time of considerable uncertainty about whether more regulation or less regulation represented the best approach to economic recovery. Brandeis did not dissent because he believed Oklahoma had the right answer on how the ice industry should be regulated, “but rather because he did not know the answer, and he was skeptical that others (including those who would limit regulation in the name of substantive due

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43 See supra note 3 and accompanying text.
45 Kirsten H. Engel and Marc L. Miller, State Governance: Leadership on Climate Change, in Agenda for a Sustainable America 442, 452 (John C. Dernbach ed. 2009).
process) had the truth more firmly in their hands.\footnote{46 \textit{Id.}} State policy experiments such as that in Oklahoma, he believed, would have shed light on the question.

Climate change is also a problem of enormous complexity, and a wide variety of approaches have been articulated for addressing it. While Congress may decide to adopt a particular approach to greenhouse gas regulation, continuing state efforts to address climate change are likely to lead to further innovations. Rather than prevent the states from doing that, as the Supreme Court did in \textit{Liebman}, Congress should encourage and support continuing innovation.

5. \textit{To prod and encourage continued improvement in the federal program.} There is a well-known tendency on the part of legislatures, particularly for complicated statutes that raise a host of contentious issues, to not revisit them in any substantial way. Yet it is highly unlikely, with the speed and rapidity of developments in science, technology, economics, and law relevant to climate change, that simply staying on course will be appropriate. It is thus essential that the legislation contain “adaptive management” mechanisms that allow or even cause decision makers to reflect on experience under climate regulation and consider ways to make it more effective.\footnote{47 John C. Dernbach, \textit{Navigating the U.S. Transition to Sustainability: Matching National Governance Challenges with Appropriate Legal Tools}, 44 TULSA L. REV. 93 (2008).} Maintaining the full engagement and participation of states in the implementation of this program is one way to do that.

A number of legal mechanisms for achieving this result are already in place. The fundamental mechanism for states to achieve National Ambient Air Quality Standards (“NAAQS”) under the Clean Air Act is the development of state implementation plans

\footnote{46 \textit{Id.}}
\footnote{47 John C. Dernbach, \textit{Navigating the U.S. Transition to Sustainability: Matching National Governance Challenges with Appropriate Legal Tools}, 44 TULSA L. REV. 93 (2008).}
into which states can incorporate a wide variety of mechanisms to control air pollution. In addition, it is generally the rule, rather than the exception, for federal environmental laws to permit states to adopt standards that are more stringent than federal standards, acting as a floor and not a ceiling. Thus, even when the Clean Air Act preempts state automobile emissions, it provides a mechanism to preserve some state experimentation through the “California waiver.” California’s legal authority under the Clean Air Act to adopt more stringent motor vehicle emission regulations than EPA has worked as a continual prod to EPA to improve national regulation of motor vehicles. Under the Clean Air Act, all states but California are preempted from adopting more stringent standards, but California’s standards can be adopted by other states. In consequence, about one-third of U.S. cars are California cars. These approaches are not the only approaches available to foster continued improvement, but are illustrative of the ways in which federal law can use state efforts to foster continued improvement in the national program.

6. To check against possible federal regulatory failure. The length of the federal effort needed to address climate change is suggested by the bills now before Congress, which require steep emission reductions in the forty-year period between now and 2050. Yet the effort is likely to last much longer, both because further reductions may be needed, and because of the continuing need to adapt to new circumstances (including the effects of changes in the climate). We have little if any experience as a nation

48 See, CAA § 110, 42 U.S.C. § 7410,
49 42 U.S.C. § 7507,
maintaining progress toward a specific goal over such a period.\textsuperscript{52} And we have repeatedly seen Presidential administrations reduce funding and attention for existing programs in order to make room for the new programs they support, and policies that become fashionable and then fall out of fashion as the public or policy makers lose interest. These tendencies, of course, are not conducive to maintaining the continuity or momentum of a national climate change effort over two or more generations. There may also be design or implementation failures in national climate change legislation; the cap may prove to be too high, the forty-year effort to reach the cap may prove to be too slow, or there may be delays in implementing the program.\textsuperscript{53} If that happens, state (and local) government climate change efforts would reduce greenhouse gas emissions beyond the reductions required by federal law and could help stimulate support for amended legislation.\textsuperscript{54}

In addition, because federal law could also fail because of a lack of enforcement; “[e]mpowering state and local governments to play their own supplementary role in enforcing the law could be the equivalent of additional cops on the beat.”\textsuperscript{55} As our experience during the past decade has shown, when states provided a counterweight in the absence of meaningful federal effort, future state climate efforts would help limit the effect of future federal backsliding. Indeed, that is exactly what has happened with federal implementation of the Clean Air Act and other environmental laws during federal administrations that have been reluctant to enforce those laws or even hostile to them. Put differently, the employment of both state and federal regulatory authority will make it

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{52} Navigating the U.S. Transition to Sustainability, supra note 48, at 99-100.
\item \textsuperscript{53} Buzbee, supra note 43, at 26-34.
\item \textsuperscript{54} \textit{Id.} at 53.
\item \textsuperscript{55} \textit{Id.}
\end{itemize}
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impossible for those resisting climate change efforts to succeed simply by opposing one or the other.

7. To foster environmentally sustainable economic development and enhance the likelihood that climate change legislation can be adopted. Giving the states a full partnership role could also make comprehensive federal climate change legislation more appealing. To begin with, giving the states a significant role would help respond to concerns that climate change legislation may give too much authority to the federal government. In addition, because the states can act with greater precision and specificity within their own borders than Congress or even EPA, state actions offer the prospect of greenhouse gas reductions that have a negative cost (or net savings) or, at least, a lower cost than would be achieved with cap-and-trade. Finally, for at least a decade, state actions to address climate change have achieved significant co-benefits, including job creation, technology development, and the reduction of other pollutants. Crafted properly, strengthening and enhancing the state role on climate change could help reframe the climate change debate in a more positive way and attract significant support because of these other benefits, wholly apart from the greenhouse gas reductions that are achieved. This is particularly important at a time when the economy and job creation are foremost in the public mind.

III. INCORPORATING STATE CLIMATE CHANGE ACTION PLANS INTO A NATIONAL PROGRAM

While there are many ways to engage states as full partners in a national effort to address climate change, a robust state planning process should be the centerpiece of this
effort. This process would be similar to those already being employed by a great many states.

A. Existing State Planning Processes

State climate change planning processes have been initiated by both executive order and legislation, and frequently establish reduction goals. The planning processes begin with a greenhouse gas emissions inventory that calculates current emissions, projects future emissions under a business-as-usual (“BAU”) scenario and determines the net emissions reductions from BAU that will be required to achieve the necessary reductions. A portfolio of policy actions is then selected from a menu of more than 250 measures.56 These measures cover a wide range: (1) energy efficiency and conservation, (2) clean and renewable energy, (3) transportation and land use efficiency, (4) agriculture and forestry conservation, (5) waste management and recycling, (6) industrial process improvements, and (7) cross cutting issues. Each state typically selects a portfolio of forty or more measures tailored to the needs of the state and calculated to achieve the emissions reduction goals. These measures are based on an equally wide variety of legal tools, including codes and standards, incentives, markets mechanisms such as taxes and cap-and-trade, monitoring, education and technical assistance, voluntary agreements, and demonstration projects.

Pennsylvania, for example, has recently adopted a climate change action plan that recommends a 30 percent reduction in greenhouse gas emissions below year 2000 levels by 2020. The plan contains 52 specific work plans or recommendations, which are expected to result in the net creation of 65,000 new full-time jobs and add more than $6

56 New “Old” Federalism, supra note 3, at 76-84.
billion to Pennsylvania’s gross state product in 2020.57 The recommendations with the greatest potential for reducing greenhouse gas emissions include the construction of new high performance commercial and residential buildings and the renovation or upgrading of existing buildings, accelerating the replacement of existing and less efficient indoor and outdoor lighting, increasing the amount of solar energy that is reflected from (rather than absorbed by) roofs, and increasing the recycling rate from 28 to 42 percent by 2020. All of these measures would result in cost savings.58

Figure I shows that 33 climate action plans are completed or in progress. These plans cover two-thirds of the U.S. economy and population and one-half of U.S. greenhouse gas emissions. These planning processes also cover the states employing the three regional cap-and-trade initiatives. Nor are these plans simply sitting on a shelf. Many reduction targets, sector specific programs, and cap-and-trade initiatives are underway.

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58 Pennsylvania Final Climate Change Action Plan, supra note 58, at ExS – 11, F-2 to F-5 (buildings), F-25 (roofs), 4-9 (lighting), 8-5 (recycling)
The cumulative emissions reductions that can be achieved at the national level through implementation of these plans are considerable. Figure 2 shows a national scale-up of 20 state plans, and indicates the potential to use state plans to reduce greenhouse gas emissions by 10 percent below 1990 levels by 2020. These plans would achieve emissions reductions in a wide variety of key sectors, including transportation and land use; vehicle and location efficiency; low carbon fuels; energy supply; renewable, advanced, and low emitting generation for heat and power; residential, commercial, and industrial energy use; agriculture, forestry, and waste; and land protection and conservation practices. Significantly, 85% of the climate policies adopted by state plans had moderate to high job creation potential, while the policies as a whole, if scaled up to be implemented nationwide, would produce net economy-wide cost
savings of $20.8 billion by 2012, net savings of $85 billion by 2020, and net cumulative savings of $535.5 billion for the period 2009 to 2020.59

Figure 2

Figure 3 shows a cost curve for 900 climate policies for 20 state plans, in which these policies are bundled into 80 groups or categories. 60 These curves show that, when properly tailored through a state planning process involving stakeholders, significant carbon dioxide emissions reductions can be achieved with overall cost savings. For example, measures in the Residential, Commercial and Industrial (RCI) sector have a

59 New Climate World, supra note 9, at 816-818.
60 (CCS, 2008)
negative cost per ton of carbon dioxide reduction up to a point where these measures can achieve a total reduction of more than 10 percent of emissions from all sectors under a “business as usual” scenario.\textsuperscript{61} This is notable because many of the emissions reductions in this sector arise from investments in energy conservation and efficiency in the built environment that can most cost effectively be achieved by state and local actions to remove market barriers. The transportation and land use sector (TLU) can achieve reductions of over 5% at zero or lower cost per ton and the agriculture, forestry, and waste sector (AFW) as well as the energy supply sector (ES) can each achieve a reduction of about 2.5% at a negative or zero cost.

Figure 3

The co-benefits to be obtained through these plans are also significant. They include emissions reductions, job and income creation, energy savings, and investment leveraging, in addition to immediate reductions in greenhouse gas emissions. Indeed, many states have focused on the potential of greenhouse gas emissions reductions

\textsuperscript{61} In a business as usual scenario, emissions trends (usually increases) are projected based on policies in place at the time the planning effort begins.
measures to stimulate the economy by generating jobs and building capital infrastructure that will produce a return through cost savings or energy generation. Many of the jobs required for energy efficiency, energy conservation, and renewable energy generation fall within the construction and manufacturing sectors most likely to stimulate economic growth. At least four states have commissioned studies of the economic impact of their respective climate plans and all studies have shown a very significant positive effect, producing increases in jobs, state GDP and income.\textsuperscript{62} The results from the most recent analysis from Wisconsin are consistent with those of the other studies. There, the authors found that the combination of options selected in the Wisconsin climate action plan will result in a net “increase gross state product by a discounted present value of $4.85 billion and will increase employment by 16,221 full-time equivalent jobs by the Year 2025.”\textsuperscript{63} Conservation and energy efficiency policies, utility supply-side programs, and building code policies--all areas traditionally regulated by the states--had the greatest opportunity for stimulus.\textsuperscript{64} Other studies have had consistent results.\textsuperscript{65}

\textsuperscript{62} These states include Wisconsin, Michigan, Florida, and North Carolina. The economic studies are:


\textsuperscript{63} Wisconsin Economic Study, supra, n. 63, at 21-22.

\textsuperscript{64} The discussion of energy conservation and efficiency measures is instructive:
B. Suggested Federal Requirement for State Climate Action Plans

1. Proposal

To achieve these results nationally will require a comprehensive program that cuts across all sectors of the economy, involves the states and uses a planning mechanism to integrate measures and address market imperfections. As already explained, this must include a cap-and-trade program for greenhouse gases, required by the federal government whether through legislation or regulation. This should be accompanied by national greenhouse gas standards for mobile sources and (at a minimum) large stationary sources. Stronger and more broadly applicable energy efficiency standards for appliances and equipment are also needed. In addition, however, the federal government should

Conservation and Energy Efficiency Policies…tend to generate the greatest impact on GSP. Holding inflation constant, these policies are expected to increase GSP by $108 million in 2015, $563 million in 2020 and $1,224 million by 2025…[T]he final column reports that the net present value (NPV) of projected GSP impacts of conservation and energy efficiency policies is valued at $3.577 billion, in 2000 dollars and discounted at five percent per year. NPV represents the importance the state places on the future stream of output today…

[Because of the] conservation and energy efficiency policies [in this plan,] in 2015, there will be a cumulative total of 2,501 more jobs than there would be under the baseline case and 14,328 more jobs in 2025 than there would be under the baseline case. [C]onservation and energy efficiency policies tend to generate the largest economic impacts in terms of employment.

[C]onservation and energy efficiency policies outlined in the CEJA have the greatest potential in terms of positive economic outcomes. Results reflect how reductions in household, commercial and industrial fuel expenditures generate cost savings that are the reallocated to other sectors of the economy. Since Wisconsin is a net importer of conventional fuels, replacing expenditures on fuels with expenditures on other goods may generate relatively more economic activity within the state. To illustrate, expenditures for fossil fuels to generate electricity in Wisconsin go to fossil energy producing states. If, on the other hand, these expenditures stay in the state, they will tend to re-circulate; generating still more multiplier effects.

Id. at 20-21.

65 See Michigan Economic Study, supra note 63, at 31 (“[T]he combination of options has a Net Present Value of increasing Gross State Product by $25.3 billion and increasing employment by 129.5 thousand full-time equivalent jobs by the Year 2025.”); Florida Economic Study, supra note 63, at 2 (“When combined, the Action Plan recommendations would, on a net present value basis, increase Gross State Product by about $37.9 billion and increase employment by 148 thousand full time equivalent jobs by the Year 2025.”); New Climate World, supra, n. 9, at 818-824 (describing North Carolina results).
make the states full partners in this effort by requiring that states develop and implement state climate action plans.\textsuperscript{66}

Giving state planning a central role in a federal climate change program would increase the effectiveness of the federal program and reduce the cost of the regulatory program for greenhouse gas emissions. States are best positioned to identify the programs that can remove disincentives to implement the most cost effective measures to reduce emissions and develop the financing and institutional mechanisms that can assist in the development of those programs. States can also address many of the land use, forestry and agricultural programs that the federal program will not engage. Continued state involvement would assure that states will continue to play their central role in climate change, develop legal and policy innovations, prod and encourage continued improvement in the federal program, and provide a check against future federal regulatory failure. By engaging stakeholders and addressing local conditions, state planning can maximize the co-benefits of greenhouse gas emission reductions. By tailoring their responses to local conditions and needs, states can continue to foster environmentally sustainable economic development. This can also reduce resistance to development of a federal program and enhance the likelihood that climate change legislation or a comprehensive federal regulatory program can be adopted.

These plans could be developed in a manner similar to state implementation plans (SIPs) required under the authority of section 110 of the Clean Air Act, but they would be

quite different from the SIPs applied to other pollutants. This could be accomplished two ways—by modifying the SIP requirements for greenhouse gases in comprehensive climate change legislation, or by promulgating new rules for state climate change action plans under the existing Clean Air Act. Either way, we propose to reinvent the SIP for climate change.

To begin with, state climate change action plans should be based on net atmospheric loading of greenhouse gases, expressed in terms of tons of carbon dioxide equivalent that are emitted within a state. SIPs, by contrast, are based on atmospheric concentrations of regulated or criteria air pollutants. Unlike greenhouse gas emissions, which are important because of their global effect on climate change and have few if any appreciable local effects, the air pollutants regulated under SIPs create public health problems primarily in the area where they are created.

The emissions loadings and reductions required would be based on the United States pro rata share of the long term emissions reductions necessary to prevent

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67 Sufficient flexibility exists under the Clean Air Act to adapt the SIP mechanism to the problems caused by climate change and to allow continued state innovation. New Climate World, supra note 9; Developing a Comprehensive Approach to Climate Change, supra note 4; Robert B. McKinstry, John C. Dernbach & Thomas D. Peterson, Federal Climate Change Legislation as if the States Matter, NAT. RESOURCES & ENV’T, Winter 2008, at 3.

Many of the criticisms of this approach focus on the ossified regulatory mechanisms that have been employed in the SIP process applicable to conventional pollutants. As we have argued, the unique characteristics of greenhouse gases, which mix rapidly and globally, require a different approach, which could be implemented by adopting rules under the Clean Air Act specific to climate SIPs aimed at reductions of pollutant loadings. New “Old” Federalism, supra, n. 3, at 100. Section 110(k)(1)(A) of the Clean Air Act authorizes EPA to adopt “minimum criteria” any plan submission must meet in order to obtain EPA approval. 42 U.S.C. § 7410(k)(1)(A). EPA could adopt regulatory criteria specific to greenhouse gas provisions of SIPs under this authority. These criteria could include criteria for a cap-and-trade program, as authorized by section 110(a)(2)(A) of the Clean Air Act. 42 U.S.C. 7410(a)(2)(A).

There are many requirements applicable to SIPs in EPA’s current regulations. For example, many requirements for permits, enforcement, monitoring, reporting, and measurement will be required under any regulatory program, including market and tax based systems. 40 C.F.R. Part 52. In other cases, certain requirements can be read and applied differently for greenhouse gases. For example, the Clean Air Act frequently requires modeling. The modeling has been used to determine local air concentrations and can be quite complex. Modeling for total statewide emissions loadings would be of a different type. Current state climate plans use modeling to project emissions increases or decreases associated with various policies and sources.
“dangerous anthropogenic interference” with the climate system under the United States under the United Nations Framework Convention on Climate Change. EPA would determine what long term reductions would be required in the United States to achieve these levels and allocate required reductions to each state based on current emissions, adjusted by population projections. As part of the calculation for the states, EPA would also subtract emissions reductions required by national measures.

Under this planning process, states would be required to designate a suite of measures from a list of measures addressing actions in each of five sectors to meet their quantitative reduction goals. EPA could provide guidance on potential policy measures, but use of stakeholders to add measures to a list is a typical part of state planning processes. Both would assure continued innovation and allow the state planning process to be tailored to individual state needs. Examples of measures that could be selected include demand reduction for heat, power and petroleum use; tax incentives, financing and assistance programs for efficiency and conservation, renewable and clean energy; waste reduction, recovery and recycling; agriculture and forestry protection and

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69 These reduction goals could be established through new legislation or be developed under existing authority. Although the greenhouse gas concentration and goals and emissions reductions required to achieve these reductions are still unresolved, there appears to be an emerging consensus that an 80% emissions reduction worldwide is needed by 2100, with 80% emissions reductions by the United States from 1990 levels by 2050. See also, James Hansen et al., Target Atmospheric CO2: Where Should Humanity Aim?, 2 OPEN ATMOSPHERIC SC. J. 217, 217-231 (2008), available at http://www.benthamopen.org/pages/content.php?TOASCJ/2008/00000002/00000001/217TOASCJ.SGM (follow "Download" hyperlink). The 2050 goal in the American Clean Energy and Security Act of 2009 (“ACESA”), HB 2454, which has passed the United States House of Representatives, would achieve that 80% reduction from 1990 levels.

Where pollution originates outside of the United States, the Clean Air Act specifically authorizes the approval of SIPs where the "implementation plan of such State would be adequate to ... maintain the relevant national ambient air quality standards ... but for emissions emanating from outside of the United States." CAA § 179B(a)(2). This authority could provide a basis for developing an emissions allocation for the United States and emissions allocations for the various states. See, New Climate World, supra note 9, at 804-805.

70 The sectors are energy supply (ES); residential, commercial and industrial (RCI); land use and transportation (LU); agriculture, forestry and waste (AFW); and cross cutting measures.
conservation; and programs to effectively engage citizens and consumers.\footnote{Michael B. Gerrard, Comment on Developing a Comprehensive Approach to Climate Change Mitigation Policy in the United States: Integrating Levels of Government and Economic Sectors, 39 ENVTL. L. REP. 10,727, 10,729 (2009).} Plans would also identify, and to the extent possible quantify, costs or cost savings and the emissions reductions associated with the measures. States would also need to use these plans to integrate climate change with other state planning (e.g., SIP, transportation) and funding efforts. Plans would include two elements: (1) measures necessary to facilitate the reductions to be achieved through cap and trade and (2) measures that would directly reduce emissions. Measures to encourage end use energy efficiency will frequently fall within the former category.

Plans would be developed and submitted for approval to EPA in two phases, with the first phase identifying the strategies to be adopted to meet emissions goals and a second identifying the actual legislation and rules needed to implement the strategy.\footnote{New Climate World, supra note 9, at 809.} Each plan would cover the next five to ten years and would be revised prior to the end of that period. As is the case with most state planning processes, the states would employ a broad multi-stakeholder development process with technical working groups. In the first phase, a variety of measures would be designated. In the second phase submission, like a SIP, the plan would need to show that the state had actually enacted any legal measures needed to implement the plan. In revising its plan, a state would be required to consider best demonstrated practices of other states. For its part, EPA would be required to publish and periodically revise a list of best demonstrated practices.\footnote{Under section 108(b) of the Clean Air Act, EPA is required to publish “information on air pollution control techniques” and section 108(c) requires it to update this information periodically, 42 U.S.C. § 7408(b), (c).} EPA would be required to approve phase one of a plan if it is demonstrated to be capable of achieving
required reductions and would fully approve the plan when appropriate legislation is adopted.

The federal government would be required to play a supporting role in the development and implementation of these plans. EPA and other federal agencies would be required to provide enhanced technical assistance and capacity building to states to prepare and implement these plans, and guide state and local efforts that address climate change. As noted above, EPA would develop and publish information about what works and what does not work in state efforts. EPA and other federal agencies would encourage state innovation and experimentation through funding, planning, and regulation. In addition, EPA and other agencies should use federal funding and incentives to reward best efforts by states. Finally, and perhaps of greatest importance, Congress or EPA would provide the parameters for a national climate program, including a national cap-and-trade program.

More broadly, the federal government should fund a systematic review of the most significant state and local (and federal) laws that cause or contribute to increased greenhouse gas emissions and/or vulnerability to climate change, or inhibit reductions in greenhouse gas emissions, and compile and distribute model laws that reduce greenhouse gas emissions and reduce vulnerability to climate change. The federal government should also use federal funding to encourage state and local governments to adopt land use, transportation, and other regulations that promote smart and sustainable growth, reduce greenhouse gas emissions, and reduce vulnerability to climate change.

This proposal builds on, but is different from, the House-passed climate change legislation. The American Clean Energy and Security Act would establish a cap-and-
trade system designed to reduce greenhouse gas emissions from covered sources 17% below 2005 levels by 2020 and 83% below 2005 levels by 2050. It would impose a climate change planning requirement on states for transportation and land use. The House bill would also require states and resource agencies to develop adaptation plans. It would allow states to allocate significant proceeds from allowances, and would allow forestry and agriculture to be used to generate offsets.

By contrast, our proposal provides a more comprehensive planning requirement that includes all sectors of a state’s economy. It would require states to plan for how allowances would be distributed, and give particular consideration to reduction of greenhouse gas emissions, with federal oversight. This will be particularly important with respect to use of allowances provided to electric distribution companies. Our proposal would also encourage states to consider the creation of forestry and agriculture offsets. Finally, our proposal would guide the efforts of states to assure consistency with the overriding national greenhouse gas emissions reduction goals. This is not achieved by American Clean Energy and Security Act because, for example, the bill would leave decisions on use of allowances to state public utility commissions.

Although this is not our preference, our proposal could also be implemented in the absence of new legislation. Section 110(a)(2)(A) of the Clean Air Act requires SIPs to include emissions control measures, which may include market based systems such as cap and trade and emissions taxes.74 EPA could provide the parameters of such a national system and allow states whose SIPs are approved and include sufficient

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74 42 U.S.C. § 110(a)(2)(A) (“Each such plan shall — (A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter”)

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reductions to include their cap-and-trade systems in such a system, similar to the system used by the European Union.\textsuperscript{75}

2. Objections

Use of a state planning process to reduce greenhouse gas emissions has been questioned by a number of critics. We answer here some of the objections that can be, or have been, raised against this proposal.

It has been said that the states will resist this proposal.\textsuperscript{76} Yet the majority of states already have climate change action plans, and these plans have demonstrated cost reductions and other co-benefits. If there is federal legislation, Congress could allocate proceeds from sale of national allowances based on adoption of plans and emissions reductions achieved under them. If there is no federal legislation, states that adopt cap-and-trade program under the existing Clean Air Act could allocate allowances by auction. In RGGI states, auction proceeds have been attractive to states and municipalities and have been used to finance popular programs to provide the capital for revolving loan or PACE programs to implement energy efficiency and alternative energy production programs and overcome market barriers to the implementation of cost effective measures

\textsuperscript{75} New Climate World, supra note 9, at 813-814. It is also possible that EPA would have the authority to prescribe such a program by rule. It is true that North Carolina v. Environmental Protection Agency, 531 F.3d 896 (D.C. Cir. 2008), partially invalidated EPA’s attempt to mandate a cap and trade system for certain other air pollutants. Yet that decision is likely distinguishable from the application of section 110 to control greenhouse gases, which have significantly different characteristics from those at issue in North Carolina. Nevertheless, an opt-in system similar to that suggested here would avoid any question of validity, given the clear words of the statute.

\textsuperscript{76} Gerrard, supra note 74, at 10,728.
to reduce greenhouse gas emissions. Thus, while there may be some state resistance, that resistance should be minimal.

It has been said that the planning process is too administratively complex for Congress. This proposal would reduce that complexity through the use of allocation formulas, lists of measures, and standardized means for calculating greenhouse gas reductions. Most of the federal burden of the remaining complexity, moreover, would likely fall on EPA rather than Congress. States already have planning requirements, administrative structures, and processes for learning from each other; the state process being proposed here is not like reinventing fire. This program is no more administratively complex than other the implementation of other major environmental programs administered by EPA, and providing states with increased flexibility to implement the program should simplify implementation considerably. Indeed, many states have already developed plans that could readily be incorporated into the federal program and meet the requirements for state planning here, suggesting that the task can be readily accomplished. Finally, the opportunities for faster, cheaper, greater reductions and for co-benefits outweigh any remaining additional complexity.

It has been said that there would be leakage—emissions reductions claimed by one state would be offset by emissions increases in an adjoining or nearby state. EPA oversight and guidance can readily assure this will not happen. Legislation or regulation

\[\text{For example, the Delaware legislation has directed that funds from its RGGI auction be invested in a Sustainable Energy Utility, where they can be reinvested many times in energy efficiency and alternative energy. 7 Del. Code §§ 6043-6046. Vermont established the nation’s first sustainable energy utility and has required that its auction revenues to allocated by trustees for the benefit of consumers though “accelerated and sustained investments in energy efficiency and other low-cost, low-carbon power system investments,” 30 V.S.A. § 255(c).}\]


\[\text{Gerrard, supra note 74, at 10,728.}\]
could establish procedures for allocating responsibilities and credit. In addition, multi-
state planning agencies under Clean Air Act already address similar issues, and so there is a basis in knowledge and experience to prevent or minimize this problem.\textsuperscript{80} In fact, because all states will be required to develop plans and EPA approval will be required to assure that the overall national goal will be achieved, there should be no leakage.

Finally, it has been said that this proposal will make federal legislation harder to achieve.\textsuperscript{81} On the contrary, this proposal should make federal legislation easier to achieve because it will reduce the costs of a stand-alone cap-and-trade program, increase the co-benefits, and provide a more even balance of state and federal roles.\textsuperscript{82}

IV. CONCLUSION

As we move ahead to address climate change, we need to find a way to move from the states as leaders on climate change to states as partners with the federal government. To be sure, a significant national effort—including cap-and-trade legislation (or regulation) as well as national standards—is needed. Yet a strong state planning process provides an opportunity to achieve cheaper, faster, and greater emissions reductions as well as significant co-benefits. The majority of states have already demonstrated that this can be done through the development of comprehensive state plans and regional cap-and-trade programs that can serve as the foundation for this federal program.

\textsuperscript{80} See Doremus & Hanemann, supra note 33, at 818 (describing EPA regulations requiring federally-funded or approved highway projects to be consistent with State Implementation Plans under Clean Air Act).
\textsuperscript{81} Guzy, supra note 81, at 10,731.
\textsuperscript{82} Alternatively, EPA could use rulemaking for greenhouse gases under Clean Air Act to develop a model for subsequent federal legislation (as it did in the case of the 1977 Clean Air Act amendments and the provisions of the Clean Water Act applying NPDES permits to stormwater).
CFTC Proposed Regulation of Energy Markets
Policy Implications of Differences in Regulatory Objectives, Enforcement Authority and Market Structures in the Energy Markets

by Patricia Dondanville

Energy Bar Association Annual Meeting
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Background

- Energy market regulation pre-2000
  - 1990’s: FERC “deregulation” of the natural gas and power markets, and developing new bilateral forward contract markets for transactions in energy and energy derivatives
  - FERC established market-based rate tariff process to facilitate bilateral physical power transactions
  - Late 1990’s, questions arose over CFTC jurisdiction in the over-the-counter (bi-lateral) transactions in energy and energy derivatives
  - Commodity Exchange Act, as reauthorized by the Commodity Futures Modernization Act of 2000, put the CFTC on the sidelines with respect to physical forward transactions, commercial options, “swap agreements,” including those in the energy markets, and “exempt commodity” (energy and metals) transactions between “eligible contract participants”
Regulatory Objectives: FERC

The Federal Power Act of 1935 and the Natural Gas Act of 1938 gave the FPC (now FERC) the power to regulate the transportation and sale of electricity and natural gas in interstate commerce.

Regulatory Objectives: FERC

- FERC’s mission is to “assist consumers in obtaining reliable, efficient and sustainable energy services at a reasonable cost through appropriate regulatory and market means.”
  
  - “Fulfilling this mission involves pursuing two primary goals:
    - Ensure that rates, terms and conditions are just, reasonable and not unduly discriminatory or preferential.
    - Promote the development of safe, reliable and efficient energy infrastructure that serves the public interest.”

- FERC interpretation of the phrase “the public interest” is in providing reliable, affordable power delivered to American consumers and businesses

- **Mobile-Sierra** Line of Cases:
  - Presumption that market-based rates (negotiated between contract counterparties) are "just and reasonable." Presumption may be overcome only if FERC concludes that the contract harms “the public interest”.

(http://www.ferc.gov/about/strat-docs/strat-plan.asp)
Regulatory Objectives: CFTC

The Commission shall have **exclusive jurisdiction**, except to the extent otherwise provided in subparagraphs (C) and (D) of this paragraph and subsections (c) through (i) of this section, with **respect to** accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an “option”, “privilege”, “indemnity”, “bid”, “offer”, “put”, “call”, “advance guaranty”, or “decline guaranty”), and **transactions involving contracts of sale of a commodity for future delivery** (including significant price discovery contracts), traded or executed on a contract market designated or derivatives transaction execution facility registered pursuant to section 7 or 7a of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 19 of this Act. **Except as herein above provided**, nothing contained in this section shall (I) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (II) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws.

Commodities Exchange Act § 2(a)(1)(A)
Regulatory Objectives: CFTC

• The CFTC’s mission “is to protect market users and the public from fraud, manipulation, and abusive practices related to the sale of commodity and financial futures and options, and to foster open, competitive, and financially sound futures and option markets.”
(http://www.cftc.gov/About/MissionResponsibilities/index.htm)

• CEA’s definition of CFTC “public interest” objective: price transparency, liquidity, fairness and financial security in the trading markets under its jurisdiction
Regulatory Objectives: CFTC

Sec. 3. Findings and Purpose.

(a) FINDINGS. The transactions subject to this chapter are entered into regularly in interstate and international commerce and are affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities.

(b) PURPOSE. It is the purpose of this chapter to serve the public interests described in subsection (a) of this section through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission. To foster these public interests, it is further the purpose of this chapter to deter and prevent price manipulation or any other disruptions to market integrity; to ensure the financial integrity of all transactions subject to this chapter and the avoidance of systemic risk; to protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets; and to promote responsible innovation and fair competition among boards of trade, other markets and market participants. Commodities Exchange Act § 3
Regulatory Objectives: CFTC

- Exchange rules precisely define futures or options “contracts” or products; exchanges also establish CFTC-approved rules for their members. These market professionals, such as futures commission merchants and introducing brokers, interact with “customers”.

- Clearing entities (either affiliated with exchanges or independent) establish CFTC-approved rules on capital levels, deposits, margining rules, segregated customer accounts, etc. The rules provide for clearing members to manage, and price or eliminate, two levels of credit risk: to the clearing entity (regulated margin) and to individual clearing members (contract margin).

• California / Western Energy Crisis
• Enron and other Bankruptcies
• 2003 Blackouts
• False Price Reporting and Wash Trade Scandals
• Amaranth loses $6 Billion in Natural Gas Transactions September 2006
• June 2008 Price Spikes in Oil, Natural Gas and Power
• August 2008 Credit and Liquidity Crisis in the Energy Markets
• September 2008 Lehman Bankruptcy (Major Energy Market Participant)
Interrelated Segments of the Energy Markets

- FERC-Regulated Physical and RTO Markets
- CFTC-Regulated Futures (and Options) Exchanges
- OTC Energy Derivatives Markets
(1) [FERC] lacks the necessary tools to address dramatic market changes, including the threat of market manipulation … if violations of market rules can go unpunished, they will become more frequent.” FERC Chairman Joseph Kelliher, 26 Energy Bar Journal 1, 30 (2005).

(2) EPAct 2005 Market Manipulation Authority

2005 FERC-CFTC MOU regarding sharing information on energy markets

-Amaranth
-ETP
-Keyspan*

* Third Energy Market Regulator: DOJ Antitrust Division

(1) False Price Reporting Cases in Natural Gas Markets
(2) Wash Sale Cases in Power Markets
(3) 2007 Farm Bill SPDC Jurisdiction closes “Enron Loophole”

CFTC Fraud and Price Manipulation Authority

- **Sec. 4b(a) – UNLAWFUL ACTIONS –** It shall be **unlawful** –
  (1) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce or for future delivery that is made, or to be made, on or subject to the rules of a designated contract market, for or on behalf of any other person; or
  (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, or other agreement, contract, or transaction subject to paragraphs (1) and (2) of section 7a(g) of this title, that is made, or to be made, for or on behalf of, or with, any other person, other than on or subject to the rules of a designated contract market—
    (A) **to cheat or defraud** or attempt to cheat or defraud the other person;
    (B) **willfully to make or cause to be made to the other person any false report or statement** or willfully to enter or cause to be entered for the other person any false record;
    (C) **willfully to deceive or attempt to deceive the other person by any means** whatsoever in regard to any order or contract or the disposition or execution of any order or contract, or in regard to any act of agency performed, with respect to any order or contract for or, in the case of paragraph (2), with the other person; or
    (D)  
      (i) **to bucket an order** if the order is either represented by the person as an order to be executed, or is required to be executed, on or subject to the rules of a designated contract market; or
      (ii) **to fill an order by offset** against the order or orders of any other person, or willfully and knowingly and without the prior consent of the other person to become the buyer in respect to any selling order of the other person, or become the seller in respect to any buying order of the other person, if the order is either represented by the person as an order to be executed, or is required to be executed, on or subject to the rules of a designated contract market unless the order is executed in accordance with the rules of the designated contract market.

- "If the Commission has reason to believe that any person (other than a registered entity) is **manipulating or attempting to manipulate** or has manipulated or attempted to manipulate the **market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity**, or has willfully made any false or misleading statement of a material fact in any registration application or any report filed with the Commission under this chapter, or willfully omitted to state in any such application or report any material fact which is required to be stated therein, or **otherwise is violating or has violated any of the provisions of this chapter or of the rules**, regulations, or orders of the Commission or the Commission thereunder, it may ..."

Commodities Exchange Act § 9
FERC’s Fraud and Market Manipulation Authority In EPAct 2005

- New section 222 to the Federal Power Act:

  “(a) in general . . . it shall be unlawful for any entity (including an entity described in section [201](f) of this title), directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of Title 15), in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.”

- New Rule Provides

  “Prohibition of electric energy market manipulation:

  (a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission,

  (1) To use or employ any device, scheme or artifice to defraud, (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) To engage in any act, practice or course of business that operates or would operate as a fraud or deceit upon any entity.” 18 C.F.R. § 1c.2(a)

- New Section of the Natural Gas Act (15 U.S.C. § 717c-1):

  “It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j (b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.”

FERC-Regulated Natural Gas Market Structure

Natural Gas Producers

Affiliated Marketers

Independent Marketers

Financial Institution Marketers

End Users (Power Generators, LDC’s, Muni’s, Coop’s)
FERC-Regulated Power Market Structure

The “Organized” RTO Power Market

- Privity with “Pool”, not with Counterparty
- Risk of Default is Mutualized, or “Socialized” to RTO Members
- Credit Risk Management, collateralization settlement, and collection by RTO
- Product definitions, market participant roles and qualifications, and market mechanisms all focus on achieving FERC regulatory objectives
CFTC Regulated Market Structure

- Trade Execution
- Exchange (Pit or Electronic)
- Clearing Member 1 / Dealer
- Matched Trades
- Clearing House (Independent or Part of Exchange)
- Position reports and regulated margin

- CFTC-Regulated Entities

- Buyer
- Contract Margin

- Matched Trades
- Clearing Member 2 / Dealer
- Clearing House (Independent or Part of Exchange)
- Position reports and regulated margin

- CFTC-Regulated Entities
OTC Energy Market Structure

- Merchant Generator
- Financial Institution
- Load Serving Entity / Local Distribution Company
- Natural Gas Producer
- Public Power / Cooperative
- Independent Energy Marketer / Hedge Fund

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Proposed Legislation’s Effect on OTC Energy Market Structure

- Merchant Generator
- Load Serving Entity / Local Distribution Company
- Natural Gas Producer
- Financial Institution
- Public Power / Cooperative
- Independent Energy Marketer / Hedge Fund

Diagram showing relationships and interactions between these entities.
Layered Complexity of OTC Energy Markets Defies Simple Regulatory Solutions

• Energy Market Economics are Complex and Different from Other Markets
  – Inherent Instability of Supply and Demand
  – Cross-Commodity Nature of the Markets and of Hedging Production, Generation and Load
  – Non-linear aspect of physical and financial market relationships

• Regulatory objectives, enforcement authority and market structures of FERC and CFTC worlds are different

• Proposed financial reform legislation tries to force the complexity of the power and natural gas OTC markets into a regulatory “round hole”

• Serious costs and consequences for energy companies and American energy consumers
BIOGRAPHIES
Mr. Bardee began working at the Commission in 1990, as an attorney-advisor in the Office of General Counsel. Mr. Bardee has held a range of other positions in the Office of General Counsel and elsewhere in the Commission. He also worked briefly in private practice.

Before joining the Commission, he worked on utility issues at the Pennsylvania Office of Consumer Advocate and also litigated environmental enforcement cases at the U.S. Department of Justice.

He holds a B.A. in Journalism from Oklahoma University and a J.D. from New York University Law School.
Stephen G. Burns
General Counsel, U.S. Nuclear Regulatory Commission

Stephen G. Burns was appointed the General Counsel of the U.S. Nuclear Regulatory Commission (NRC) in May 2009. Previously, he had served as the NRC’s Deputy General Counsel since 1998. He joined the NRC as an attorney in 1978, and he had served in various positions, including Executive Assistant to Chairman Kenneth M. Carr, Director of the Office of Commission Appellate Adjudication, and Associate General Counsel. Mr. Burns received his J.D. degree with honors in 1978 from the George Washington University, where he was an editor on the George Washington Law Review. He received his B.A. degree, magna cum laude, in 1975 from Colgate University in Hamilton, New York. Mr. Burns received the NRC Distinguished Service Award in 2001 and the Presidential Meritorious Executive Rank Award in 1998 and 2008.
Joseph Goffman returns to the EPA’s Office of Air and Radiation – as Senior Counsel to the Assistant Administrator – 18 years after serving as a special assistant and section chief in the then brand-new Acid Rain Division (now known as the Clean Air Markets Division). He was most recently Majority Senior Counsel to the Senate Committee on Environment and Public Works (EPW), focusing on climate change, Clean Air and energy issues. Immediately prior to his Senate EPW stint, Mr. Goffman was Legislative Director for Senator Joseph Lieberman (D-CT). He has more than two decades of experience in environmental issues in the public and non-profit sectors, with special expertise in climate and air pollution policy. He held senior legal, policy and management positions at the Environmental Defense Fund and served as counsel to the Environment and Public Works Committee during the development of the landmark Clean Air Act Amendments of 1990, which established, among other things, the first U.S. “cap and trade” program for air pollution. Mr. Goffman received his J.D. from Yale Law School, and graduated from Yale College. He lives in Washington, DC with his wife; the couple has three children.
Scott Blake Harris is the General Counsel of the Department of Energy. He was nominated for the position by President Barack Obama in March, and was confirmed by the United States Senate in May, 2009. Mr. Harris also serves as Co-Chair of the Broadband Subcommittee of the Administration’s National Science and Technology Council. Mr. Harris has had extensive litigation, telecommunications and technology law, trade law, administrative law, and national security law experience.

Prior to joining the Department, Mr. Harris was the Managing Partner of Harris, Wiltshire & Grannis LLP, a nationally recognized law firm he founded in 1998. He has also been a partner in the law firms of Williams & Connolly LLP and Gibson, Dunn & Crutcher LLP, where he headed the firm’s communications practice. Mr. Harris also served in government from 1993 to 1996, first as Chief Counsel for Export Administration in the United States Department of Commerce, and then as the first Chief of the International Bureau at the Federal Communications Commission. Early in his career he served as a law clerk to the Honorable Gerhard A. Gesell on the United States District Court for the District of Columbia.

In addition to practicing law, Mr. Harris has been active in the legal and policy communities. He has been a member of the Advisory Board of Virginia Tech’s Center for Wireless Communications, Chairman of the FCC’s Advisory Committee for the 1997 World Radio Conference, Co-Chair of the Council on Foreign Relations Study Group on Information Technology and Foreign Policy, a member of the Executive Committee of the United States ITU Association, a Trustee of the Federal Communications Bar Association (FCBA) Foundation, Co-Chair of the FCBA’s International, Online, Legislative Practice, and Annual Seminar Committees, and an Adjunct Professor at Georgetown Law Center.
FRANK R. LINDH

Mr. Lindh was appointed General Counsel of the California Public Utilities Commission effective June 23, 2008.

Prior to his CPUC appointment, Mr. Lindh was an attorney with Pacific Gas and Electric Company in San Francisco for 15 years. During that time, he also served for a two-year term as General Counsel of PG&E’s then-wholly-owned subsidiary, Pacific Gas Transmission Company, an interstate natural gas pipeline.

Before joining PG&E’s Law Department, Mr. Lindh practiced energy law in several law firms, both in Washington, D.C., and in San Francisco. In 1987-1989, he served as an appellate attorney in the Office of the Solicitor at the Federal Energy Regulatory Commission in Washington.

Mr. Lindh was the law clerk to the Solicitor General of the United States, in the U.S. Department of Justice, during the Supreme Court’s 1984-1985 Term.

Mr. Lindh is a 1985 honors graduate of the Georgetown University Law Center. He also holds a Masters Degree in Social Work from the University of North Carolina at Chapel Hill, and worked in a variety social service agencies before becoming a lawyer. He is a graduate of The Pennsylvania State University.

Mr. Lindh currently serves on the national Board of Directors of the Energy Bar Association, a professional association of more than 4,500 members (both attorneys and non-attorney professionals) headquartered in Washington, D.C. He is also President-elect of the EBA’s Western Chapter.

Mr. Lindh also has been a member of the Conference of California Public Utility Counsel for more than 15 years.

Mr. Lindh has published several law review articles on issues of federal and state jurisdiction in the electricity and natural gas industries.

Mr. Lindh is a member of the State Bar of California (since 1992) and a member of the District of Columbia Bar (since 1985; currently on inactive status). He is admitted to practice before the Supreme Court of the United States and the United States Courts of Appeals for the District of Columbia, Second, Fourth, Fifth, Seventh, Ninth and Tenth Circuits.
Douglas W. Smith  
Member  

Doug Smith represents clients on electricity and natural gas matters before the Federal Energy Regulatory Commission (FERC) and on energy efficiency and Recovery Act matters before the Department of Energy (DOE). He also provides counsel on climate change, energy technology, and renewable energy policy.

Representative matters include:

- advising regulated companies on FERC rulemaking and policy matters;
- representing electricity clients in FERC rate and merger proceedings;
- representing utilities and natural gas pipelines on FERC audits and investigations;
- assisting clients with training and compliance programs;
- providing strategic advice on climate change policy for energy companies, manufacturers, and other clients;
- representing equipment manufacturers on efficiency regulation under the Energy Policy and Conservation Act;
- advising applicants seeking Recovery Act assistance for energy-related projects;
- advising a trade association on carbon capture and sequestration policy; and
- working with think tanks and coalitions to pursue innovative energy and environmental policies in areas such as climate change and transmission policy.

As General Counsel of the FERC from 1997 to 2001, Mr. Smith played a lead role in Commission policy initiatives on electricity (e.g., Order No. 2000), natural gas rates (e.g., Order No. 637), pipeline certificates, and hydropower licensing reform. As Deputy General Counsel for Energy Policy at DOE, he was significantly involved in Departmental initiatives on electricity restructuring, the Climate Challenge program, and new energy efficiency standards.

Mr. Smith speaks frequently at conferences on energy regulation and climate change. He taught Energy Law and Regulation at George Washington University Law School from 2005-2008. He is admitted to practice in Massachusetts and the District of Columbia.

Government Service

- General Counsel, Federal Energy Regulatory Commission, 1997-2001
Associate General Counsel for Energy Policy, U.S. Department of Energy, 1995

Professional and Civic Affiliations
- American Bar Association
- D.C. Bar Association
- Energy Bar Association

Publications


"Electricity Regulation: How is Federal Policy Changing?” Douglas W. Smith, Trends, Volume 33, No. 6 (July/August 2002) at 4.

JOHN E. McCAFFREY
PARTNER

AT A GLANCE
John, a member of the firm’s Energy Group, has a broad range of experience representing clients before the Federal Energy Regulatory Commission (FERC), state public utility commissions and federal and state courts. 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, utility ratemaking, new project certifications, and energy-related merger issues. John’s experience also includes appellate matters before state and federal courts. John is listed in Best Lawyers in America for Energy Law.

PRACTICE EMPHASIS
Appellate Litigation
FERC
Litigation
Utilities

EDUCATION
George Washington University, J.D., 1995
Boston College, B.A., magna cum laude, 1992

RELEVANT REPRESENTATION
• Represented the interests of state public utility commissions with respect to all aspects of FERC regulation of utility companies
• On behalf of the Nevada Attorney General, advocated for the interests of Nevada utility consumers in FERC proceedings and associated appeals (including appeals to the United States Supreme Court) addressing the electricity crisis in the California and the Western United States during 2000-2001
• Represented the Missouri Public Service Commission in FERC proceedings and related appeals challenging the level of rates for a new interstate natural gas pipeline company. The case, including two successful appeals to the United States Court of Appeals for the District of Columbia Circuit, ultimately resulted in refunds of $13.6 million to Missouri natural gas consumers. See Missouri Public Service Commission v. FERC, 234 F.3d 36 (D.C. Cir. 2000); Missouri Public Service Commission v. FERC, 337 F.3d 1066 (D.C. Cir. 2003); Enbridge Pipelines (KPC), 109 F.E.R.C. (CCH) ¶ 61,042 (2004)
• Represented the Missouri Public Service Commission in objecting to certain rates proposed by an interstate natural gas pipeline. The case resulted in a settlement that saved consumers millions of dollars in natural gas rates
• On behalf of the New York Public Service Commission, litigated a complaint under section 5 of the Natural Gas Act challenging the rates of an interstate natural gas pipeline. The case resulted in a settlement that provided significant savings to consumers

OF NOTE
John currently sits on the Board of Directors of the Energy Bar Association (EBA), an international non-profit association of attorneys active in all areas of energy law with over 2500 members. John is listed in Best Lawyers in America for energy law.
COMMUNITY INVOLVEMENT
- Boston College Alumni Club of Washington, D.C.
- George Washington Law School Alumni Association

BAR ADMISSIONS
- Massachusetts, 1995
- District of Columbia, 1997

PROFESSIONAL AFFILIATIONS
- American Bar Association
- Energy Bar Association, Secretary

ARTICLES/PUBLICATIONS

WASHINGTON, D.C. OFFICE
Direct 202.728.3013
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Email jmccaffrey@stinson.com
Robert H. Solomon
Solicitor, Federal Energy Regulatory Commission

Bob has been FERC Solicitor since January 2006. The Solicitor’s Office operates within the FERC Office of the General Counsel. The Solicitor is responsible for defending the agency’s orders, policies and initiatives, primarily in the U.S. Courts of Appeals. The Solicitor has independent litigating authority – i.e., the Solicitor files pleadings and presents oral argument on behalf of the FERC without the need for coordination with other federal agencies and departments – except in matters before the U.S. Supreme Court, where the Solicitor coordinates with the Solicitor General at the U.S. Department of Justice. Information about the Solicitor’s Office and its operations – including links to pending cases and recent decisions – can be found (on the FERC web site) at http://www.ferc.gov/legal/court-cases.asp.

Within the Solicitor’s Office, Bob has the privilege of working with 9 of the finest attorneys in the energy and appellate bars – Lona Perry, Beth Pacella, Judy Albert, Holly Cafer, Carol Banta, Bob Kennedy, Sam Soopper, Kay Henry, and Jennifer Amerkhail. Bob also has the pleasure of working daily with members of the energy and appellate bars who consistently raise thoughtful, interesting issues for consideration and practicing before judges who are studious and fair in their deliberations. In addition to his management responsibilities, Bob personally has presented oral argument before appellate panels, in defense of the Commission, over 50 times.

Bob has been with FERC for 21 years. Before becoming Solicitor, Bob was Associate and Deputy Solicitor (2001-2006), a Legal Advisor to Commissioners Bailey and Hébert (1998-2001), a Deputy Assistant General Counsel (1991-1998), and a trial attorney in the Solicitor’s Office (1988-1991). During these years, Bob has had the extremely good fortune of working with a number of terrific bosses and mentors, including Jerry Feit, Dan Larcamp, Vicky Bailey, Curt Hébert, Dennis Lane, and many General Counsel and other public-minded FERC lawyers and officials.

Before coming to FERC in 1988, Bob was an associate attorney at Newman & Holtzinger, a Washington, D.C. law firm specializing in energy and regulatory matters. Bob received his law degree in 1985 from Washington University School of Law in St. Louis, Missouri and his undergraduate degree in 1982 from the University of Pennsylvania in Philadelphia, Pennsylvania.
Scott Strauss is a partner at the Washington, DC law firm of Spiegel & McDiarmid LLP, which represents consumers and other public groups on energy, environmental, telecommunications, transportation, and legislative issues. Mr. Strauss has substantial experience in complex litigation before federal and state agencies concerning all aspects of utility ratemaking and electric utility industry restructuring, including wholesale market design, transmission rates, and utility mergers. Scott's undergraduate degree is from Cornell University's School of Industrial and Labor Relations, and he is a cum laude graduate of the University of Pennsylvania Law School, where he was a Law Review Editor.
John N. Estes III

Partner
Skadden, Arps, Slate, Meagher & Flom LLP
Energy Regulation and Litigation

JohnEstes, a partner with Skadden’s Energy Regulation and Litigation Group, focuses
on complex FERC litigation at the agency and on appeal, often involving market
design, market power and market manipulation issues in organized electric markets.
Mr. Estes has played a lead role in many of the significant “organized market” cases
that have gone to trial. Representative matters include:

• a large coalition of generators in the bitterly fought New England “LICAP” case
   involving capacity markets;

• Exelon in groundbreaking litigation involving whether FERC should exempt
   AEP from certain state laws that were preventing AEP from joining PJM;

• Dynegy in the protracted and highly complex “California Refund Case”; and

• Dynegy and NRG in the “California Long-Term Contract Case.”

Mr. Estes also has an active appellate practice. He has argued 22 cases in the
United States Courts of Appeals and briefed many more. He recently represented
NRG in the “third-party Mobile-Sierra” case before the United States Supreme
Court. He also recently briefed and argued the New England “ICR” case before the
D.C. Circuit, where the court affirmed FERC’s jurisdiction over a critical compo-
nent of capacity markets.

Mr. Estes currently is representing the New England Power Generators Association
in seeking critical modifications to the New England capacity markets, and
FirstEnergy in its proposal to move from the Midwest ISO to PJM.

Recently, Mr. Estes has been particularly active in defending against market
manipulation charges. He represented Energy Transfer Partners in ground-breaking
trial proceedings involving alleged manipulation of the natural gas markets, ending
with favorable settlement terms, and successfully defended H.Q. (United States) in
the first complaint case claiming market manipulation. He has navigated numerous
enforcement matters, involving a broad range of issues, to resolution without
sanction.

Mr. Estes has been ranked Band 1 each year since 2005 in Chambers USA:
America’s Leading Lawyers for Business and Chambers Global: The World’s
Leading Lawyers for Business.

(continued on reverse side)
Biography

John N. Estes III

Oral Arguments, Briefs and Pleadings


Authorships (continued)

Ms. Hill has practiced utility regulatory law in Washington since graduating from law school 1976. She has been in her present position with Exelon since 2002. Prior to that, she was Vice President Regulatory Affairs for the American Gas Association from 1997-2002. She opened and managed Niagara Mohawk Power Company’s Washington office from 1991-97. She worked at the Federal Energy Regulatory Commission, from 1980-88, in the Solicitor’s Office representing the agency in the Courts of Appeals and as legal assistant to Chairman Martha Hesse. She also has worked in private practice at Morgan Lewis & Bockius and Swidler & Berlin representing natural gas and electric utilities.

Ms. Hill is Vice-Chair of the Board of My Sister’s Place, a D.C. organization that serves women and children who are victims of domestic violence. For many years she served on the Boards of the Energy Bar Association, the Charitable Foundation of the Energy Bar Association, and the Foundation of the Energy Law Journal.

Ms. Hill earned a J.D. at University of Houston Bates College of Law, where she was an editor on the Houston Law Review. She earned a B.A. in English at the University of Iowa.
Jonathan Schneider  
Partner, Stinson Morrison Hecker  
Washington, D.C.  
(202)728-3034  
JSchneider@stinson.com

Jon is a partner with Stinson Morrison Hecker, here in Washington. He has been a card carrying EBA (formerly FEBA) member for over 25 years, began his career as a natural gas lawyer (something many lawyers won't admit) and has represented regulated and municipal utilities, marketers and generators in the electric industry since Order 888. He served on the EBA Board at the turn of the century, chaired the Program Committee for several years, and inexplicably agreed to serve as co-chair of that Committee once again, next year.

Jon began his career in New York with the old Huber Lawrence & Abell firm.

Jon holds a J.D. from Albany Law School, and a degree in economics from Colgate University.

Jon may be best known at the Bar as the guy who plays jazz for the EBA Charitable Ball. He's not sure if that is his highest valued use.
David A. Whiteley
Consultant - Eastern Interconnection Planning Collaborative

David Whiteley is engaged as a consultant to the group of Planning Authorities from the Eastern Interconnection that are currently advancing the concept of an open and transparent approach to performing transmission system analyses at the interconnection level based on the roll-up of existing regionally developed plans. This effort is known as the Eastern Interconnection Planning Collaborative. Mr. Whiteley currently provides a leadership role in that development effort.

Prior to starting his own consulting company, Dave was employed by the North American Electric Reliability Corporation (NERC) as Executive Vice President from March, 2007 to March 2009. In that position, he was responsible for overseeing NERC’s activities in Standards; Reliability Readiness; Training, Education, and Personnel Certification; Event Analysis; Metrics and Benchmarking; and Members’ Forums.

Prior to NERC, Dave was Senior Vice President - Energy Delivery Services for Ameren Corporation – a position he assumed in January 2005 after serving as senior vice president, Energy Delivery, since October 2003. At Ameren, he was responsible for the planning, design, construction and technical support for all electric transmission and distribution systems for Ameren’s operating utility companies – AmerenCILCO, AmerenCIPS, AmerenIP and AmerenUE. Dave was also responsible for transmission operations and the transmission interface with the Midwest Independent System Operator (MISO) – the regional transmission operator for Ameren. He also led the company’s transmission policy area and served on various task forces and committees of the Edison Electric Institute, the North American Electric Reliability Council, and the Association of Edison Electric Illuminating Companies. Dave started his career as an assistant engineer in the System Planning Department of Union Electric Company in 1978.

A native of St. Louis, Dave earned a bachelors degree in electrical engineering from Rose-Hulman Institute of Technology, Terre Haute, Indiana. He holds a masters degree in Electrical Engineering from the University of Missouri-Rolla completed in 1985. He was granted a Professional Degree in Engineering from the Electrical Engineering Department of the University of Missouri-Rolla in 2004. Dave is a registered professional engineer in the states of Missouri and Illinois. He is also a member of the National Society of Professional Engineers and the Institute of Electrical and Electronics Engineers.
Christopher A. Helms  
Executive Vice President & Group CEO

As Executive Vice President of NiSource and CEO of the NiSource Gas Transmission & Storage group, Chris Helms is responsible for executing an aggressive growth strategy. He has held a variety of leadership roles in the energy sector, including President and Chief Executive Officer of CMS Panhandle Companies, President of Centennial Pipeline Company LLC, and Executive Vice President of CMS Gas Transmission Corp.

Helms was the 2008 Chairman of the Southern Gas Association during its Centennial Celebration Year and also has served as Vice President of the Groupe International des Importateurs de Gaz Naturel Liquefie. He currently serves as a Director of the Interstate Natural Gas Association of America (INGAA), is a member of INGAA's Executive Committee and Chair of the Budget and Dues committee. He is a member of the State Bar Associations of Texas, Louisiana and Florida, and is a past member of the College of the State Bar of Texas.

Helms earned Bachelors degrees in Political Science and Journalism from Southern Illinois University and a Juris Doctor degree from Tulane University School of Law.
Mark R. Haskell
partner

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1111 Pennsylvania Ave., NW
Washington, DC 20004-2541
Phone: 202.739.5766
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Mark R. Haskell is a partner in Morgan Lewis’s Energy Practice. Mr. Haskell’s practice focuses on Federal Energy Regulatory Commission (F.E.R.C.) matters, including F.E.R.C. investigations, litigation and related court appeals.

A seasoned energy lawyer, Mr. Haskell has represented natural gas and power marketers, regulated oil pipelines, local distribution companies, end users, major producers, and consumers of natural gas and LNG terminal developers in a broad range of F.E.R.C. regulatory matters including, but not limited to: price and refund disputes relating to both natural gas sales in the Midwest and sales of electric energy in California and the Pacific Northwest; F.E.R.C. investigations; F.E.R.C. jurisdiction over LNG terminals; regulation of company-owned pipelines; participation by gas producers, marketers, consumers and local distribution companies in proceedings involving the rates and services of major interstate gas pipelines; and regulatory advice in conjunction with sales and acquisitions.

Mr. Haskell possesses over 20 years of industry experience in matters relating to federal regulation of natural gas, electric energy and ancillary services, and interstate pipeline safety and infrastructure.


Mr. Haskell is admitted to practice in the District of Columbia and before the U.S. Supreme Court.

honors + affiliations

Member, American Bar Association, Section of Energy, Environment and Resources (Vice Chair, Committee on Electric and Natural Gas Marketing 2000–2001; 2001–2002)

Energy Bar Association (Member, Board of Directors, 2001–2004)

1980 Harry S Truman Scholar, State of Maine

National Merit Scholar

Member, Phi Beta Kappa

Member, Phi Kappa Phi

Member, Alpha Lambda Delta


**education**

Harvard Law School, 1985, J.D.
University of Maine, 1982, B.A., With Highest Honors and Highest Distinction
Monica Schwebs is Of Counsel in the San Francisco Office of Bingham McCutchen where she works on federal and state energy and environmental law issues. She has handled a wide variety of matters relating to power plant licensing, renewable energy, transmission, natural gas (including liquefied natural gas), petroleum refining and oil pipelines, hydroelectric licensing, appliance energy efficiency standards, and climate change. She has represented clients in judicial proceedings in both federal and state courts and in administrative proceedings, including proceedings before the Federal Energy Regulatory Commission, the California Public Utilities Commission, the California Energy Commission, and the U.S. Environmental Protection Agency Environmental Appeals Board.

Prior to joining the firm in 2006, Monica spent six years working as staff counsel for the California Energy Commission. Before entering state service, Monica served as a trial attorney for the U.S. Department of Justice, Environment and Natural Resources Division in Washington, D.C. where she served as lead counsel in federal court cases for many federal agencies, including the U.S. Environmental Protection Agency. The cases she handled were brought under a variety of environmental laws, including air, water, coastal zone management, hazardous waste and pesticide laws.

Prior to entering public service, Monica practiced both energy and environmental law at a major national firm in its Washington, D.C., office.

Monica currently serves as a member of the Board of Directors of the Energy Bar Association and a Co-Chair of the Climate Change and Emissions Committee.

Monica is a graduate of the University of Virginia School of Law and Princeton University, magna cum laude, where she majored in public and international affairs.
Roger Martella is a partner in the Environmental Practice Group at Sidley Austin LLP. He recently rejoined Sidley Austin LLP after serving as the General Counsel of the United States Environmental Protection Agency, concluding 10 years of litigating and handling complex environmental and natural resource matters at the Department of Justice and EPA.

Mr. Martella was unanimously confirmed by the United States Senate as EPA General Counsel. In that role, Mr. Martella served as EPA’s chief legal advisor supervising an office of 350 attorneys and staff in Washington and 10 regional offices. In particular, Mr. Martella lead the team responsible for developing for the first time under the Clean Air Act the federal government’s climate change legal framework and options in response to the landmark Supreme Court decision Massachusetts v. EPA, which held greenhouse gases to be air pollutants under the Clean Air Act. His efforts included developing a full range of legal options for decision makers related to greenhouse gas regulation, alternative and renewable fuels, the development of regulatory carbon sequestration controls, and the intersection of climate change and natural resource issues including the National Environmental Policy Act and the Endangered Species Act. Recognized for his knowledge on legal approaches to addressing climate change, Mr. Martella focuses specifically on dissecting the extraordinarily complex and interrelated ramifications of climate change on numerous provisions of the Clean Air Act relating to mobile and stationary sources, as well as other laws, such as the ESA and NEPA. Mr. Martella’s experience in this area enables him to work to forecast for clients the likelihood of upcoming regulations and controls in the area of climate change, clean energy, and sustainability, and to develop strategic approaches to be best prepared for such controls. Mr. Martella also focuses on international climate issues, working with Chinese institutes on climate and clean energy issues and advocating for conformity between United States climate rules with the European Union. Since the April 2007 Massachusetts decision, Mr. Martella has been invited to address climate change regulation more than twenty five times in the United States and abroad.

Recognizing deficiencies in the China environmental law framework and the challenges for multinational organizations in understanding the laws on the books, Mr. Martella created the China Environmental Law Initiative in 2007. As part of the initiative, Mr. Martella created the only known website devoted to China environmental laws and organized with the State Environmental Protection Agency (now the Ministry of Environmental Protection) two separate symposia in China. Mr. Martella has served as a visiting professor at the Environmental Law Institute of Wuhan University and the State Environmental Protection Agency, and at Tsinghua University, working with academics, officials and students on developing environmental law frameworks for China. Mr. Martella has testified as an expert on this issue before the United States Congress, worked with numerous government officials at the national and provincial level in China, and has lectured with academics and students at leading universities and think tanks in both nations.

Mr. Martella graduated from Vanderbilt Law School, where he was Editor in Chief of the Vanderbilt Law Review, and Cornell University, where he studied environmental science. Following law school, he clerked for the Hon. David M. Ebel of the Tenth Circuit Court of Appeals.

Mr. Martella, elected at large to the Warrenton, VA, Town Council, devotes significant effort to public service in his community and was recognized in 2006 as Citizen of the Year by the Fauquier County Board of Supervisors for his public service and volunteerism efforts.
Vincent P. Duane, vice president and general counsel, heads the legal function at PJM and is responsible for advocating and defending the organization’s interests before the Federal Energy Regulatory Commission and providing counseling and transactional support to the core business units at PJM. Mr. Duane additionally serves as counsel and secretary to PJM’s independent Board of Managers.

Prior to joining PJM, Mr. Duane was vice president at Mirant Corp. in Atlanta and general counsel for the company’s power and natural gas businesses in North America and the Caribbean. Previously he served as vice president, secretary & general counsel at Southern Company’s energy trading and marketing business. Mr. Duane began his career in the private practice of energy law at a firm in Washington, D.C., where he represented public power and industrial consumer interests.

Mr. Duane is a member of the American Corporate Counsel Association, Energy Bar Association and the Maryland State Bar Association.

Mr. Duane earned a bachelor of arts in Political Science from McGill University, a juris doctor with honors from University of Maryland School of Law and a master of science with honors from Georgetown University, School of Foreign Service.

PJM Interconnection ensures the reliability of the high-voltage electric power system serving 51 million people in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia. PJM coordinates and directs the operation of the region’s transmission grid, which includes 6,038 substations and 56,250 miles of transmission lines; administers the world’s largest competitive wholesale electricity market; and plans regional transmission expansion improvements to maintain grid reliability and relieve congestion.
Patty Dondanville is a partner in the Chicago-based national law firm Schiff Hardin LLP. She concentrates in corporate and finance matters, often representing energy companies. In particular, Ms. Dondanville provides strategic counsel on corporate governance, risk management, contracting, and related credit risk, collateral and credit support matters. Her clients include energy marketing companies, generators, electric cooperatives, and utility and energy holding companies. Ms Dondanville also provides legal analysis with respect to legislation and regulatory policy at the increasing important intersection between the energy industry and the financial markets.

Ms. Dondanville served for several years as a deputy general counsel for a major energy holding company. She also served as Co-Chair, and remains a member, of the Edison Electric Institute's Contract Drafting Committee, which drafted the EEI Master Purchase and Sale Agreement, the model for current energy trading contracts. Ms. Dondanville is a frequent speaker and panel member on programs dealing with corporate finance, derivatives risks and energy marketing. Ms. Dondanville's most recent publications are "Not the Same: Commodity and Derivatives Markets for Power Defy Standardization," in Electric Perspectives, Edison Electric Institute, Sept/Oct 2009, and "Regulatory 'Round Holes' in the OTC Derivatives Markets" in EnergyLaw 360, November 2, 2009.
Robert McNally

Robert McNally is the founder and President of The Rapidan Group. Mr. McNally has a successful 18 year government and industry track record as a senior international energy market consultant, strategist and policy official. Mr. McNally’s background and expertise spans the convergence of energy with economic, security, and environmental sectors, from global oil market fundamentals to emissions policy. Mr. McNally started his professional career as an oil market analyst and consultant with Energy Security Analysis, Inc. In 1994, he joined Tudor Investment Corporation and for twelve subsequent twelve years analyzed energy markets, macroeconomic policy, and geopolitics for Tudor portfolio managers, retiring as partner. From 2001 to 2003, Mr. McNally served on the White House National Economic Council as Special Assistant to the President and on the National Security Council as Senior Director for International Energy. Mr. McNally served in the Peace Corps in Senegal from 1988-1990. He earned his double major BA/BS in International Relations and Political Science from American University and his MA in International Economics and American Foreign Policy from Johns Hopkins Paul H. Nitze School of Advanced International Studies (SAIS).
**Biographical Sketch**

Betsy heads Exelon Corporation's Washington, DC office, and serves as a member of Exelon’s senior officers Executive Committee. She joined Exelon (formerly Unicom Corp.) in January, 2000. During 1999 she was a partner in the law firm of Vinson & Elkins and a member of the Unicom Board of Directors.

Betsy is a nationally recognized energy policy expert, with particular emphasis on electricity markets and transmission policy. She is responsible for all aspects of Exelon’s federal government affairs initiatives. She leads Exelon’s team on climate change policy issues and in advocating federal legislation to address the issue wholesale market development team efforts. She also leads Exelon’s wholesale market development team efforts.

Betsy had a long career in government service. She was a staff member on Capitol Hill for 20 years. She served as Senior Counsel for the United States Senate Committee on Energy and Natural Resources from 1976 to 1988 under Senators Henry M. (“Scoop”) Jackson and J. Bennett Johnston. She was appointed by three different Presidents (Ronald Reagan, George H.W. Bush and Bill Clinton) and confirmed by the U.S. Senate to serve as a Member of the Federal Energy Regulatory Commission (FERC) from 1988-1997. In 1993, she was designated by President Clinton to serve as the Commission’s Chair. Under her leadership FERC adopted a landmark initiative (Order Nos. 888 and 889) to require utilities to open their transmission lines on an equal access basis to their competitors, paving the way for robust wholesale competitive electricity markets. She continued to serve as the Commission’s Chair until June 1997, when she was appointed by President Clinton and confirmed by the U.S. Senate to serve as the Deputy Secretary of Energy. She resigned in October 1998.
Professional and Educational Background

- Senior Vice President and Executive Vice President, Exelon Corporation (2000 – Present)
- Deputy Secretary, United States Department of Energy (1997–1998)
- Senior Counsel and Counsel, Committee on Energy and Natural Resources, United States Senate (1977–1988)
- Other Capitol Hill legislative experience (1967–1977)
- George Washington University Law School, Juris Doctor (1977)
- Johns Hopkins University, graduate studies (1971–1972)
- American University, School of International Service, B.A., with honors (1971)

Activities and Affiliations

- Member: District of Columbia Bar Association; American Bar Association
- Member: Board of Directors, Henry M. Jackson Foundation
- Recognized by The Hill newspaper as a “Top Corporate Lobbyist” in Washington (2003 -, 2008)
- Recipient, National Energy Resources Organization Distinguished Service Award, 1996
- Recipient, Energy Daily Annual Public Policy Leadership Award, 1996
- Recipient, Women's Council on Energy and the Environment, Woman of the Year Award, 1996 and 1998
- Betsy is the wife of Thomas B. Williams, and the mother of two grown children, Blake and Eleanor Williams