

APPLYING THE *MOBILE-SIERRA* DOCTRINE TO MARKET-BASED RATE CONTRACTS

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I. INTRODUCTION

In companion decisions issued nearly half a century ago, *United Gas Pipe Line Co. v. Mobile Gas Services Corp.*¹ and *FPC v. Sierra Pacific Power Co.*,² the Supreme Court considered the authority of the Federal Power Commission (FPC), predecessor of the Federal Energy Regulatory Commission (FERC),³ to modify the rates, terms, and conditions of contracts for services subject to its jurisdiction under the Natural Gas Act (NGA)⁴ and Part II of the Federal Power Act (FPA),⁵ respectively. Recognizing that these statutes “permit[] the relations between the parties to be established initially by contract,”⁶ the Court articulated the so-called “*Mobile-Sierra*” doctrine, which bars the Commission from reforming or abrogating a fixed-rate contract absent a showing that contract reformation or abrogation is required to protect the public interest.⁷ In articulating the doctrine, the Supreme Court explained that the resulting “public interest” standard of review under *Mobile-Sierra* “preserv[es] the integrity of contracts,” thereby “permit[ting] the stability of supply arrangements which all agree is essential to the health of the . . . industry.”⁸

Mobile and *Sierra* were decided in the context of a traditional, cost-of-service regulatory regime under which contracts were, as a general matter, individually filed with, and reviewed by, the Commission. In recent years, the FERC has adopted a market-oriented ratemaking approach for wholesale sales of electricity and certain other jurisdictional services that, among other things, largely dispenses with the filing and review of individual contracts in favor of an increased focus on the adequacy of competition in markets.

While there is a large body of judicial precedent applying the *Mobile-Sierra* doctrine to cost-based contracts⁹ and a growing body of judicial precedent

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1. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956).

2. *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

3. The FPC and/or the FERC are also referred to herein, individually or together as applicable, as the “Commission.”

4. 15 U.S.C. §§ 717(a)–717(w) (2000).

5. 16 U.S.C. §§ 824(a)–824(m) (2000). The relevant provisions of the FPA and the NGA are “substantively identical,” *Sierra*, 350 U.S. at 350, and decisions interpreting the provisions of the two statutes may be cited “interchangeably,” *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

6. *Mobile*, 350 U.S. at 339.

7. *Sierra*, 350 U.S. at 355.

8. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956).

9. See, e.g., *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Atl. City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002); *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403 (D.C. Cir. 2000); *Ne. Utils. Serv. Co. v. FERC*, 993 F.2d 937, 961 (1st Cir. 1993).

affirming the lawfulness of the FERC's market-based rate regime,¹⁰ to date, only the FERC has had occasion to consider the applicability and application of the doctrine to contracts for sales of electricity at market-based rates.¹¹ For its part, the FERC has rejected claims that *Mobile-Sierra* is inapplicable or should be applied any less stringently where market-based rate contracts¹² are concerned. The Commission has done so in three parallel proceedings involving allegedly excessive rates in forward market-based rate contracts executed during the Western energy crisis of 2000–2001. These proceedings were initiated by complaints filed pursuant to section 206 of the FPA¹³ in late 2001 and early 2002 by: (i) Nevada Power Company (Nevada Power) and Sierra Pacific Power Company (“Sierra” and, together with Nevada Power, the “Nevada Companies”), Southern California Water Company (SCWC) and Public Utility District No. 1 of Snohomish County, Washington (Snohomish);¹⁴ (ii) the California Public Utilities Commission (CPUC) and the California Electricity Oversight Board (CEOB);¹⁵ and (iii) PacifiCorp (together with the Nevada Companies, SCWC, Snohomish, the CPUC and the CEOB, the “Forward Contracts Complainants”).¹⁶ The FERC has likewise applied a very stringent *Mobile-Sierra* public interest

10. See, e.g., *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012–14 (9th Cir. 2004); *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993).

11. In a case involving market-based rate contracts, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) assumed without discussion that the *Mobile-Sierra* doctrine would apply to such contracts unless it was shown that there were problems with contract formation that would make the contracts void. See *Pub. Util. Dist. No. 1 v. IDACORP, Inc.*, 379 F.3d 641, 652 n.13 (9th Cir. 2004) (citations omitted).

12. As used in this article, the term “market-based rate contracts” primarily refers to power sales contracts that sellers execute pursuant to their umbrella market-based rate tariffs. As a practical matter, virtually all contracts for wholesale sales of electricity at market-based rates, except for affiliate transactions involving a traditional public utility with captive ratepayers, are now executed on that basis.

13. 16 U.S.C. § 824(e) (2000).

14. See *Nev. Power Co.*, 99 F.E.R.C. ¶ 61,047 (2002) (consolidating and setting for hearing complaints by the Nevada Companies against ten sellers, a complaint by SCWC against Mirant Americas Energy Marketing, L.P. and a complaint by Snohomish against Morgan Stanley Capital Group, Inc. in the “*Nevada Power Proceeding*”) [hereinafter *Nevada Power I*], *on reh'g*, 100 F.E.R.C. ¶ 61,273 (2002) (granting, in part, and denying, in part, clarification and rehearing of *Nevada Power I*) [hereinafter *Nevada Power II*]; *Nev. Power Co.*, 101 F.E.R.C. ¶ 63,031 (2002) (initial decision) [hereinafter *Nevada Power ID*]; *Nev. Power Co.*, 103 F.E.R.C. ¶ 61,353 (2003) (order on initial decision, denying complaints and denying rehearing of *Nevada Power II*) [hereinafter *Nevada Power III*], *reh'g denied*, 105 F.E.R.C. ¶ 61,185 (2003) [hereinafter *Nevada Power IV*], *appeal docketed*, No. 03-74208 (9th Cir. Nov. 20, 2003).

15. See *Pub. Utils. Comm'n of Cal.*, 99 F.E.R.C. ¶ 61,087 (2002) (consolidating and setting for hearing separate complaints by the CPUC and CEOB against sellers under long-term, forward contracts with the California Department of Water Resources (CDWR) in the “*CPUC Proceeding*”) [hereinafter *CPUC I*], *reh'g denied*, 100 F.E.R.C. ¶ 61,098 (2002) [hereinafter *CPUC II*]; *Pub. Utils. Comm'n of Cal.*, 102 F.E.R.C. ¶ 63,013 (2003) (initial decision on the applicability of *Mobile-Sierra*) [hereinafter *CPUC ID*]; *Pub. Utils. Comm'n of Cal.*, 103 F.E.R.C. ¶ 61,354 (2003) (order on initial decision and denying complaints) [hereinafter *CPUC III*], *reh'g denied*, 105 F.E.R.C. ¶ 61,182 (2003) [hereinafter *CPUC IV*], *appeal docketed*, No. 03-74207 (9th Cir. Nov. 19, 2003).

16. See *PacifiCorp*, 99 F.E.R.C. ¶ 61,381 (2002) (consolidating and setting for hearing complaints by PacifiCorp against five sellers in the “*PacifiCorp Proceeding*” (together, the *Nevada Power Proceeding*, *CPUC Proceeding*, and *PacifiCorp Proceeding* are referred to as the “Forward Contracts Proceedings”)) [hereinafter *PacifiCorp I*]; *PacifiCorp*, 102 F.E.R.C. ¶ 63,030, 65,076–78 (2003) (initial decision) [hereinafter *PacifiCorp ID*]; *PacifiCorp*, 103 F.E.R.C. ¶ 61,355 (2003) (order on initial decision, denying complaints and denying rehearing of *PacifiCorp I*) [hereinafter *PacifiCorp II*], *reh'g denied*, 105 F.E.R.C. ¶ 61,184 (2003) [hereinafter *PacifiCorp III*], *PacifiCorp v. FERC*, No. 03-72522, 2005 WL 1906895 (9th Cir. Aug. 8, 2005) (unpublished) (memorandum dismissing petition for review) [hereinafter *PacifiCorp Memorandum*].

standard of review in a proceeding where it perceived a seller reorganizing under Chapter 11 of the United States Bankruptcy Code (Bankruptcy Code)¹⁷ to be attempting to abrogate a long-term, market-based rate contract through its efforts to cease performance after rejecting the contract in bankruptcy.¹⁸ The courts, or at least one court, will soon have an opportunity to address the issue as well, because the FERC's orders in the *Nevada Power* and *CPUC* Proceedings denying challenges to forward contracts executed during the Western energy crisis of 2000–2001 are now pending before the Ninth Circuit.¹⁹

This article addresses both the applicability and the application of the *Mobile-Sierra* doctrine to market-based rate contracts. In other words, it considers the question: What, if anything, about market-based rate contracts would warrant a change in when and how the *Mobile-Sierra* doctrine is applied? The authors conclude that, while this question may, as a member of the Ninth Circuit panel in the *Nevada Power* and *CPUC* Proceedings suggested, present an issue of first impression,²⁰ the distinctions between market-based and cost-based rate contracts are largely distinctions without a difference in terms of whether and how one applies the *Mobile-Sierra* doctrine. The authors further maintain that, consistent with the FERC's assessment,²¹ policy considerations make applying the *Mobile-Sierra* doctrine to market-based rate contracts, if anything, more—not less—important than it was in the case of cost-based rate contracts.

II. THE *MOBILE-SIERRA* DOCTRINE GENERALLY

A. *The Genesis of the Mobile-Sierra Doctrine*

The *Mobile-Sierra* doctrine has its genesis in *Mobile* and *Sierra* and also in a third Supreme Court decision decided two years later, *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*,²² in which the Court provided additional guidance as to the applicability (and inapplicability) of the *Mobile-Sierra* doctrine.

1. *Mobile*

Mobile involved a ten-year contract executed in 1946 under which United

17. 11 U.S.C. §§ 101–1532 (2000).

18. See *Blumenthal*, 103 F.E.R.C. ¶ 61,344, 62,321–22 (2003) (setting complaints for hearing in the “*NRG-PMI* Proceeding”) [hereinafter *NRG-PMI I*], *reh'g denied*, 104 F.E.R.C. ¶ 61,211 (2003) [hereinafter *NRG-PMI II*]; *Blumenthal*, 104 F.E.R.C. ¶ 61,210 (2003) (order on the merits) [hereinafter *NRG-PMI III*].

19. To the authors' knowledge, the Forward Contracts and *NRG-PMI* Proceedings are the only cases in which the applicability and application of the *Mobile-Sierra* doctrine to market-based rate contracts have been addressed directly. At least one FERC commissioner suggested, however, that the *Mobile-Sierra* doctrine would have provided an alternative basis for denying relief to buyers who purchased power in bilateral spot markets in the Pacific Northwest during the Western energy crisis. See *Puget Sound Energy, Inc.*, 103 F.E.R.C. ¶ 61,348, 62,371 (2003) (Brownell, Comm'r, concurring).

20. Audio Recording: Oral Argument in Case No. 03-74207, at 37:34–38:27 (Dec. 8, 2004), available at [http://www.ca9.uscourts.gov/ca9/media.nsf/DE4AF05B51D2B33A88256F65005D947F/\\$file/03-74207.wma?openelement](http://www.ca9.uscourts.gov/ca9/media.nsf/DE4AF05B51D2B33A88256F65005D947F/$file/03-74207.wma?openelement) (Judge Berzon characterizing the fact that the *CPUC* Proceeding involved the application of *Mobile-Sierra* to market-based rate contracts as “really unusual” and as meaning that the analysis “comes out, possibly, quite different” than prior cases involving cost-based rate contracts).

21. *PacifiCorp I*, *supra* note 16, at 62,614; *CPUC I*, *supra* note 15, at 61,383; *Nevada Power I*, *supra* note 14, at 61,190.

22. *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958).

Gas Pipe Line Company (United), a natural gas company whose rates for sales and transportation of natural gas were regulated by the FPC pursuant to the NGA, agreed to sell natural gas to Mobile Gas Service Corporation (Mobile Gas), a local distribution company serving end users in Mobile, Alabama, for "the equivalent of 10.7 cents per MCF [(thousand cubic feet)], a rate substantially lower than that for other gas furnished by United."²³ Mobile Gas sought the contract with United so that it could enter into another ten-year contract pursuant to which it would sell natural gas to an industrial customer at a rate of 12 cents per MCF.²⁴ The United/Mobile Gas contract was filed with, and accepted by, the FPC.²⁵

Notwithstanding the contract, United filed new rate schedules with the FPC in 1953 proposing to increase the rate for its sales to Mobile Gas in order to bring those rates into line with rates for United's other sales of natural gas.²⁶ The FPC rejected Mobile Gas's contention that United could not unilaterally modify the contract rate and accepted the new rate schedule.²⁷

Mobile Gas petitioned for review of the FPC's order in the United States Court of Appeals for the Third Circuit (Third Circuit). The Third Circuit reversed and directed the FPC to reject United's rate schedule, finding that:

[T]he [NGA] does not expressly permit existing contract rights to be abolished by a mere unilateral filing of new rates. The plan of the [NGA] is . . . one of reasonable regulation, as evidenced by the fact that the Commission itself cannot change an existing contract rate under Section 5(a) without first finding that such rates are unreasonable.²⁸

Affirming the Third Circuit, the Supreme Court found that the NGA "evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the [NGA] expressly recognizes that rates to particular customers may be set by individual contracts."²⁹ In this regard, the Court observed, the NGA is markedly different from common carrier regimes such as that established by "the Interstate Commerce Act [(ICA)], which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform"³⁰ The NGA, by contrast, "permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public."³¹

23. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 335-36 (1956).

24. *Id.* at 336.

25. *See United Gas Pipe Line Co.*, 5 F.P.C. 770 (1946) (accepting the contract for filing and stating that "[n]othing contained . . . shall . . . be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract, or practice . . .").

26. *Mobile*, 350 U.S. at 336-37.

27. *Mobile Gas Serv. Corp.*, 12 F.P.C. 1422, 1423 (1953).

28. *Mobile Gas Serv. Corp. v. FPC*, 215 F.2d 883, 889 (3d Cir. 1954).

29. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 338 (1956).

30. *Id.* (citation omitted).

31. *Mobile*, 350 U.S. at 339. The Court attributed this distinction between the ICA's statutory regime for railroads and that of the NGA for natural gas companies to the Congressional recognition of differences in the two industries being regulated:

The vast number of retail transactions of railroads made policing of individual transactions administratively impossible; effective regulation could be accomplished only by requiring

The Supreme Court rejected United's characterization of the rate provisions of the NGA as "rate-changing 'procedures'" that could be used for initiating unilateral modifications to contracts, stating that such a view reflects "a misconception of the structure of the [NGA]."³² As described by the Court, sections 4 and 5 of the NGA³³ (which are similar to sections 205 and 206 of the FPA³⁴, respectively) "are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful."³⁵ Indeed, "the [NGA] provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates."³⁶

Given this structure, the Court observed:

The obvious implication is that, except as specifically limited by the [NGA], the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the [NGA]: to establish *ex parte*, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer.³⁷

Thus, the Court concluded that the NGA does not empower companies unilaterally to modify their contracts.³⁸ This finding, the Court explained, "fully promotes the purposes of the [NGA]"³⁹ because:

By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate.⁴⁰

At the same time, the Court emphasized that restricting the unilateral modification of contract rates "in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of

compliance with a single schedule of rates applicable to all shippers. On the other hand, only a relatively few wholesale transactions are regulated by the [NGA] and these typically require substantial investment in capacity and facilities for the service of a particular distributor.

Id. at 338–39. Later decisions have interpreted Congress' understanding of the two industries similarly. See *Boston Edison Co. v. FERC*, 233 F.3d 60, 64 (1st Cir. 2000) (observing that "[t]raditionally, contracts fixing utility or carrier rates have been anathema to the courts because, almost by definition, they suggest different treatment of similarly-situated customers in contravention of the basic principle of non-discrimination[.]" but stating that, in enacting the FPA and NGA, Congress allowed rates to be set by contracts because "the customers in interstate sales of electricity and natural gas sales have tended to be big companies, and negotiated contracts formed a useful means of allocating risks").

32. *Mobile*, 350 U.S. at 340–41.

33. 15 U.S.C. § 717(c)–(d) (2000).

34. 16 U.S.C. § 824(d)–(e) (2000).

35. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 341 (1956).

36. *Id.* at 343 (emphasis added).

37. *Mobile*, 350 U.S. at 343 (emphasis added).

38. *Id.* at 343–44.

39. *Mobile*, 350 U.S. at 344.

40. *Id.*

the Commission to modify them when necessary in the public interest.”⁴¹ Thus, where “the Commission . . . determines the contract rate to be so low as to conflict with the public interest, it may . . . authorize the natural gas company to file a schedule increasing the rate.”⁴² In this way, the Court reasoned, the statute “affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other.”⁴³

2. *Sierra*

This case involved a contract dispute between Sierra, a distributor of electricity to consumers in northern Nevada and eastern California, and Pacific Gas and Electric Company (PG&E), whose sales of wholesale power were subject to the FPC’s regulation under the FPA. Although Sierra had historically purchased much of its power from PG&E, it began searching for alternative sources of supply in 1947. In order to retain Sierra as a customer, PG&E offered Sierra a contract containing a “special low rate,” which was executed in 1948,⁴⁴ and which was filed with and accepted by the FPC.⁴⁵

Like United in the *Mobile* case, PG&E unilaterally filed new rate schedules with the FPA in 1953 proposing to increase the rates for its sales to Sierra (by approximately 28%) in order to bring those rates into line with rates for PG&E’s other sales of electricity.⁴⁶ The new rate schedule was accepted by the FPC.⁴⁷ In accepting the rate change, the FPC examined the rate of return under the new rate, and found it to be reasonable.⁴⁸ Although it rejected the argument that it was required to find the existing rate in the 1948 contract unlawful before it could accept a new rate,⁴⁹ the FPC indicated that it would have had little difficulty, on the record before it, finding that the existing rate was “unreasonably low and therefore unlawful.”⁵⁰

The United States Court of Appeals for the District of Columbia (D.C. Circuit) set aside the FPC’s order, finding that the contract rate could be reformed only upon an FPC finding that it was unreasonable.⁵¹ The D.C. Circuit reasoned:

Clearly, if contract rates are reasonable, the public interest does not require allowance of higher rates upon the unilateral application of the seller under [section] 205, just because the Commission deems the higher rates also to be reasonable. Therefore, it does not ‘deprive the statute of its efficacy’ to give effect to a duly filed rate contract until such time as the rates specified therein are found unreasonable under [section] 206(a).⁵²

41. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956).

42. *Id.* at 345.

43. *Mobile*, 350 U.S. at 344.

44. *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 352 (1956).

45. *Pac. Gas & Elec. Co.*, 7 F.P.C. 832 (1948) (accepting the contract for filing and stating that “[n]othing contained in this order shall be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract or practice . . .”).

46. *Sierra*, 350 U.S. at 352.

47. *See In re Pac. Gas & Elec. Co.*, 13 F.P.C. 200 (1954).

48. *See id.* at 204–08.

49. *In re Pac. Gas & Elec. Co.*, 13 F.P.C. at 212–13.

50. *Id.* at 213.

51. *Sierra Pac. Power Co. v. FPC*, 223 F.2d 605, 607 (D.C. Cir. 1955).

52. *Id.*

The Supreme Court affirmed, relying in large part on the reasoning of its companion decision under the NGA in *Mobile*. In so doing, the Court observed that the relevant “provisions of the [FPA] . . . are in all material respects substantially identical to the equivalent provisions of the [NGA],” and, therefore, that the reasoning of *Mobile* was equally applicable in cases arising under the FPA.⁵³ Applying the *Mobile* reasoning, the Court found that neither PG&E’s 1953 filing nor the FPC’s order accepting that filing was “effective to change PG&E’s contract with Sierra.”⁵⁴

The Court also addressed a further question not presented in *Mobile*—namely, whether the FPC’s finding that the existing rate in the PG&E/Sierra contract produced a less than normal rate of return for the seller was sufficient to justify a determination that the contract was “unreasonable” within the meaning of section 206 of the FPA and thus to permit the FPC to fix a new rate to be thereafter observed. On this issue, the Court concluded that such a finding was insufficient to justify modifying the contract, and that the FPC had applied the wrong standard in evaluating the contract rate.⁵⁵ The Court explained:

[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.⁵⁶

In so holding, the Court relied on section 201 of the FPA,⁵⁷ which declares the purpose of the FPA to be “the protection of the public interest, as distinguished from the private interests of the utilities”⁵⁸ When section 206 “is read in the light of this purpose,” the Court added, “it is clear that a contract may not be said to be either ‘unjust’ or ‘unreasonable’ simply because it is unprofitable to the public utility.”⁵⁹

3. *Memphis*

Two years after handing down its decisions in *Mobile* and *Sierra*, the Supreme Court issued its decision in *Memphis*. This case involved a number of contracts entered into by United with various customers that contained provisions stating that the rate would be as set forth in the contract “*or any effective superseding rate schedules . . .*”⁶⁰ United later filed new rate schedules increasing the contract rates by amounts that would, in the aggregate, have increased United’s revenues for the subject sales by almost \$10 million.⁶¹ The FPC accepted the new rate schedules, distinguishing them from the rate schedules at issue in *Mobile* and *Sierra* on the basis that United was not

53. *Sierra*, 350 U.S. at 353.

54. *Id.*

55. *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 354–55 (1956).

56. *Id.* at 355 (citation omitted).

57. 16 U.S.C. § 824 (2000).

58. *Sierra*, 350 U.S. at 355.

59. *Id.*

60. *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 105 (1958).

61. *Id.* at 106.

contractually foreclosed from unilaterally changing the contract rates.⁶²

The D.C. Circuit reversed, holding that, under *Mobile* and *Sierra*, the FPC lacked the jurisdiction to accept the new rate schedules.⁶³ Under the D.C. Circuit's reading of those cases, the customers' consent to have the Commission review a proposed rate change under section 4 of the NGA was "not sufficient" to put the FPC in the position of having "to arbitrate a dispute when the seller sought to raise its price."⁶⁴

The Supreme Court reversed. It found that the D.C. Circuit had misapplied *Mobile* and *Sierra*, and that United had not bound itself in the contracts at issue to make sales at a "fixed rate" but instead had agreed to make such sales at the "going rate."⁶⁵ These "going rate" contracts, which expressly provided that United could make subsequent filings to modify the contract rate, "left United free to change its rates from time to time, subject, of course, to the procedures and limitations of the [NGA]."⁶⁶

The Court stated the rule of *Mobile* as being that the NGA "did not 'empower natural gas companies to change their contracts unilaterally,' and that in this respect regulated natural gas companies stood in no different position under the [NGA] than they would have in the absence of the [NGA]."⁶⁷ A "necessary corollary of this proposition is that changes which in fact are 'otherwise valid' in the light of the relationship between the parties can be put into effect under [Section] 4(d) by a seller through giving the required notice to the Commission."⁶⁸ Applying that corollary to the *Memphis* circumstances, the Court held that "United, like the seller of an unregulated commodity, has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so."⁶⁹

B. Subsequent Application of the Mobile-Sierra Doctrine

Since the *Mobile-Sierra* doctrine was first articulated by the Supreme Court in the 1950s, it has repeatedly demanded that the Commission and the courts "wrestle[] with issues related to contract interpretation, contract rights, statutory rights, judicial deference to agency expertise, and public policy."⁷⁰ While subsequent precedent confirms the broad principle that the Commission may alter fixed-rate contracts "only in circumstances of unequivocal public necessity,"⁷¹ it also shows that this broad and "refreshingly simple"⁷² principle

62. *In re United Gas Pipe Line Co.*, 16 F.P.C. 19, 22-23 (1956) ("[T]he pertinent agreements . . . do not fix an absolute or static rate. Rather, these letter agreements simply provide that the rate to be charged shall be the effective rate on file from time to time with the Commission.").

63. *See Memphis Light, Gas & Water Div. v. FPC*, 250 F.2d 402 (D.C. Cir. 1957).

64. *Id.* at 407.

65. *Memphis*, 358 U.S. at 108-09.

66. *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 110 (1958). *See also id.* at 111 (In the contract at issue in *Mobile*, United had "bargained away by contract the right to change its rates unilaterally . . .").

67. *Memphis*, 358 U.S. at 109-110 (citation omitted).

68. *Id.* at 112.

69. *Memphis*, 358 U.S. at 113.

70. Carmen L. Gentile, *The Mobile-Sierra Rule: Its Illustrious Past and Uncertain Future*, 21 ENERGY L.J. 353, 386 (2000) [hereinafter *The Mobile-Sierra Rule*].

71. *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968).

72. *Richmond Power & Light v. FPC*, 481 F.2d 490, 493 (D.C. Cir. 1973).

leaves any number of issues to be resolved through further litigation. A brief review of some recurring *Mobile-Sierra* issues follows.

1. Contract Language Invoking the *Mobile-Sierra* Doctrine

In the wake of *Memphis*, the Commission and the courts have struggled with the distinction between “going-rate” and “fixed-rate” contracts. The prevailing view, as explained by the D.C. Circuit in *Texaco Inc. v. FERC*, is that:⁷³ “[A]bsent contractual language ‘susceptible to the construction that the rate may be altered while the contract[] subsist[s],’ the *Mobile-Sierra* doctrine applies.”⁷⁴ At the same time, there is authority from the same court—in a decision that precedes, and was clarified by, *Texaco*—that can be (and frequently is) cited for a contrary proposition.⁷⁵

2. Whether the Public Interest Standard of Review is “Practically Insurmountable” in All Instances

Several D.C. Circuit decisions have described the *Mobile-Sierra* public interest standard of review as “practically insurmountable”⁷⁶ or “almost insurmountable.”⁷⁷ While recognizing that “the ‘public interest’ standard [is] ‘a more difficult standard for the Commission to meet than the statutory ‘unjust and unreasonable’ standard,’”⁷⁸ the First Circuit has rejected the notion that the public interest standard “should be considered ‘practically insurmountable’ in all circumstances.”⁷⁹ Interestingly, while the D.C. Circuit decision that first suggested that the standard might be “practically insurmountable” took particular note of the fact that “the Commission itself is unaware of any case granting relief under it,”⁸⁰ subsequent decisions of the same court reveal the public interest standard to be an obstacle that *can* be surmounted under the right circumstances.⁸¹

73. *Texaco, Inc. v. FERC*, 148 F.3d 1091 (D.C. Cir. 1998).

74. *Id.* at 1096 (alterations in original) (quoting *Appalachian Power Co. v. FPC*, 529 F.2d 342, 348 (D.C. Cir. 1976)). *See also, e.g.*, *Boston Edison Co. v. FERC*, 233 F.3d 60, 67 (2000) (explaining that “specification of a rate or formula by itself implicates *Mobile-Sierra* (unless the parties negate the implication) . . .”); *La. Power & Light Co. v. FERC*, 587 F.2d 671, 675 (5th Cir. 1979) (to the extent that parties intended for their contracts to be “going” rate contracts like that in *Memphis*, the “contracts should have stated as much in unambiguous terms.”).

75. *See Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157, 161 (D.C. Cir. 1997). The following passage from *Union Pacific* is often cited for the proposition that express language is required to make a contract a “fixed-rate” contract: “A contract between private parties may preserve [the] FERC’s right to impose new rates by ‘leav[ing] unaffected the power of the Commission . . . to replace not only rates that are contrary to the public interest but also rates that are unjust [or] unreasonable.’” *Id.* (alterations in the original) (quoting *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 953 (D.C. Cir. 1983)). As the same court stated less than a year later, however, this passage “is misleading, and it does not represent the law.” *Texaco*, 148 F.3d at 1096.

76. *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 407 (D.C. Cir. 2000); *Papago*, 723 F.2d at 954.

77. *Me. Pub. Serv. Co. v. FERC*, 964 F.2d 5, 8 (D.C. Cir. 1992) (citation omitted); *Kan. Cities v. FERC*, 723 F.2d 82, 87–88 (D.C. Cir. 1983).

78. *Ne. Utils. Serv. Co. v. FERC*, 55 F.3d 686, 691 (1st Cir. 1995) (quoting *Ne. Utils. Serv. Co. v. FERC*, 993 F.2d 937, 960 (1st Cir. 1993)).

79. *Id.* at 692.

80. *Papago*, 723 F.2d at 954.

81. *See, e.g., Ariz. Corp. Comm’n v. FERC*, 397 F.3d 952, 953–54 (D.C. Cir. 2005) (affirming a FERC order reforming settlement agreements where the FERC “did not merely protect [the natural gas company]

3. Applicability and Application of the *Mobile-Sierra* Doctrine to Contract Modifications Sought in "High-Rate" Cases

Mobile, *Sierra*, and *Memphis*, as well as most (but not all) of their progeny, were so-called "low-rate" cases in which a seller sought relief from a rate that was alleged to be inadequate. Subsequent decisions have confirmed that the *Mobile-Sierra* doctrine applies in so-called "high-rate" cases in which rates are alleged to be excessive by buyers⁸² or the Commission⁸³ but have left open questions about the relevance of the three-pronged public interest standard set forth in *Sierra*⁸⁴ to "high-rate" cases⁸⁵ and whether a less demanding public interest standard of review may apply in such cases.⁸⁶

4. Applicability of the *Mobile-Sierra* Doctrine in Instances Where the Contract at Issue Was Not Filed With the Commission

While *Mobile*, *Sierra*, and *Memphis* involved contracts previously filed with, and reviewed by, the Commission, subsequent cases have presented the issue of whether and how *Mobile-Sierra* applies to contracts in the absence of initial rate review by the Commission. For their part, the D.C. Circuit and the First Circuit have both held the Commission to a *Mobile-Sierra* public interest standard irrespective of whether it previously reviewed the contract rates.⁸⁷ At

from an 'improvident bargain,' . . . but exercised its *Mobile-Sierra* authority to prevent 'the imposition of an excessive burden' on third parties." (quoting *Ne. Utils. Serv. Co.*, 55 F.3d at 691)); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 709–12 (D.C. Cir. 2000) (affirming generic public interest determinations made in connection with industry restructuring), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); *Texaco*, 148 F.3d at 1097 (affirming a FERC order modifying the rate design in natural gas transportation contracts where it "satisfied its obligation to articulate supportable and reasonable explanations for how the public interest required modification of a private contract"); *Ne. Utils. Serv. Co.*, 55 F.3d at 693 (affirming an order modifying a fixed-rate contract in which "gave thoughtful consideration to the public interest . . ."). If there is a common thread that runs through the cases in which modification of *Mobile-Sierra* contracts has been permitted under the public interest standard, it is that the Commission was acting to protect interests of third parties where such interests were not aligned with those of one of the contracting parties such that the contracting party could be relied upon to protect the third-parties' interests at the same time it was protecting its own interests.

82. See *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403 (D.C. Cir. 2000); *San Diego Gas & Elec. Co. v. FERC*, 904 F.2d 727 (D.C. Cir. 1990).

83. See *Ne. Utils. Serv. Co. v. FERC*, 993 F.2d 937 (1st Cir. 1993); *Boston Edison Co. v. FERC*, 233 F.3d 60 (1st Cir. 2000).

84. The three *Sierra* prongs of the public interest standard examine whether the challenged rate: (i) "might impair the financial ability of the public utility to continue its service," (ii) "cast upon other consumers an excessive burden," or (iii) "be unduly discriminatory." *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956).

85. See *Ne. Utils. Serv. Co.*, 55 F.3d at 690 (stating that the three-pronged *Sierra* standard was "formulated in the context of a low-rate case" and "was not and could not be an across-the-board definition of what constitutes the public interest in other types of cases").

86. See *id.* at 691. But see *Potomac*, 210 F.3d at 412 (stating that the buyer challenging a rate alleged to be too high had not met its burden of justifying contract modification "given the *practically insurmountable standard* that [the buyer] faced" (emphasis added)).

87. See *Ne. Utils. Serv. Co.*, 993 F.2d at 961–62 (ordering the FERC to apply the public interest standard to its review of a contract that was being filed under section 205 of the FPA); *San Diego*, 904 F.2d 727 (affirming the FERC order applying the public interest standard to its review of a contract filed under section 205); *Sam Rayburn Dam Elec. Coop. v. FPC*, 515 F.2d 998, 1008 (D.C. Cir. 1975) (requiring the application of the public interest standard to a contract not filed with the Commission); *Borough of Lansdale v. FPC*, 494 F.2d 1104, 1113 (D.C. Cir. 1974) (rejecting the "theory . . . that a fixed-rate contract has no binding force, at least for regulatory purposes, until it is physically filed with, and accepted by, the Commission" as "stand[ing] the

the same time, however, the First Circuit has tacitly appeared to endorse the notion that a less demanding public interest standard may apply where the FERC is reviewing rates for the first time.⁸⁸

III. FERC'S MARKET-BASED RATE REGIME

Over a decade ago, the FERC "departed from its historical policy of basing rates upon the cost of providing service plus a fair return on invested capital, and began approving market-based [rate] tariffs" of public utilities.⁸⁹ Under this market-based rate regime, the FERC grants a wholesale electricity seller blanket authorization to make sales at market-based (i.e., negotiated) rates⁹⁰ only if the seller can demonstrate that it "and its affiliates do not have, or adequately have mitigated, market power in the generation and transmission of . . . energy"⁹¹ An applicant for market-based rate authorization must also demonstrate that neither it nor any of its affiliates controls inputs to production that would permit it to erect barriers to entry by potential competitors.⁹² The rationale underlying this market-based rate regime is that any rates charged by a seller that meet the FERC's requirements for making market-based rate sales will be "just and reasonable" within the meaning of section 205 of the FPA because:

In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that price is close to marginal cost, such that the seller makes only a normal return on its investment.⁹³

As part of its adoption of a market-based rate regime, the FERC has also implemented "strict reporting requirements to ensure that the rate[s] charged by market-based rate sellers are] 'just and reasonable' and that markets are not subject to manipulation."⁹⁴ These requirements include requiring each market-based rate seller to file a notice of any changes in status that would reflect a departure from the characteristics the FERC relied upon in granting the seller market-based rate authorization⁹⁵ and an updated market analysis every three

Sierra-Mobile doctrine on its head").

88. See *Ne. Utils. Serv. Co. v. FERC*, 55 F.3d 686, 692 (1st Cir. 1995) (affirming a FERC order that stated that the public interest standard is not "practically insurmountable" in all circumstances, including in situations where the contract is being reviewed by the FERC for the first time). *Ne. Utils. Serv. Co.* did not expressly endorse or adopt the FERC's reasoning on this point. See *infra* note 203 and accompanying text.

89. *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012 (9th Cir. 2004). The use of market-based rates was first approved in the natural gas context, see *Elizabethtown*, 10 F.3d at 870, and was subsequently extended to sales of electricity, see *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998).

90. Affiliated power sales transactions involving a traditional public utility with captive ratepayers are not authorized under these umbrella tariffs and instead require separate the FERC authorization under section 205 of the FPA. See, e.g., *Consolidated Water Power Co.*, 109 F.E.R.C. ¶ 61,278, 62,317 n.8 (2004); *Aquila, Inc.*, 101 F.E.R.C. ¶ 61,331, 62,374 (2002); *DPL Energy, Inc.*, 76 F.E.R.C. ¶ 61,367, 62,712 (1996); *Atl. City Elec. Co.*, 75 F.E.R.C. ¶ 61,167, 61,552-53 (1996); *PECO Energy Co.*, 74 F.E.R.C. ¶ 61,336, 62,048 (1996).

91. *La. Energy & Power Auth.*, 141 F.3d at 365 (footnote omitted) (citing *Heartland Energy Servs., Inc.*, 68 F.E.R.C. ¶ 61,223, 62,060 (1994)).

92. *AEP Power Mktg., Inc.*, 97 F.E.R.C. ¶ 61,219, 61,969 (2001) [hereinafter *AEP*], *order on reh'g*, 107 F.E.R.C. ¶ 61,018 (2004).

93. *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990).

94. *Lockyer*, 383 F.3d at 1013.

95. See generally Order No. 652, *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, F.E.R.C. STATS. & REGS. ¶ 31,175 (2005), 70 Fed. Reg. 8253 (2005) (codified at 18 C.F.R. pt. 35).

years.⁹⁶ While a market-based rate seller is not required to file its individual contracts with the FERC,⁹⁷ it is required to report the terms of such contracts in quarterly reports, summarizing its short-term and long-term transactions during the preceding quarter.⁹⁸

To be clear, the FERC certainly *could* review the rates, terms, and conditions of individual market-based rate contracts.⁹⁹ The FERC has recognized, however, that such a review would render the initial grant of blanket market-based rate authorization “a pointless exercise of no value to anyone,”¹⁰⁰ inasmuch as the seller would have to repeat the exercise of demonstrating that it lacked, or had adequately mitigated any, market power on a transaction-by-transaction basis notwithstanding the prior order approving its market-based rate tariff.¹⁰¹ Thus, the absence of initial review of individual contracts may not be an inevitable feature of a market-based rate regime, but it appears to be a logical incident of such an approach.

IV. FERC’S APPLICATION OF MOBILE-SIERRA TO MARKET-BASED RATE CONTRACTS

A. *The Forward Contracts Proceedings*

In the summer of 2000, prices in the bid-based spot markets administered by the California Independent System Operator (Cal ISO) and California Power Exchange (Cal PX) spiked dramatically. While the FERC attributed most of this price volatility to market fundamentals affecting the supply of, and demand for, electricity,¹⁰² it also found that “market dysfunctions” had impacted prices in the

96. *AEP*, *supra* note 92, at 61,967.

97. See 18 C.F.R. § 35.1(g) (2005). See also Order No. 2001, *Revised Public Utility Filing Requirements*, F.E.R.C. STATS. & REGS. ¶ 31,127, 30,121 (2002), 70 Fed. Reg. 31,043 (2002) (codified at 18 C.F.R. pts. 2, 35) (“Public utilities will continue to file requests for market-based rate authority on a case-by-case basis, and agreements under the umbrella tariffs approved in these cases need not be filed with the Commission.”) [hereinafter Order No. 2001], *reh’g denied*, Order No. 2001-A, 100 F.E.R.C. ¶ 61,074 (2002), *reh’g denied*, Order No. 2001-B, 100 F.E.R.C. ¶ 61,342 (2002).

98. See 18 C.F.R. § 35.10b (2005); Order No. 2001, *supra* note 97, at 30,118–19.

99. Indeed, while individual review of market-based rate contracts is now the exception (applicable only to transactions not authorized under a seller’s umbrella market-based rate tariff, *see supra* note 90), it was the rule when the FERC first began experimenting with allowing market-based rates for wholesale power sales. See *Prior Notice & Filing Requirements Under Part II of the FPA*, 64 F.E.R.C. ¶ 61,139, 61,980 (1993), *clarified*, 65 F.E.R.C. ¶ 61,081 (1993).

100. *CPUC III*, *supra* note 15, at 62,422 (citing *GWF Energy, LLC*, 98 F.E.R.C. ¶ 61,330, 62,390–91 (2002) [hereinafter *GWF II*]). See also *Nevada Power III*, *supra* note 14, at 62,388–89; *PacifiCorp II*, *supra* note 16, at 62,456–57.

101. Moreover, such an exercise would inevitably impair the efficient operation of bilateral spot markets and otherwise entail substantial transactions costs, especially in the case of short-term transactions. See *S. Co. Servs., Inc.*, 87 F.E.R.C. ¶ 61,214, 61,848 (1999).

The current general practice of sellers in the industry . . . is to engage in short-term transactions that frequently are not the subject of separate written agreements. To require [sellers] to prepare, negotiate and file a written agreement for every short-term transaction would seriously diminish the flexibility and efficiency of the short-term market and burden the resources of both the reporting parties and the Commission.

Id.

102. See *San Diego Gas & Elec. Co.*, 93 F.E.R.C. ¶ 61,121, 61,358–59 (2000) [hereinafter *SDG&E*] (describing a supply and demand imbalance, as well as high prices for generation inputs such as natural gas and emissions credits costs that led to increased prices). See also FED. ENERGY REGULATORY COMM’N, FINAL

Cal ISO and Cal PX spot markets.¹⁰³ In particular, the FERC found that the design of the Cal ISO and Cal PX markets was “seriously flawed” and that “[m]any of the market dysfunctions in California and the exposure of California consumers to high prices can be traced directly to an over reliance on spot markets” resulting from that flawed market design.¹⁰⁴

In late 2001 and early 2002, the Forward Contracts Complainants filed a series of complaints with the Commission seeking to abrogate or to modify certain forward contracts entered into during the Western energy crisis, alleging that the dysfunctional Cal ISO and Cal PX spot markets adversely impacted bilateral forward prices such that the contract rates were unjust and unreasonable under section 206 of the FPA. The Commission consolidated proceedings initiated by the nineteen individual complaints into three separate proceedings—the *Nevada Power* Proceeding, the *CPUC* Proceeding and the *PacifiCorp* Proceeding—and established hearings before an administrative law judge (ALJ) in each of the three proceedings.¹⁰⁵ The Commission directed the ALJs and the parties in each of the Forward Contracts Proceedings to examine three issues: (i) whether the *Mobile-Sierra* doctrine was applicable to the contracts at issue;¹⁰⁶ (ii) whether the dysfunctional Cal ISO and Cal PX spot markets had adversely affected the bilateral forward markets; and (iii) if so, whether the adverse effect

REPORT ON PRICE MANIPULATION IN WESTERN MARKETS, Docket No. PA02-2-000, at ES-1 (2003), available at <http://www.ferc.gov/legal/maj-ord-reg/land-docs/PART-I-3-26-03.pdf> (The FERC staff concluding that a “significant supply shortfall[]” was a “root cause[]” of the Western energy crisis).

103. *SDG&E*, *supra* note 102, at 61,359. See also, e.g., *San Diego Gas & Elec. Co.*, 97 F.E.R.C. ¶ 61,275, 62,171 (2001) (stating that the FERC had issued orders “aimed at correcting the market dysfunctions which contributed to the California crisis”); *San Diego Gas & Elec. Co.*, 96 F.E.R.C. ¶ 61,120, 61,511 (2001) (asserting that all sellers “contributed to and benefited from the dysfunctions that offered the possibilities for the market abuse under certain conditions”).

104. *SDG&E*, *supra* note 102, at 61,359.

105. See *Nevada Power I*, *supra* note 14, at 61,191–92; *CPUC I*, *supra* note 15, at 61,383–85; *PacifiCorp I*, *supra* note 16, at 62,609–10, 62,616–17. In separate orders, the Commission also set for hearing several other complaints involving forward market-based rate contracts executed during the Western energy crisis of 2000–2001. See *City of Burbank*, 102 F.E.R.C. ¶ 61,268 (2003) (setting for hearing a complaint by the City of Burbank, California against three sellers and a complaint by The Kroger Company (Kroger) against one seller); *Pub. Util. Dist. No. 1*, 100 F.E.R.C. ¶ 61,296 (2002) (setting for hearing a complaint by Snohomish against one seller and a complaint by the Sacramento Municipal Utility District against another seller). The proceedings that were the subject of such orders were eventually settled (as were some of the individual complaints that were part of the Forward Contracts Proceedings). See *The Kroger Co.*, 104 F.E.R.C. ¶ 61,095 (2003) (approving a settlement of Kroger’s complaint); Notice Of Partial Withdrawal With Prejudice of Complaint as to Duke Energy Trading and Marketing, L.L.C., *City of Burbank v. Calpine Energy Servs., L.P.*, No. EL02-117-000 (June 12, 2003), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=9712015>; Notice Of Partial Withdrawal With Prejudice of Complaint as to El Paso Merchant Energy, L.P., *City of Burbank v. Calpine Energy Servs., L.P.*, No. EL02-117-000 (May 29, 2003), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=9704297>; Notice Of Partial Withdrawal With Prejudice of Complaint as to Calpine Energy Services, L.P., *City of Burbank v. Calpine Energy Servs., L.P.*, No. EL02-117-000 (May 29, 2003), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=9704299>; Notice of Withdrawal With Prejudice of Complaint of Public Utility District No. 1 of Snohomish County, Washington Against American Electric Power Service Corporation, *Pub. Util. Dist. No. 1 of Snohomish County, Washington v. Am. Elec. Power Serv. Corp.*, No. EL02-100-000 (Feb. 14, 2003), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10567048>; Notice of Withdrawal With Prejudice of Sacramento Municipal Utility District’s Complaint Against Duke Energy Trading and Marketing, L.L.C., *Sacramento Municipal Util. Dist. v. Duke Energy Trading & Marketing, L.L.C.*, No. EL02-109-000 (Feb. 7, 2003), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=9633913>.

106. As discussed *infra* at note 109, the Commission summarily found certain contracts were subject to the *Mobile-Sierra* public interest standard of review.

was of a magnitude sufficient to warrant contract abrogation or modification.¹⁰⁷

Declining to adopt concurring Commissioner Nora Brownell's position that contractual silence could appropriately be found to mandate application of the public interest standard,¹⁰⁸ the majority of the Commissioners found that where contracts did not expressly preclude unilateral rate challenges, further evidence was required before the Commission could determine such contracts to be protected under the *Mobile-Sierra* doctrine.¹⁰⁹ The FERC emphasized "that even under a 'just and reasonable' burden of proof standard, parties who seek to overturn market-based contracts into which they voluntarily entered will bear a heavy burden."¹¹⁰ The FERC explained:

The Commission's long-standing policy, consistent with a substantial body of Supreme Court and other judicial precedent, has been to recognize the sanctity of contracts. Rarely has the Commission deviated from that policy, and then only in extreme circumstances, such as the fundamental industry-wide restructuring under Order No. 888 and the reorganization of a bankrupt utility.¹¹¹

The Commission added: "Preservation of contracts has, if anything, become even more critical since the policy was first adopted. Competitive power markets simply cannot attract the capital needed to build adequate generating

107. *Nevada Power I*, *supra* note 14, at 61,190–91; *CPUC I*, *supra* note 15, at 61,383–84; *PacifiCorp I*, *supra* note 16, at 62,614–15. The Commission also made clear that "[t]he hearing will not address issues concerning the Commission's policies on granting market-based rate authority or on regulation of sellers with such authority." *Nevada Power I*, *supra* note 14, at 61,191; *CPUC I*, *supra* note 15, at 61,384; *PacifiCorp I*, *supra* note 16, at 62,615.

108. *Nevada Power I*, *supra* note 14, at 61,202–03 (Brownell, Comm'r, concurring); *CPUC I*, *supra* note 15, at 61,387 (Brownell, Comm'r, concurring); *PacifiCorp I*, *supra* note 16, at 62,619 (Brownell, Comm'r, concurring).

109. *See Nevada Power I*, *supra* note 14, at 61,190–91.

For all but one of the [challenged] contracts . . . Section 6.1 of the umbrella [Western Systems Power Pool (WSPP)] Agreement appears to be the only specific contractual provision which may affect parties' rights to make changes to contracts entered into under the WSPP Agreement; however, this provision addresses sellers' FPA Section 205 rights, not buyers' FPA Section 206 rights, to modify rates affecting WSPP transactions . . . We do not believe that we have a sufficient record to address the *Mobile-Sierra* issue definitively and, accordingly, we will set for hearing the issue of whether the complainants must bear the burden of showing that a challenged contract is contrary to the public interest, or whether they will bear the burden of showing that the contract is not just and reasonable.

Id. *See also CPUC I*, *supra* note 15, at 61,383 ("As for the contracts that do not contain an explicit *Mobile-Sierra* provision, we do not believe that we have a sufficient record to address the *Mobile-Sierra* issue definitively . . ."); *PacifiCorp I*, *supra* note 16, at 62,614–15 (setting for hearing the issue of whether the *Mobile-Sierra* doctrine was applicable to contracts that only prohibited unilateral filings to modify the contract under section 205 of the FPA and contracts that did not address the rights of parties to seek contract modifications). The Commission did, however, find that where the parties had barred unilateral applications for contract modifications under sections 205 and 206 of the FPA, the *Mobile-Sierra* doctrine was applicable. *See Nevada Power II*, *supra* note 14, at 62,047–48 (finding the public interest standard of review to apply to the contract between Snohomish and MSCG referencing both sections 205 and 206); *CPUC I*, *supra* note 15, at 61,383.

Certain contracts identified by the complainants appear to have a specific contractual provision which addresses FPA Sections 205 and 206 rights of the parties to these contracts, as well as the Section 206 rights of third parties. For these contracts . . . the complainants must satisfy the public interest standard to justify contract modification.

CPUC I, *supra* note 15, at 61,383.

110. *Nevada Power I*, *supra* note 14, at 61,191; *CPUC I*, *supra* note 15, at 61,383; *PacifiCorp I*, *supra* note 16, at 62,614–15.

111. *Nevada Power I*, *supra* note 14, at 61,190 (citations omitted); *CPUC I*, *supra* note 15, at 61,383 (citations omitted); *PacifiCorp I*, *supra* note 16, at 62,614 (citations omitted).

infrastructure without regulatory certainty, including certainty that the Commission will not modify market-based contracts unless there are *extraordinary* circumstances.”¹¹²

At the conclusion of the hearings, the ALJs in the respective Forward Contracts Proceedings found that each of the contracts at issue was subject to the *Mobile-Sierra* doctrine.¹¹³ The ALJs in the *Nevada Power* and *PacifiCorp* Proceedings also made findings with respect to the issues of whether dysfunctions in the Cal ISO and Cal PX spot markets adversely affected prices in the challenged contracts and whether any such effect was of a magnitude sufficient to justify contract abrogation or modification.¹¹⁴

The Commission affirmed the ALJs’ conclusions with respect to the applicability of the *Mobile-Sierra* public interest standard of review to the contracts at issue.¹¹⁵ In particular, the Commission found that none of the contracts at issue contained language permitting unilateral rate modifications, and that the challenged contracts were subject to the public interest standard of review.¹¹⁶ In so finding, the Commission rejected arguments that the *Mobile-Sierra* doctrine was inapplicable to the contracts at issue by virtue of their having been challenged as “high-rate” contracts. The Commission observed: “Both *Mobile* and *Sierra* addressed seller challenges to contract rates alleged to be too low. In later cases, the *Mobile-Sierra* doctrine was applied to contracts containing rates that allegedly were too high.”¹¹⁷ The Commission also found that the *Mobile-Sierra* public interest standard of review applies to contract challenges brought by non-parties to the contract.¹¹⁸

The Commission also rejected the argument that the *Mobile-Sierra* doctrine should not apply to market-based rate contracts “because these contracts have not been previously reviewed and accepted for filing by the Commission.”¹¹⁹ While recognizing that the *Mobile-Sierra* doctrine “extended to contracts that were not on file with the Commission,”¹²⁰ the Commission based its decision not on the absence of any initial review requirement but instead on its conclusion that any such a requirement had been satisfied by virtue of its prior grant of blanket market-based rate authorization to each of the sellers under the

112. *Nevada Power I*, *supra* note 14, at 61,190; *CPUC I*, *supra* note 15, at 61,383; *PacifiCorp I*, *supra* note 16, at 62,614.

113. See *Nevada Power ID*, *supra* note 14, at 65,273–79; *CPUC ID*, *supra* note 15, at 65,023–24, 65,026; *PacifiCorp ID*, *supra* note 16, at 65,076–78.

114. See *Nevada Power ID*, *supra* note 14, at 65,281–95, 65,297–310; *PacifiCorp ID*, *supra* note 16, at 65,081–92. In order to act more expeditiously, the Commission withdrew these issues from the ALJ in the *CPUC* Proceeding. See *Pub. Utils. Comm’n of Cal.*, 102 F.E.R.C. ¶ 61,025 (2003).

115. See *Nevada Power III*, *supra* note 14, at 62,382; *CPUC III*, *supra* note 15, at 62,409–10; *PacifiCorp II*, *supra* note 16, at 62,451.

116. *Nevada Power III*, *supra* note 14, at 62,388; *PacifiCorp II*, *supra* note 16, at 62,455–56.

117. *Nevada Power III*, *supra* note 14, at 62,384; *CPUC III*, *supra* note 15, at 62,410; *PacifiCorp II*, *supra* note 16, at 62,452.

118. *Nevada Power III*, *supra* note 14, at 62,389 (“There is no Commission or court precedent that supports a finding that a non-signatory party may challenge a *Mobile-Sierra* contract under the ‘just and reasonable’ standard of review, as opposed to the ‘public interest’ standard of review.” (footnote omitted)).

119. *Id.* at 62,388; *PacifiCorp II*, *supra* note 16, at 62,456–57.

120. *Nevada Power III*, *supra* note 14, at 62,384 (citing *Borough of Lansdale v. FPC*, 494 F.2d 1004, 1112 (D.C. Cir. 1974); *Richmond Power & Light v. FPC*, 481 F.2d 490, 493 (D.C. Cir. 1973)); *CPUC III*, *supra* note 15, at 62,410 (citing *Lansdale*, 494 F.2d at 1112; *Richmond*, 481 F.2d at 493); *PacifiCorp II*, *supra* note 16, at 62,452 (citing *Lansdale*, 494 F.2d at 1112; *Richmond*, 481 F.2d at 493).

challenged contracts.¹²¹ The Commission explained that, under its market-based rate regime:

The need for prior Commission review . . . was met when, after determining that the Respondents lacked market power or had taken steps to mitigate it, the Commission authorized all of the Respondents . . . to make sales of power at market-based rates. . . . The Commission is not required specifically to review each agreement since the Commission, when it grants umbrella market-based rate authorization, pre-determines that rates under future contracts entered into pursuant to the market-based rate authorization will be just and reasonable. The "just and reasonable" standard of Section 205(e) of the FPA is satisfied by the Commission's determination that the utility (and its affiliates) lacks market power or has taken sufficient steps to mitigate market power. As noted in *GWF Energy, LLC*, if we were required to examine every long-term service agreement as if the seller was seeking new market-based rate authority, it would make the original grant of market-based rate authority . . . a pointless exercise of no value to anyone.¹²²

Applying the public interest standard of review, the Commission examined record evidence relevant to the three *Sierra* factors,¹²³ as well as the "totality of circumstances preceding and following the execution of the contracts at issue."¹²⁴ Based on this review, the Commission found that the Forward Contracts Complainants "failed to demonstrate that any of the three prongs announced in the *Sierra* case has been met or that any other factor introduced into evidence warrants a finding that any of the contracts is contrary to the public interest and should be modified."¹²⁵ The Commission maintained that its order furthered "the public interest because it balances effective rate regulation with respect for the sanctity of contracts, as dictated by the U.S. Supreme Court under the *Mobile-Sierra* doctrine."¹²⁶

On rehearing, the Commission reaffirmed its prior dismissal of the complaints. The FERC reiterated that the challenged contracts were subject to the public interest standard of review, explaining that "[o]nce a party signs a *Mobile-Sierra* contract, it cannot escape by later claiming that the rates were not just and reasonable when it signed the contract, unless there is evidence such as the seller fraudulently inducing the buyer to execute the contract."¹²⁷ With regard to the argument that *Mobile-Sierra* did not apply to the challenged contracts by virtue of their not having subject to initial review by the FERC, the

121. *Nevada Power III*, *supra* note 14, at 62,388; *CPUC III*, *supra* note 15, at 62,422; *PacifiCorp II*, *supra* note 16, at 62,456.

122. *Nevada Power III*, *supra* note 14, at 62,388–89 (footnotes omitted) (citing *GWF II*, *supra* note 100, at 62,390); *CPUC III*, *supra* note 15, at 62,422 (footnotes omitted) (citing *GWF II*, *supra* note 100, at 62,390); *PacifiCorp II*, *supra* note 16, at 62,456–57.

123. As explained in *supra* note 84, the three *Sierra* factors consider whether the challenged contract rate is so high (or low) that it would "impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or [are] unduly discriminatory." *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956).

124. *Nevada Power III*, *supra* note 14, at 62,384, 62,398; *CPUC III*, *supra* note 15, at 62,410, 62,416; *PacifiCorp II*, *supra* note 16, at 62,452–53, 62,462.

125. *Nevada Power III*, *supra* note 14, at 62,397; *CPUC III*, *supra* note 15, at 62,414; *PacifiCorp II*, *supra* note 16, at 62,461.

126. *Nevada Power III*, *supra* note 14, at 62,384; *CPUC III*, *supra* note 15, at 62,410–11; *PacifiCorp II*, *supra* note 16, at 62,453.

127. *Nevada Power IV*, *supra* note 14, at 61,982; *CPUC IV*, *supra* note 15, at 61,944. See also *PacifiCorp III*, *supra* note 16, at 61,971 ("We reaffirm our holding that the public interest standard applies to any unilateral changes to the challenged contracts.").

Commission stated:

The Commission has held that this grant of market-based rate authority constitutes what is known as the “initial review” of rates in the cost-based rate context. Then, if the parties have not agreed to apply the public interest standard to future challenges, a party may come to the Commission pursuant to Section 206 of the FPA and demonstrate that the rate is no longer just and reasonable. Alternatively, a party who does not have such a right may seek changes by demonstrating that the contract rate is contrary to the public interest. In essence, the [Forward Contracts Complainants] attempt to add another layer to this two-step process, claiming that parties to contracts that are subject to the public interest standard of review should have another opportunity to argue that the rate was not just and reasonable at the outset. This argument, however, has no support in either the statute or the relevant Commission or Court precedent. Indeed, the [Forward Contracts Complainants]’ suggested approach would create uncertainty in the market, as a party who suddenly finds that its deal has become uneconomical, can undo the terms to which it was contractually bound. This is precisely what the *Mobile-Sierra* doctrine was designed to avoid, and we see no support for an exception to this established doctrine simply because a party has contracted in a market-based rate regime.¹²⁸

At the same time, the Commission appeared to retreat from any reliance on *Borough of Lansdale v. FPC*¹²⁹ and similar cases for the proposition that *Mobile-Sierra* protections attach even where contracts had not been previously filed with, or reviewed by, the Commission.¹³⁰

With respect to its application of the *Mobile-Sierra* public interest standard to the challenged contracts, the FERC rejected the argument that it had limited its public interest analysis to the three *Sierra* prongs. Rather, the FERC noted that, in denying relief, it had considered the “totality of circumstances” surrounding the contracts.¹³¹

The Forward Contracts Complainants (and others) sought review of the Commission’s orders in the Forward Contracts Proceedings before the Ninth Circuit. A panel of the Ninth Circuit heard oral argument regarding the Commission’s orders in the *Nevada Power* and *CPUC* Proceedings on December 8, 2004, and another panel heard oral argument of the orders in the *PacifiCorp* Proceeding on July 12, 2005. On August 8, 2005, the Ninth Circuit dismissed *PacifiCorp*’s petition for review of the orders in the *PacifiCorp* Proceeding

128. *Nevada Power IV*, *supra* note 14, at 61,982–83; *CPUC IV*, *supra* note 15, at 61,944; *PacifiCorp III*, *supra* note 16, at 61,972.

129. *Borough of Lansdale v. FPC*, 494 F.2d 1104 (D.C. Cir. 1974).

130. See *CPUC IV*, *supra* note 15, at 61,946–47.

[T]he Commission did not find *Lansdale* and *Richmond* to hold that ‘entities holding market-based rate certificates [are entitled] to charge unjust and unreasonable rates.’ Instead, . . . the Commission relied on the *Lansdale* and *Richmond* cases to demonstrate that a party may not circumvent *Mobile Sierra*’s limitations by failing to file a contract with the Commission.

Id. (citation omitted) (emphasis added); *PacifiCorp III*, *supra* note 16, at 61,973.

131. See *CPUC IV*, *supra* note 15, at 61,953–54; *PacifiCorp III*, *supra* note 16, at 61,976. In addition, on rehearing in the *PacifiCorp* Proceeding (but not in either of the *CPUC* or the *Nevada Power* Proceedings), the FERC offered a new rationale for denying relief. Because all of the challenged contracts had expired, the FERC maintained that, “even if *PacifiCorp* established that its rates were not just and reasonable, there is no longer ongoing harm.” *Id.* at 61,978. Citing judicial precedent affirming the FERC’s remedial discretion, *PacifiCorp III*, *supra* note 16, at 61,978–79 nn.109–110, the FERC held that, “even assuming that *PacifiCorp* had met its burden, we find that remedial action is not warranted in this case,” *Id.* at 61,978. As discussed *infra* at note 132, this rationale, and, more specifically, *PacifiCorp*’s failure to preserve its objections with regard to this rationale, ultimately resulted in the dismissal of its petition for review of the FERC’s orders denying its complaints.

without addressing the FERC's reasoning with regard to *Mobile-Sierra*.¹³² As of this writing, the Ninth Circuit has not issued orders on the petitions for review of the FERC's orders in the *Nevada Power* and *CPUC* Proceedings.

B. *The NRG-PMI Proceeding*

In *Blumenthal (NRG-PMI I)*, the Commission addressed a complaint by Richard Blumenthal, Attorney General of the State of Connecticut and by the Connecticut Department of Public Utility Control requesting that the Commission bar NRG Power Marketing, Inc. (NRG-PMI) from ceasing service under a Standard Offer Service Wholesale Agreement (SOS Agreement) between NRG-PMI and the Connecticut Light and Power Company (CL&P) despite the fact that the bankruptcy court overseeing the bankruptcy of NRG-PMI and various of its affiliates had authorized rejection of the SOS Agreement.¹³³ Equating the cessation of service under the rejected SOS Agreement with abrogation of NRG-PMI's contractual obligations to CL&P,¹³⁴ the FERC held that NRG-PMI could not cease performance under the SOS Agreement unless it could satisfy the *Mobile-Sierra* public interest standard of review.¹³⁵ The FERC established a paper hearing for purposes of affording NRG-PMI an opportunity to make the evidentiary showing that would be required to satisfy that standard.¹³⁶

Consistent with its rulings in the Forward Contracts Proceedings, the

132. Based on PacifiCorp's failure to seek rehearing of this aspect of the FERC's rehearing order, as well as its failure to raise this issue in its initial brief, the Ninth Circuit found that lacked jurisdiction to review this basis for the FERC's denial of relief and therefore "[could] give no effective relief." *PacifiCorp* Memorandum, *supra* note 16, at 4. Accordingly, it dismissed PacifiCorp's petition for review without reaching the merits of the FERC's *Mobile-Sierra* determinations. *See id.*

133. *NRG-PMI I*, *supra* note 18, at 62,313.

134. *See id.* at 62,321.

NRG-PMI argues that under bankruptcy law, a rejection of an executory contract constitutes a breach of the contract, as opposed to a termination, and that a breach does not require prior notice and approval by the Commission. However, a breach is still a cessation of performance of a FERC-jurisdictional contract and has the same effect for our purposes as a termination that is unauthorized by the contract itself: NRG-PMI is no longer performing its obligations under the agreement.

NRG-PMI I, *supra* note 18, at 62,321. It is not the purpose of this article to examine the validity of the FERC's assertion that rejection of a jurisdictional contract pursuant to section 365 of the Bankruptcy Code, 11 U.S.C. § 365, and/or cessation of performance under such a contract represented contract abrogation or modification implicating *Mobile-Sierra*. Nonetheless, it is worth noting that one member of the Commission disputed the FERC's reasoning in this regard at the time, *see NRG-PMI I*, *supra* note 18, at 62,325–26 (Brownell, Comm'r, dissenting), and that a subsequent judicial decision casts doubt on the notion that the FERC may require continued performance under a contract rejected in bankruptcy, *see In re Mirant Corp.*, 378 F.3d 511, 519–24 (5th Cir. 2004). Not surprisingly, the *NRG-PMI* Proceeding and subsequent developments surrounding the *Mirant* decision have spawned substantial literature on the issue of the interaction between the FERC's jurisdiction under the FPA and that of the courts under the Bankruptcy Code. *See, e.g.*, Indraneel Sur, Comment, *Jealous Guardians in the Psychedelic Kingdom: Federal Regulation of Electricity Contracts in Bankruptcy*, 152 U. PA. L. REV. 1697 (2004); Michael Kohler, Note, *The Ambit of FERC Jurisdiction over Electricity Contracts During Insolvency: Bankruptcy Jurisdiction and the "Just And Reasonable" Directive*, 104 COLUM. L. REV. 1947 (2004); John P. Ratnaswamy, *FERC Versus Bankruptcy Jurisdiction: A Double-Edged Sword*, 142 NO. 11 PUB. UTIL. FORT. 22 (2004); Brian Bassett, Comment, *How to Keep the Lights On: An Exploration of the Abrogation of Wholesale Energy Contracts*, 38 J. MARSHALL L. REV. 303 (2004); Kenneth Irvin & Robert Loeffler, *The Tyranny of FERC*, 142 NO. 5 PUB. UTIL. FORT. 21 (2004); Kenneth Irvin & Robert Loeffler, *Restructure or Bust?*, 141 NO. 18 PUB. UTIL. FORT. 17 (2003).

135. *NRG-PMI I*, *supra* note 18, at 62,321.

136. *Id.* at 62,322.

Commission rejected NRG-PMI's argument that the SOS Agreement was not subject to the *Mobile-Sierra* doctrine because it was not filed with the Commission, explaining:

We agree with NRG-PMI that the [SOS Agreement] was never required to be filed with the Commission (*i.e.*, the relevant contract information is provided pursuant to quarterly reports but the contract itself is not filed). However, we disagree with NRG-PMI's assertion that this means that "any change to it (including termination) need not receive prior approval by the Commission." If a seller seeks to modify or abrogate a jurisdictional contract, the seller must make appropriate filings under FPA Sections 205 or 206 to change the contract, whether or not the contract itself has been physically filed.¹³⁷

The Commission went on to cite express language in the SOS Agreement that prevented either NRG-PMI or CL&P from unilaterally modifying the contract, and determined that before ceasing performance, "NRG-PMI must demonstrate that its contract is contrary to the public interest."¹³⁸

Following the paper hearing, the Commission determined that "NRG-PMI has not carried its burden under *Mobile-Sierra* of demonstrating that the unilateral modification (*i.e.*, the premature cessation of service under the agreement) it seeks to make to [the SOS Agreement] is in the public interest."¹³⁹ Of particular note were the FERC's findings with respect to the prong of the *Sierra* test under which the public interest may justify abrogation or other modification of contract if the "contract 'might impair the financial ability of the public utility to continue its service . . .'"¹⁴⁰ Notwithstanding the fact that NRG-PMI was already subject to reorganization proceedings under Chapter 11 of the Bankruptcy Code and warned that continued performance could force it to liquidate under Chapter 7 of the Bankruptcy Code,¹⁴¹ the FERC determined that "NRG-PMI has not demonstrated that its continued performance under the contract, *even if it results in its liquidation*, will impair or interrupt the reliability of electric service to end users."¹⁴² Rather, the Commission stated that "[t]he focus of the *Mobile-Sierra* doctrine has always been on the impact that proposed contract modifications would have on third parties, not merely the consequences of continued performance on the contracting parties themselves,"¹⁴³ and stated

137. *NRG-PMI I*, *supra* note 18, at 62,320 (citation omitted). See also *NRG-PMI II*, *supra* note 18, at 61,741.

Although we agree with NRG-PMI that the [SOS Agreement] was never required to be filed with the Commission, this does not mean that any unilateral change to it (including premature cessation of service) need not receive prior approval from the Commission. We reiterate that if NRG-PMI seeks to abrogate a jurisdictional agreement, such as the [SOS Agreement], it must make appropriate filings under Section 205 or 206 of the FPA to change the contract, whether or not the contract itself has been physically filed.

Id. In this regard, the FERC distinguished orders holding that sellers were not required to file notices of termination pursuant to section 35.15 of the Commission's Regulations, 18 C.F.R. § 35.15 (2004), from the circumstances surrounding the SOS Agreement. *NRG-PMI I*, *supra* note 18, at 62,321 n.82. While appearing to concede that NRG-PMI was not required to file a notice of termination, FERC stressed that that was not the end of the matter. *Id.* ("Section 35.15 is simply a notice provision and does not prevent us from acting, as here, under Section 206 regarding the potential cessation of jurisdictional service of which we become aware.").

138. *NRG-PMI I*, *supra* note 18, at 62,321 (footnote omitted).

139. *NRG-PMI III*, *supra* note 18, at 61,721–22.

140. *Id.* at 61,727 (quoting *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956)).

141. 11 U.S.C. §§ 701–784 (2000).

142. *NRG-PMI III*, *supra* note 18, at 61,731 (emphasis added).

143. *Id.* at 61,730 (footnote omitted).

that “NRG-PMI has not with particularity made a showing of definite harm to [third] parties.”¹⁴⁴

V. THE APPLICABILITY AND APPLICATION OF THE MOBILE-SIERRA DOCTRINE TO MARKET-BASED RATE CONTRACTS

In cases involving cost-based rate contracts, the courts have repeatedly and consistently held that the *Mobile-Sierra* doctrine allows the Commission to modify contracts “only if required by the public interest”¹⁴⁵ and that the public interest standard of review “is much more restrictive than the just and reasonable standard of section 205 of the [FPA].”¹⁴⁶ Recently, over vigorous objections from various quarters, the FERC has followed those holdings in finding that the *Mobile-Sierra* doctrine barred relief sought in cases involving market-based rate contracts in the Forward Contracts Proceedings and in the *NRG-PMI* Proceeding.

In this Section, the authors consider whether any of the distinctions between market-based rate contracts and cost-based rate contracts rises to the level of making a legal or policy difference in terms of when and how one applies the *Mobile-Sierra* doctrine. As discussed below, it is the authors’ view that, from a legal perspective, arguments that the *Mobile-Sierra* doctrine does not apply to contracts not filed with, or reviewed by, the Commission may be more prevalent—but not necessarily any more compelling—in the context of challenges to market-based rate contracts and that, from a policy perspective, market-based rate contracts are, if anything, deserving of greater *Mobile-Sierra* protection than are cost-based rate contracts.

A. Legal Considerations in Applying *Mobile-Sierra* to Market-Based Rate Contracts

The Forward Contracts Proceedings and the *NRG-PMI* Proceeding are unusual in the sense that they represent the first time that the Commission has been asked to address the application and applicability of the *Mobile-Sierra* doctrine to market-based rate contracts. At the same time, the legal arguments put forth by parties seeking to avoid stringent application of the *Mobile-Sierra* doctrine to their unilateral challenges to market-based rate contracts are, by and large, no different from those that have been advanced for decades in challenges to cost-based rate contracts. For example, the Forward Contracts Complainants and their supporters in the Forward Contracts Proceedings emphasized that the proceedings were “high-rate” cases distinguishable from the “low-rate” cases in which the doctrine was first articulated.¹⁴⁷ As illustrated by *San Diego Gas &*

144. *NRG-PMI III*, *supra* note 18, at 61,731.

145. *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002). *See also, e.g., In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968) (The regulatory scheme “contemplates abrogation of these agreements only in circumstances of unequivocal public necessity.”); *Metro. Edison Co. v. FERC*, 595 F.2d 851, 856 n.29 (D.C. Cir. 1979) (A contract subject to the *Mobile-Sierra* doctrine “should be modified by the Commission under [Section] 206(a) only if imperatively demanded by the public interest” (citations omitted)).

146. *Atl. City*, 295 F.3d at 14. *See also Ne. Utils. Serv. Co. v. FERC*, 993 F.2d 937, 960 (1st Cir. 1993) (the public interest standard of review is “a more difficult standard for the Commission to meet than the statutory ‘unjust and unreasonable’ standard of [Section] 206.” (citation omitted)).

147. *See Nevada Power III*, *supra* note 14, at 62,387; *CPUC III*, *supra* note 15, at 62,420–21.

Electric Power Co. v. FERC,¹⁴⁸ *Potomac Electric Power Co. v. FERC*,¹⁴⁹ and *Northeast Utilities Service Co. v. FERC (NUSCO II)*,¹⁵⁰ however, this “low-rate”/“high-rate” debate is not unique to the market-based rate context and in fact pre-dates the FERC’s market-based rate regime by at least a decade. Much the same can be said of the other arguments regarding the application of the *Mobile-Sierra* doctrine in the Forward Contracts Proceedings: whether the absence of specific language preserving the unilateral rights of contractual parties to seek contract modifications is required to establish that the *Mobile-Sierra* doctrine applies;¹⁵¹ whether the public interest standard of review applies to contract challenges by third parties;¹⁵² and how exacting the public interest standard of review is in circumstances where there is alleged harm to third parties.¹⁵³

To date, the closest thing to a “new” legal argument for avoiding stringent application of the *Mobile-Sierra* doctrine to market-based rate contracts is the argument that contract rates must be filed with, and reviewed by, the Commission before a stringent *Mobile-Sierra* public interest standard applies. As discussed above, market-based rate contracts are, as a general matter, not individually filed with, or reviewed by, the FERC under current reporting requirements for market-based rate sellers.¹⁵⁴ An unintended consequence of the FERC’s decision to avoid the “pointless exercise” of individually reviewing market-based rate contracts¹⁵⁵ is that filing and initial review arguments against stringent application of *Mobile-Sierra* are almost certain to be heard with greater frequency in a market-based rate setting than they were under the traditional, cost-of-service paradigm.¹⁵⁶ Moreover, if these arguments were to become the law, they would have considerably more far-reaching consequences in a market-based rate regime than they would in a cost-based rate regime; indeed, adoption of such arguments as law would deprive virtually all market-based rate contracts of *Mobile-Sierra* protection.

As discussed below, the theory that contracts must have been filed with, and have undergone an initial review by, the Commission, in order for the *Mobile-*

148. *San Diego Gas & Electric Co. v. FERC*, 904 F.2d 727 (D.C. Cir. 1990).

149. *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403 (D.C. Cir. 2000).

150. *Ne. Utils. Serv. Co. v. FERC*, 55 F.3d 686 (1st Cir. 1995).

151. See *Nevada Power III*, *supra* note 14, at 62,387; *CPUC III*, *supra* note 15, at 62,419; *PacifiCorp II*, *supra* note 16, at 62,454–55.

152. See *Nevada Power III*, *supra* note 14, at 62,388; *CPUC III*, *supra* note 15, at 62,420–21.

153. See *Nevada Power III*, *supra* note 14, at 62,387–88; *CPUC III*, *supra* note 15, at 62,420–21.

154. See discussion *supra* Part III.

155. *CPUC III*, *supra* note 15, at 62,422 (citing *GWF II*, *supra* note 100, at 62,390–91). See also *Nevada Power III*, *supra* note 14, at 62,389; *PacifiCorp II*, *supra* note 16, at 62,457. The FERC made this observation in connection with the pre-Order No. 2001 market-based rate reporting requirements, under which generation-owning market-based rate sellers were required to file individual agreements with terms of one year or more. Interestingly, despite the fact that such agreements were typically accepted for filing, see, e.g., *Erie Boulevard Hydropower, L.P.*, 97 F.E.R.C. ¶ 61,350 (2001), it is not clear that such agreements ever received the initial review that is alleged to be a prerequisite to applying the *Mobile-Sierra* public interest standard of review, because the filings of such agreements were treated as being “not traditional [FPA] Section 205 filings, but rather [as] informational filings submitted in response to the filing requirements found in the orders granting market-based rate authority.” *GWF Energy LLC*, 97 F.E.R.C. ¶ 61,297, 62,390–91 (2001), *reh’g denied*, *GWF II*, *supra* note 100. Of course, as discussed below, it is not clear that even the cost-based contracts at issue in *Mobile* and *Sierra* themselves underwent the initial review that has been alleged to be required before the *Mobile-Sierra* public interest standard applies.

156. Indeed, the last judicial decision directly addressing the applicability of *Mobile-Sierra* to an un-filed cost-based rate contract appears to be *Rayburn*, which was decided over thirty years ago.

Sierra doctrine to apply depends on what the authors would argue is the demonstrably false premise that *Mobile-Sierra* acts as the equivalent of an estoppel doctrine, under which the Commission's power to modify a contract is a function of the extent of its prior findings with respect to that contract. Such a premise ignores the law. Moreover, even assuming that there is a filing or initial review requirement, there appears to be considerable merit to the FERC's position that this requirement is satisfied by the grant of blanket market-based rate authorization to the seller.

1. Application of the Mobile-Sierra Doctrine Is Not Dependent On the Filing of Contracts With, And the Review of Contract Rates By, the Commission

In *Mobile* the Supreme Court said that the NGA "permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, *which to that end must be filed with the Commission and made public.*"¹⁵⁷ In its order responding to the *Northeast Utilities Service Co. v. FERC (NUSCO I)*¹⁵⁸ remand,¹⁵⁹ the Commission ruled that the public interest standard of review is less restrictive when the Commission is reviewing a contract for the first time.¹⁶⁰ Relying on these rulings, some litigants have attempted to recast *Mobile-Sierra* as an estoppel-type doctrine, not applicable to contracts that have not been individually filed with, and/or reviewed by the FERC. Such arguments cannot, however, be squared with either the structure of the FPA itself or with *Mobile-Sierra* precedent.

a. The Statutory Structure

While FPA section 205(a) sets forth the basic requirement that "all rates . . . shall be just and reasonable,"¹⁶¹ the fact remains that "the legality of rates . . . filed is not conditioned upon the Commission's approval."¹⁶² Unless the FERC makes an affirmative finding that a proposed rate is (or may be) unjust and unreasonable and issues an order rejecting or suspending¹⁶³ the proposed rate within the prescribed notice period under section 205, section 205 has been interpreted as providing that "the new rates take effect automatically."¹⁶⁴ Thus,

157. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 339 (1956) (emphasis added).

158. *Ne. Utils. Serv. Co. v. FERC*, 993 F.2d 937 (1st Cir. 1993).

159. *Ne. Utils. Serv. Co.*, 66 F.E.R.C. ¶ 61,332 (1994) [hereinafter *NUSCO Remand Order*].

160. *See id.* at 62,076.

161. 16 U.S.C. § 824d(a) (2000).

162. *Boston Edison Co. v. FERC*, 856 F.2d 361, 368 (1st Cir. 1988) (quoting *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 255-56 (1951) (Frankfurter, J., dissenting)). *See also* *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012 (9th Cir. 2004) ("Unless the filed rates are challenged administratively, the filed rates become the legal rates.").

163. Suspending the effectiveness of a proposed rate change pursuant to section 205(e) of the FPA permits the FERC not only to delay the effective date of such rate change for up to five months, but also to provide that rates thereafter collected are subject to refund pending the outcome of the rate proceeding. 16 U.S.C. § 824d(e) (2000). The FERC's power to suspend proposed rate changes is "discretionary," but the decision not to suspend may be "reviewable for abuse of discretion." *Penn. Gas & Water Co. v. FERC*, 463 F.2d 1242, 1245 (D.C. Cir. 1972).

164. *Ala. Power Co. v. FERC*, 22 F.3d 270, 271 (11th Cir. 1994). *See also* *H.S. Phillips v. FERC*, 586 F.2d 465, 467 (5th Cir. 1978) (explaining that "in a typical filing, a rate change would become effective after

when a proposed rate is filed under section 205 of the FPA, the FERC is not even required to issue an order, much less an order making affirmative findings, before a proposed rate takes effect.¹⁶⁵ Once a rate is allowed to go into effect without suspension, an aggrieved customer may seek relief only through a complaint filed pursuant to section 206 of the FPA, a procedure in which “the customer bears the burden of proof”¹⁶⁶ The FERC’s obligation to proceed under section 206 where it seeks to alter a rate allowed to take effect does not turn on whether that rate was “expressly approved in an earlier rate proceeding.”¹⁶⁷

Not only does the FPA ratemaking scheme not require that the FERC make any threshold determination that proposed rates are “just and reasonable” before such rates are allowed to take effect, the FERC rarely if ever makes such determinations or otherwise “approves” rate schedules filed under section 205. Instead, proposed rates that do not trigger an investigation are typically accepted for filing and allowed to take effect subject to the caveat that “permit[ting] a rate schedule or any part thereof . . . to become effective shall not constitute approval by the Commission of such rate schedule or part thereof”¹⁶⁸ In fact, market-based rate tariffs are no different in this regard from the contracts at issue in

thirty days if no action has been taken by the Commission under [S]ection 4(e)” and “[t]hereafter, the Commission must determine that the rates are unjust under [S]ection 5 of the [NGA] . . . in order to reject them.”). See also *Ind. & Mich. Elec. Co. v. FPC*, 502 F.2d 336, 341 (D.C. Cir. 1974).

The Supreme Court has interpreted [Section 205(d) of the FPA] to create not only a *minimum notice period* for the utility’s customers and the Commission, but also a *maximum waiting period for the filing utility* Thirty days is the maximum a utility can be compelled to wait from the time it files its rate changes until the date the changes take effect unless the Commission properly exercises its suspension power.

Id. (emphasis added) (citing *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 114 (1958)). See also *Fla. Power & Light Co. v. FERC*, 617 F.2d 809, 818 (D.C. Cir. 1980) (Tamm, J., dissenting).

When, as here, a utility has requested that the effective date for a change in rates be no later than thirty days after the date of filing, it is undisputed that for the Commission to act under section 205(d)-(e) of the Federal Power Act, it must do so within this thirty-day period. At the end of the thirtieth day, the Commission, by operation of law, loses its power to take action pursuant to this section. Any action after that time is ultra vires and beyond the statutory authority granted by Congress.

Id. (citations and footnote omitted). Two points bear emphasis with respect to the preceding decisions. First, section 205(d) of the FPA was amended in 1978 to extend the notice period from thirty (30) to sixty (60) days. See *Nat’l Fuel Gas Supply Corp. v. FERC*, 899 F.2d 1244, 1248 (D.C. Cir. 1990). Prior to that amendment, section 205(d) of the FPA provided for the same 30-day notice period still reflected in the current version of section 4(d) of the NGA. Second, sixty (60) days is not *always* the maximum waiting period for the filing utility, because a seller providing more notice (i.e., requesting an effective date more than sixty (60) days after filing) may also be deemed to have extended the maximum waiting period. See *id.* at 1248.

165. See, e.g., *PJM Interconnection, L.L.C.*, Notice of Acceptance of Filing by Operation of Law, No. ER05-10-000 (Nov. 30, 2004) (unreported) [hereinafter *PJM*], available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10321912>. *PJM* is illustrative of the fact that it is the Commission’s failure to take action suspending a rate – and not the acceptance or approval of such rate – that allows the rate to take effect. In this case, two of the four then-sitting FERC commissioners “dissented” to a notice of a filing’s having taken effect by operation of law. See *PJM Interconnection, L.L.C.*, Joint Statement By Chairman Pat Wood, III and Commissioner Suedeene G. Kelly, No. ER05-10-000 (Dec. 1, 2004) (Wood, Chairman & Kelly, Comm’r, dissenting) (unreported), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10322463>.

166. *Cities of Anaheim v. FERC*, 723 F.2d 656, 658 (9th Cir. 1984).

167. *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1312 n.11 (D.C. Cir. 1991).

168. 18 C.F.R. § 35.4 (2004).

Mobile and *Sierra*, which were accepted on the same basis.¹⁶⁹

Under such a statutory scheme, it is difficult, if not impossible, to see how *Mobile-Sierra* could operate as some sort of estoppel doctrine. The FPA does not require that the Commission take an affirmative position on the justness and reasonableness of proposed rates submitted pursuant to section 205 such that it could be estopped by its having allowed those rates to take effect from later modifying such rates pursuant to section 206 without satisfying the *Mobile-Sierra* public interest standard. Rather, sections 205 and 206 are essentially components of a single regulatory mechanism whereby the Commission may act, on initial filing or at a later date, to modify contract rates that fail to meet the statutory requirements.¹⁷⁰

Even as it described the filing requirements in *Mobile*, the Supreme Court did not suggest that the *Mobile-Sierra* doctrine it was articulating was some sort of estoppel doctrine that would be inapplicable to contracts not previously filed with, or reviewed by, the Commission. To the contrary, the Court saw little difference between the Commission's ability to modify rate proposals under section 4 of the NGA (which corresponds to section 205 of the FPA) and challenges to existing rates under section 5 of the NGA (which corresponds to section 206 of the FPA), stating "[t]hese sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful."¹⁷¹ The Court also rejected the argument that there was a difference between the Commission's powers under sections 4 and 5 of the NGA, finding that Section 5(a) is "neither a 'rate-making' nor a 'rate-changing' procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them."¹⁷² Finally, the Court explained that:

Section 4(d) [of the NGA] provides not for the filing of 'proposals' but for notice to the Commission of any 'change . . . made by' a natural gas company, and the change is effected, if at all, *not by an order of the Commission but solely by virtue of the natural gas company's own action*. If the purported change is one the natural gas company has the power to make, the 'change' is completed upon compliance with the notice requirement and the new rate has the same force as any other rate — it can be set aside only upon being found unlawful by the Commission. *It is thus no more a 'proposed' rate than any other rate, all of which are equally subject to*

169. See *Pac. Gas & Elec. Co.*, 7 F.P.C. 832 (1948) (accepting the contract challenged in *Sierra* for filing and stating that "[n]othing contained in this order shall be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract or practice . . ."); *United Gas Pipe Line Co.*, 5 F.P.C. 770 (1946) (accepting the contract challenged in *Mobile* for filing and stating that "[n]othing contained . . . shall be construed as . . . constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract, or practice . . .").

170. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 341 (1956).

171. *Id.*

172. *Mobile*, 350 U.S. at 341 (stating that "Section 5(a) would of its own force apply to all the rates of a natural gas company, whether long-established or newly changed, but in the latter case the power is further implemented by [Section] 4(e)"). See also *Metro. Edison Co. v. FERC*, 595 F.2d 851, 855 (D.C. Cir. 1979) (stating "a public electric utility subject to regulation under the [FPA] cannot unilaterally abrogate a contractually-fixed rate simply by filing a new rate under Section 205(d) and securing Commission approval thereof under Section 205(e)" (citation omitted)).

*Commission review.*¹⁷³

In short, *Mobile* indicates that the statutory structure of the NGA and the FPA does not support attempts to differentiate between newly proposed and already existing rates for purposes of determining the standard of review that is applicable, or the powers of the Commission to modify such rates. Rather, as the First Circuit explained, the requirement that rates be filed with the FERC “is a notice requirement” intended to afford the FERC an opportunity to review such rates and does not depend on any affirmative approval by the FERC.¹⁷⁴

b. *Mobile-Sierra* Precedent

As the Commission observed in the Forward Contracts Proceedings: “The *Mobile* and *Sierra* cases were decided in a cost-based rate regime and consequently dealt with changes proposed to contracts that were already on file with the Commission. The application of the *Mobile-Sierra* doctrine was later extended to contracts that were not on file with the Commission.”¹⁷⁵ Notwithstanding the Commission’s subsequent retreat from this statement as a basis for its decisions,¹⁷⁶ its initial characterization of *Mobile-Sierra* precedent on this point was entirely accurate. To date, there is no judicial precedent purporting to withdraw *Mobile-Sierra* protections from contracts not filed with, or reviewed by, the FERC, and, as discussed below, *Lansdale* and other precedents, including *NUSCO I*, demonstrate that the *Mobile-Sierra* doctrine applies irrespective of whether a contract was previously filed with (and thus was available for review by) the Commission. At the same time, *NUSCO II* suggests that, at least in the First Circuit’s view, initial review may be relevant to the determination of how stringently the doctrine is to be applied in a given circumstance.

c. *Lansdale* and Its Progeny

In *Lansdale*, the D.C. Circuit was confronted with a public utility seller that sought to avoid the strictures of *Mobile-Sierra* by virtue of the fact that the contract containing the rate it was challenging was not on file with the Commission. In that case, the seller, Philadelphia Electric Company (PECO), and the buyer, the Borough of Lansdale (the “Borough”), had entered into a contract in 1971 that was to supersede a 1964 contract. Among other things, the 1971 contract provided for an increase in the volume of PECO’s sales to the Borough from the 8,000 kilowatts per month set forth in the 1964 contract to 29,000 kilowatts per month.¹⁷⁷ The 1964 and 1971 contracts were both filed with the FPC, but PECO withdrew the filing of the 1971 contract before the FPC could act on it.¹⁷⁸ Taking the position that it was bound only by the 1964 contract, PECO subsequently made a unilateral filing with the FPC to establish a new—and “substantially higher”—rate for sales to the Borough in excess of

173. *Mobile*, 350 U.S. at 342 (emphasis added).

174. *Boston Edison Co. v. FERC*, 856 F.2d 361, 368 (1st Cir. 1988). See also *Penn. Gas & Water v. FPC*, 463 F.2d 1242, 1245 (D.C. Cir. 1972).

175. *Nevada Power III*, *supra* note 14, at 62,384; *CPUC III*, *supra* note 15, at 62,410; *PacifiCorp II*, *supra* note 16, at 62,452.

176. See *CPUC IV*, *supra* note 15, at 61,946; *PacifiCorp III*, *supra* note 16, at 61,973.

177. *Borough of Lansdale v. FPC*, 494 F.2d 1104, 1107 (D.C. Cir. 1974).

178. *Id.* at 1109.

8,000 kilowatts per month.¹⁷⁹ Despite the Borough's requests that the FPC reject the rate schedule summarily, the FPC accepted the rate filing pending a hearing on its lawfulness and rejected the Borough's request that the FPC order PECO to re-file the 1971 contract.¹⁸⁰

On review, the D.C. Circuit reversed the FPC's orders, rejecting the Commission's argument that "if a fixed-rate contract is not yet filed with the FPC, the Commission and the public utility which signed the contract may ignore the document and proceed, respectively, to file rates and to accept their filing as if the contract had never been negotiated."¹⁸¹ The D.C. Circuit stated:

The gist of the Commission's theory is that a fixed-rate contract has no binding force, at least for regulatory purposes, until it is physically filed with, and accepted by, the Commission. This stands the *Sierra-Mobile* doctrine on its head, for it is the purpose of that doctrine to subordinate the statutory filing mechanism to the broad and familiar dictates of contract law.¹⁸²

179. *Lansdale*, 494 F.2d at 1109.

180. *See Phila. Elec. Co.*, 48 F.P.C. 1119 (1972).

181. *Lansdale*, 494 F.2d at 1112.

182. *Id.* at 1113 (emphasis added). One Forward Contract Complainant, PacifiCorp, argued before the Ninth Circuit that the D.C. Circuit's characterization of the *Mobile-Sierra* doctrine's purpose has been superseded by subsequent statements of the Supreme Court in *Ark. La. Gas Co. v. Hall*. Reply Brief for Petitioner at 18, *PacifiCorp v. FERC* No. 03-72522 (9th Cir. 2005) (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571 (1981)) [hereinafter *PacifiCorp Reply Brief*]. The *PacifiCorp Reply Brief* quotes a passage from *Ark. La. Gas Co.*, which states:

[The *Mobile-Sierra*] rule does not affect the supremacy of the [FPA] itself, and under the filed rate doctrine, when there is a conflict between the filed rate and the contract rate, the filed rate controls. . . . Moreover, to permit parties to vary by private agreement the rates filed with the Commission would undercut the clear purpose of the congressional scheme: granting the Commission an opportunity in every case to judge the reasonableness of the rate.

PacifiCorp Reply Brief, *supra*, at 18 (alterations in the original) (quoting *Ark. La. Gas Co.*, 453 U.S. at 582 (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 338-39 (1956))). The authors submit that this argument misreads both the Supreme Court's decision in *Ark. La. Gas Co.* and the D.C. Circuit's decision in *Lansdale*. As an initial matter, *Ark. La. Gas Co.* does not address the applicability of the *Mobile-Sierra* doctrine at all. Instead, *Ark. La. Gas Co.* involved a situation in which a State court decision was found to violate the filed rate doctrine because it effectively ordered "a retroactive rate increase based on speculation about what the Commission might have done had it been faced with the facts of this case." *Ark. La. Gas Co.*, 453 U.S. at 578-79. To the limited extent that the Supreme Court addressed *Mobile-Sierra* in *Ark. La. Gas Co.*, it did not disturb—and, indeed, reaffirmed—the basic premise of the *Mobile-Sierra* doctrine that informed the *Lansdale* decision—namely, the rule "that the Commission itself lacks affirmative authority, absent extraordinary circumstances, to 'abrogate existing contractual arrangements.'" *Id.* at 582 (emphasis added) (quoting *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 820 (1968) and citing also *Mobile*, 350 U.S. at 338-39). In considering the relevance of *Ark. La. Gas Co.*, it is also noteworthy that neither *Lansdale* nor any of the recent cases involving market-based rate contracts involved any alleged conflict between a filed rate and a contract rate, inasmuch as there is no preexisting filed rate with which there could even arguably be a conflict.

More fundamentally, *PacifiCorp*'s argument misreads *Lansdale* as having been predicated upon an understanding of *Mobile-Sierra* as "subordinating the FPA to contract law" or as depriving the Commission of its opportunity to judge the reasonableness of rates. *See PacifiCorp Reply Brief*, *supra*, at 18 (emphasis added). In observing that the doctrine "subordinate[s] the statutory filing mechanism to the . . . dictates of contract law," *Borough of Lansdale v. FPC*, 494 F.2d 1104, 1113 (D.C. Cir. 1974) (emphasis added), the D.C. Circuit was interpreting the FPA consistent with *Mobile*. As discussed *supra* in Part V.A.1.a, the statutory scheme of the FPA is one that "permit[s] the relations between the parties to be established initially by contract," *Lansdale*, 494 F.2d at 1113 (quoting *Mobile*, 350 U.S. at 339), and in which the statutory filing mechanism contained in section 205 merely serves "to give notice" to the Commission, whose "approval is not necessary for new and changed rates," *id.* at 1110 (citing *Mobile*, 350 U.S. at 342). Once the rates have been fixed by contract, whether the Commission acts to protect the public interest under section 205 or section 206 is immaterial,

Quoting *Richmond Power & Light v. FPC*, the D.C. Circuit continued by describing the *Mobile-Sierra* doctrine as “refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid.”¹⁸³

The D.C. Circuit subsequently followed *Lansdale* in *Sam Rayburn Dam Electric Coop. v. FPC*,¹⁸⁴ another case where a seller sought to use the absence of prior filing as a basis for avoiding the strictures of the *Mobile-Sierra* doctrine. In that case, the D.C. Circuit described the *Mobile-Sierra* doctrine as standing for the proposition that “except in rare cases, the [Commission] has no power under the [FPA] or the [NGA] to accept for filing rates that contravene existing contracts.”¹⁸⁵ Based on *Lansdale*, the D.C. Circuit in that case also rejected the “claim . . . that the *Sierra-Mobile* doctrine does not bar a utility from initiating a unilateral rate change, even if it has a fixed-rate contractual obligation, so long as the obligation is not evidenced by documents accepted for filing by the FPC.”¹⁸⁶

In a later decision involving natural gas imports regulated pursuant to section 3 of the NGA,¹⁸⁷ the D.C. Circuit again followed *Lansdale*—this time in holding a buyer to its obligations under a contract that the seller failed to file with the Commission.¹⁸⁸ The D.C. Circuit found that its holding in *Lansdale* “is equally applicable . . . even though [the seller that failed to file its contract], unlike the public utility company in [*Lansdale*], is seeking to enforce, rather than to abrogate, the unfilled contract.”¹⁸⁹ Although *Compania de Gas de Nuevo*

because the two provisions are not “alternative rate-changing ‘procedures’” but “parts of a single statutory scheme under which all rates are established initially by the [sellers], by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful.” *Mobile*, 350 U.S. at 340–41. This view of the role of contracts in the regulatory scheme of the FPA was left untouched by *Ark. La. Gas Co.* and has since been reaffirmed by the Supreme Court. See *Verizon Commc’ns Inc. v. FCC*, 535 U.S. 467, 479 (2002) (emphasizing that, under the FPA, “contracts between commercial buyers and sellers could be used in ratesetting” and stating that “[w]hen commercial parties did avail themselves of rate agreements, the principal regulatory responsibility was not to relieve a contracting party of an unreasonable rate” (emphasis added) (citing *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956))). Nor does the application of the *Mobile-Sierra* doctrine deprive the FERC of its ability to assess the reasonableness of rates, as made clear by the Supreme Court in *Mobile*, when it held that the public interest standard of review “in no way impairs the regulatory powers of the Commission” *Mobile*, 350 U.S. at 344 (emphasis added).

The Ninth Circuit ultimately dismissed PacifiCorp’s petition for review without addressing the merits of this or other *Mobile-Sierra* issues. See *supra* note 132.

183. *Borough of Lansdale v. FPC*, 494 F.2d 1104, 1113 (D.C. Cir. 1974) (quoting *Richmond Power & Light v. FPC*, 481 F.2d 490, 493 (D.C. Cir. 1973)).

184. *Sam Rayburn Dam Elec. v. FPC*, 515 F.2d 998, 1002 (D.C. Cir. 1975).

185. *Id.* at 1002 (footnote and citation omitted).

186. *Sam Rayburn Dam Elec.*, 515 F.2d at 1008.

187. Natural Gas Act § 3, 15 U.S.C. § 717(b) (2000).

188. *Compania de Gas de Nuevo Laredo, S.A. v. FERC*, 606 F.2d 1024 (D.C. Cir. 1979).

189. *Id.* at 1029. *Nuevo Laredo* involved a contract executed in 1944 that was filed with the FPC as required by regulations promulgated pursuant to section 3 of the FPA, as well as later, un-filed supplemental agreements between the parties. *Nuevo Laredo*, 606 F.2d at 1026. The buyer argued that the only effective rate was that prescribed in the 1944 contract, and that the supplemental agreements were unenforceable by virtue of the seller’s failure to file them with the Commission. *Id.* at 1027. The facts of *Nuevo Laredo* are such that its holding may be limited by the Supreme Court’s subsequent decision in *Ark. La. Gas Co.* In contrast to *Lansdale*, see *supra* note 182, *Nuevo Laredo* arguably did involve a conflict between a filed rate (i.e., the rate prescribed in the 1944 contract on file with the FPC) and a contract rate (i.e., the rates prescribed in the later, un-filed supplemental agreements). Under such circumstances, *Ark. La. Gas Co.* provides that “the filed rate controls,” *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 582 (1981), at least where rates on file pursuant to the core

Laredo, S.A. v. FERC did not directly address the application of the *Mobile-Sierra* doctrine,¹⁹⁰ the D.C. Circuit's interpretation in *Nuevo Laredo* of its prior decision in *Lansdale* in that decision casts doubt on efforts to limit the holding in *Lansdale*, as the FERC did in later orders in Forward Contracts Proceedings, to circumstances in which a seller attempts to "circumvent *Mobile-Sierra*'s limitations by failing to file a contract with the Commission."¹⁹¹

d. *NUSCO I & II*

Read together, the First Circuit's decisions in *NUSCO I* and *NUSCO II* confirm the applicability of *Mobile-Sierra* to the FERC's initial review of contract rates, but they also could be interpreted as providing for a less stringent application of the doctrine to such initial review. The *Mobile-Sierra* issues before the First Circuit in these cases centered on a contract (Seabrook Power Contract) that was submitted to the FERC pursuant to section 205 of the FPA and considered by the FERC in connection with its overall review of a proposed merger between Northeast Utilities (NU) and the Public Service Company of New Hampshire (PSNH). The FERC conditionally approved the NU/PSNH merger but, acting on its own motion, reduced the rates under Seabrook Power Contract.¹⁹² The First Circuit remanded, finding that the FERC had erroneously applied the just and reasonable standard of review in ordering the rate reduction, and ordered the FERC to reconsider the issue under the public interest standard.¹⁹³ Because the section 205 filing of the Seabrook Power Contract represented the FERC's first opportunity to review the contract, *NUSCO I* is one of a number of cases whose facts appear to be in perfect accord with the holding of *Lansdale*.¹⁹⁴

On remand, the Commission "reconsider[ed its] modifications to the

rate provisions of the FPA (Sections 205 and 206) or the NGA (Sections 4 and 5) are concerned.

190. The D.C. Circuit in *Nuevo Laredo* did, however, refer briefly to *Mobile* in finding that "at least for regulatory purposes, [the buyer] is bound by the terms of the supplemental agreements even though they were not filed by [the seller]" *Nuevo Laredo*, 606 F.2d at 1029 (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 338-39 (1956)).

191. See *CPUC IV*, *supra* note 15, at 61,947; *PacifiCorp III*, *supra* note 16, at 61,973. While the holding of *Nuevo Laredo* may be limited by *Ark. La. Gas Co.* to the extent that a later contract rate conflicts with a pre-existing filed rate, see *supra* note 189, the D.C. Circuit's holding in *Nuevo Laredo* that *Lansdale* applies equally where a seller seeks to enforce (and a buyer to avoid) contractual obligations should be undisturbed in the absence of a conflict with the pre-existing filed rate.

192. *Ne. Utils. Serv. Co.*, 50 F.E.R.C. ¶ 61,266, 61,838-39 (1990) (while recognizing that the parties "intended to limit the section 205 and 206 rights of the parties, and to place on the Commission a *Mobile-Sierra* burden before the *Seabrook Power Contract* can be modified, under section 206," the FERC declined to review the Seabrook Power Contract under the public interest standard of review on the grounds that *Mobile-Sierra* was inapplicable to (i) contract challenges by nonparties, and/or (ii) instances where the contract was between affiliates.).

193. *Ne. Utils. Serv. Co. v. FERC*, 993 F.2d 937, 962 (1st Cir. 1993).

194. See also *Metro. Edison Co. v. FERC*, 595 F.2d 851, 853 (D.C. Cir. 1979) (affirming an order applying the *Mobile-Sierra* public interest standard of review to contract executed in 1906—i.e., almost three decades before the enactment of the FPA in 1935—and, as a consequence, not previously filed with, or reviewed by, the Commission); *Richmond Power & Light v. FPC*, 481 F.2d 490, 497 (D.C. Cir. 1973) (reversing an FPC order that declined to apply the *Mobile-Sierra* public interest standard of review based on the fact that the contractual undertaking with respect to rates was expressed not as a "single fixed rate" but instead by reference to State-regulated retail rates not on file with the Commission). With respect to arguments that the *Lansdale* holding was superseded by *Ark. La. Gas Co.*, see *supra* note 182, it is noteworthy that *NUSCO I* was decided subsequent to *Ark. La. Gas Co.*

Seabrook Power Contract under the public interest standard of review” and affirmed its prior modifications to the Seabrook Power Contract.¹⁹⁵ While recognizing that the public interest standard has generally been regarded as “stringent” and even as “practically insurmountable,”¹⁹⁶ the Commission stated that: “[W]hen . . ., as here, the Commission is presented with an agreement for the first time and concludes that certain modifications to material rate provisions are necessary to protect the interests of non-parties—the public interest is served by making the modifications, and a more flexible standard is therefore appropriate.”¹⁹⁷

As part of a lengthy discussion of how the FERC’s rate review functions could be reconciled with the *Mobile-Sierra* doctrine in the context of an agreement that was being reviewed for the first time, the Commission concluded that:

Allowing private parties to impose upon the Commission a “practically insurmountable” barrier to ordering modifications at the time of the Commission’s initial review of a newly filed contract would not achieve such a “reasonable accommodation.” To the contrary, imposing such a constraint would virtually preclude the Commission from effectively carrying out its statutory responsibilities to protect the public interest.¹⁹⁸

In *NUSCO II*, the First Circuit held that the FERC had satisfactorily complied with the mandate of *NUSCO I*, finding that the “FERC has done more on remand than simply substitute the words ‘public interest’ for the forbidden phrase ‘just and reasonable.’”¹⁹⁹ The First Circuit rejected the contention that the FERC was bound, by *NUSCO I* or otherwise, to apply a “practically insurmountable” public interest standard.²⁰⁰ The First Circuit explained: “In [*NUSCO I*] we said that the ‘public interest’ standard was ‘a more difficult standard for the Commission to meet than the statutory “unjust and unreasonable” standard.’ We, however, did not characterize the public interest standard as ‘practically insurmountable.’”²⁰¹

Although *NUSCO II* quotes the FERC’s discussion regarding the application of a more flexible public interest standard on initial review,²⁰² the

195. *NUSCO Remand Order*, *supra* note 159, at 62,081.

196. *Id.* (citing *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983)).

197. *NUSCO Remand Order*, *supra* note 159, at 62,076.

198. *Id.* at 62,087. In a footnote, the FERC responded to claims that its application of a less stringent public interest standard of review in this instance was inconsistent with *Lansdale* and *Rayburn*, suggesting that:

[T]o the extent that the[se] cases could be read to restrict the Commission’s authority to modify previously unfiled contracts on initial review, it is not clear that such a restriction could be reconciled with the Supreme Court’s subsequent pronouncement that the FPA intends that the Commission have “an opportunity in every case to judge the reasonableness of the rate.”

NUSCO Remand Order, *supra* note 159, at 62,088 n.89 (quoting *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 582 (1981)). Significantly, although the FERC cited *Ark. La. Gas Co.* for the proposition that it may apply a less stringent public interest standard on initial review, it did not claim, as has *PacificCorp* before the Ninth Circuit, *see supra* note 182, that *Ark. La. Gas Co.* means the FERC may avoid the *Mobile-Sierra* doctrine altogether where it has not previously had an opportunity to review contract rates. In this respect, the *NUSCO Remand Order* lends support to the idea that applying the public interest standard of review under *Mobile-Sierra* does not deprive the FERC of an opportunity to judge the reasonableness of rates.

199. *Ne. Utils. Serv. Co. v. FERC*, 55 F.3d 686, 692 (1st Cir. 1995).

200. *Id.* at 691.

201. *Ne. Utils. Serv. Co.*, 55 F.3d at 691 (citation omitted).

202. *See id.* at 692 (quoting *NUSCO Remand Order*, *supra* note 159, at 62,076).

decision does not expressly endorse the FERC's reasoning and does not otherwise support the proposition (for which it is often cited) that a lower public interest standard applies when the FERC is reviewing a proposed rate for the first time. Moreover, in that case there were a number of other bases for the First Circuit's decision.²⁰³ As a result, *NUSCO II* does not establish that a public interest standard that is less than "practically insurmountable" must be applied simply because the FERC is reviewing contract rates for the first time.

2. Even if a Filing and/or Initial Review Requirement Exists, It May Be Satisfied by FERC's Substantive Review of Sellers' Market-Based Rate Tariffs

As discussed above, in the Forward Contracts Proceedings, the FERC avoided the issue of whether there was any sort of "initial review" requirement that had to be met before *Mobile-Sierra* applies. Instead, the FERC took the position that any such requirement had been met, because its initial grant of blanket authorization to sell electricity at market-based rates "constitutes what is known as the 'initial review' of rates in the cost-based rate context."²⁰⁴ If one assumes that there is an "initial review" requirement, this position that such requirement is satisfied by the prior grant of blanket authorization appears reasonable, given the procedures the FERC has in place for assessing a potential market-based rate seller's market power.

The principal basis for arguments that the *Mobile-Sierra* doctrine is somehow inapplicable to, or that the public interest standard of review is less stringent in the case of, contract rates not previously filed with, and reviewed by, the Commission is the *Mobile* Court's discussion about the filing requirements of the FPA—specifically, the statement that the FPA "permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public."²⁰⁵ Even if one assumes, for the sake of argument, that this statement contemplates some initial review before contract rates receive the protection of the *Mobile-Sierra* doctrine, it cannot be read as requiring any review more searching than the statute itself requires. In other words, if contract rates have received any review alleged to be required by section 205 of the FPA, they should also have received any initial review that can reasonably be alleged to be required by *Mobile-Sierra*. Thus, regardless of the implications of such a reading for contracts that were required to be but were not individually filed, such as that at issue in *Lansdale*, it appears altogether irrelevant with respect to market-based rate contracts to the extent that those contracts satisfied the statutory filing and review requirements. Given that

203. In particular, after observing that *Mobile*, *Sierra* and *Papago* had each arisen in the context of contract challenges by buyers alleging that the contract rate was too low, the First Circuit stated that "[w]e do not think that *Papago*, read in context, means that the 'public interest' standard is practically insurmountable in all circumstances. It all depends on whose ox is gored and how the public interest is affected." *Ne. Utils. Serv. Co.*, 55 F.3d at 691. The First Circuit also found that "under the circumstances of this case FERC, on remand, gave thoughtful consideration to the public interest in reviewing its previously ordered modification of the Seabrook Power [C]ontract," and that "[i]n its order on remand, FERC has responded to our concerns by explaining how the disputed contractual terms may harm third parties to the contract." *Id.* at 692–93.

204. *Nevada Power IV*, *supra* note 14, at 61,982; *CPUC IV*, *supra* note 15, at 61,944; *PacificCorp III*, *supra* note 16, at 61,972.

205. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 339 (1956).

the courts have consistently held that the “FERC’s authorization of market-based tariffs . . . complie[s] with the [FPA],”²⁰⁶ and, more generally, that market-based ratemaking is lawful under the FPA,²⁰⁷ therefore, there is simply no reasonable reading of *Mobile* that would justify depriving market-based rate contracts, as such,²⁰⁸ of the protections afforded by the *Mobile-Sierra* doctrine.

B. The Policy Considerations Underlying the Application of the Mobile-Sierra Doctrine to Market-Based Rate Contracts

In articulating the *Mobile-Sierra* doctrine, the Supreme Court emphasized that respecting the “integrity of contracts . . . permits the stability of supply arrangements which all agree is essential to the health of the . . . industry.”²⁰⁹ The doctrine thus “defined an arena of freedom of contract within the regulated environment”²¹⁰ From a policy perspective, it is difficult to imagine how such a doctrine would become less relevant—i.e., why one would allow less freedom of contract—as a result of the move to a more market-oriented

206. *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1008 (9th Cir. 2004).

207. See *Consumers Energy Co. v. FERC*, 367 F.3d 915, 922–23 (D.C. Cir. 2004) (“The [FPA] requires that public utilities charge ‘just and reasonable’ rates for the transmission or sale of electric energy. *Id.* § 824d(a). In competitive markets, [the] ‘FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a ‘just and reasonable’ result.’ *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993).”); *Interstate Natural Gas Ass’n of Am. v. FERC*, 285 F.3d 18, 31 (D.C. Cir. 2002) (discussing the circumstances in which “more relaxed . . . regulation than traditional cost-based ceilings, [is permitted] in the context of a mandate to set ‘just and reasonable’ rates”); *Grand Council of the Crees v. FERC*, 198 F.3d 950, 956–57 (D.C. Cir. 2000) (observing that the fact that “the grant of ratemaking authority stems from congressional concern over market power . . . justifies the agency’s relaxing its grip when such power is absent”); *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998) (The FERC “may rely on market-based rates in lieu of cost-of-service regulation to ensure that rates satisfy this requirement.”); *Elizabethtown*, 10 F.3d at 870 (stating that “when 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 generally Hon. Joseph T. Kelliher, *Market Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission*, 26 ENERGY L.J. 1, 5–14 (2005) [hereinafter *Market Manipulation*] (discussing the legal basis for FERC’s market-based rate regime); Michael J. Gergen, George D. Cannon, Jr., David G. Tewksbury, *Market-Based Ratemaking and the Western Energy Crisis of 2000 and 2001*, 24 ENERGY L.J. 321, 322–34 (2003). Cf., e.g., *Tex. Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 509 (5th Cir. 2005) (finding that the filed rate doctrine applies to market-based rates); *Pub. Util. Dist. No. 1 v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 760–62 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 2957 (2005); *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 852–53 (9th Cir. 2003), *amended*, 387 F.3d 966 (2004), *cert. denied*, 125 S.Ct. 1836 (2005); *Pub. Util. Dist. No. 1 v. IDACORP, Inc.*, 379 F.3d 641, 649–52 (9th Cir. 2004); *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000).

208. Even as it rebuffed a “facial challenge” to the FERC’s market-based rate regime and affirmed that “there is nothing inherent in the general concept of a market-based tariff that violates the FPA,” the Ninth Circuit found that the FERC had inadequately enforced its market-based rate reporting requirements, in effect, “abdicate[ing] its regulatory responsibility” under the FPA. *Lockyer*, 383 F.3d at 1013–15. The purpose of this article is to address the broad issue of whether and how *Mobile-Sierra* applies to market-based rate contracts and not to delve into the specific facts and circumstances of particular contracts or contracting parties. Accordingly, the authors do not address alleged inadequacies in the FERC’s enforcement of its market-based rate reporting requirements that could, under *Lockyer*, be construed as meaning that a given contract or class of contracts did not receive the initial review purportedly required under *Mobile-Sierra*.

209. *Mobile*, 350 U.S. at 344. See also *Cities of Newark v. FERC*, 763 F.2d 533, 546 (3d Cir. 1985) (“[F]ixed rate contracts foster orderly planning and stable power supply arrangements.” (citation omitted)); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1139 (D.C. Cir. 1984) (“Because the preservation of private contracts within the context of a rate-setting statutory scheme promotes economic stability, the Supreme Court held, in the *Mobile* and *Sierra* cases, that statutory provisions governing public utilities’ rates should be construed, when possible, as compatible with private rate agreements.”).

210. *Cities of Campbell v. FERC*, 770 F.2d 1180, 1185–86 (D.C. Cir. 1985).

regulatory approach. To the contrary, as the FERC suggested in setting for hearing the complaints in the Forward Contracts Proceedings, “[p]reservation of contracts has, if anything, become even more critical since the policy was first adopted. 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.”²¹¹

The FERC’s observation that the *Mobile-Sierra* doctrine may play an even more important role in the market-based rate context than in a cost-based rate one makes sense on a number of levels. First, the policies underlying *Mobile-Sierra* are in perfect accord with the whole thrust of the FERC’s market-based rate regime. Consistent with the idea that the *Mobile-Sierra* doctrine carves out an “arena of freedom of contract” within the regulated environment,²¹² at least one commentator has also described the *Mobile-Sierra* doctrine as having “created a sphere of quasi-deregulation years before the Commission adopted the concept of market-based ratemaking.”²¹³ While not necessarily deregulatory in all respects,²¹⁴ the FERC’s market-based rate regime takes a deregulatory approach to market outcomes. Regulators are (or should be) more concerned with market rules and market forces and less concerned with market outcomes as they abandon the traditional, cost-of-service paradigm in favor of a market-oriented regulatory approach.²¹⁵ Maintaining *Mobile-Sierra*’s “modest deregulation”²¹⁶ of one class of market outcomes—bilateral contracts—is thus consistent with the overall move away from regulation of market outcomes. Conversely, retreating from *Mobile-Sierra* would be directly at odds with the broader direction of the FERC’s regulatory policies.

Second, if and to the extent that market power is a relevant input to the

211. *PacifiCorp I*, *supra* note 16, at 62,614; *CPUC I*, *supra* note 15, at 61,383; *Nevada Power I*, *supra* note 14, at 61,190.

212. *Campbell*, 770 F.2d at 1185–86.

213. *The Mobile-Sierra Rule*, *supra* note 70, at 357.

214. See, e.g., Sidney A. Shapiro & Joseph P. Tomain, *Rethinking Reform of Electricity Markets*, 40 WAKE FOREST L. REV. 497, 511 (2005) (emphasizing “that the industry is experiencing a restructuring rather than deregulation”) [hereinafter *Rethinking Reform*]; *Market Manipulation*, *supra* note 207, at 11 (noting that “the Commission’s [market-oriented] policy was never intended to deregulate wholesale power markets” and observing that “[t]he panoply of market rules established by the Commission belies descriptions of the [Commission]’s policy objective as deregulation”); Darren Bush & Carrie Mayne, *In (Reluctant) Defense of Enron: Why Bad Regulation is to Blame for California’s Power Woes (or Why Antitrust Law Fails to Protect Against Market Power When the Market Rules Encourage Its Use)*, 83 OR. L. REV. 207, 208 (2004) (explaining that “the term ‘deregulation’ is a misnomer” inasmuch as “[d]eregulated electricity markets are in fact highly regulated, albeit the regulations in place at the inception of competition differ dramatically from regulations in place prior to the opening of the markets to competition”); Vicky A. Bailey, *Reassessing the Role of Regulators of Competitive Energy Markets, Or: Walking the Walk of Competition*, 20 ENERGY L.J. 1, 3 (1999) (“Because our pro-competitive initiatives will require continued oversight, I do not view the Commission’s recent efforts as ‘deregulating’ utility industries; rather they simply reflect a different, more market and consumer-responsive, form of regulation.”) [hereinafter *Reassessing the Role of Regulators*].

215. See *Rethinking Reform*, *supra* note 214, at 511 (“What is being deregulated or what is attempting to be deregulated is the pricing of electricity at the wholesale and retail levels.”); *Reassessing the Role of Regulators*, *supra* note 214, at 15 (1999) (“Unlike the past, when regulators focused on regulating market outcomes, today we must look for ways to reduce government interference with market forces so that competitive markets can flourish.”).

216. *The Mobile-Sierra Rule*, *supra* note 70, at 367.

Mobile-Sierra calculus (and it is far from clear that it is²¹⁷), the move to a market-based rate regime provides greater assurance than was previously available that the contracts protected under *Mobile-Sierra* do not reflect the exercise of market power. In this regard, it is important to bear in mind that the *Mobile-Sierra* doctrine developed during an era when presumed monopolists were negotiating contracts in the setting of actual or perceived market failure.²¹⁸ By contrast, under its market-based rate regime, the FERC makes a threshold determination that a would-be market-based rate seller lacks market power and then engages in ongoing oversight of the markets.²¹⁹ In other words, today's market-based rate regime places a cop on the market power beat, albeit one whose job performance is not all that some would hope,²²⁰ where previously there was none.

Third, the move to a market-based rate regime also militates in favor of more stringent application of the *Mobile-Sierra* doctrine by eliminating a policy rationale that may previously have existed for differentiating between so-called "low-rate" and "high-rate" cases and for applying a less stringent public interest standard of review in the latter.²²¹ Under the traditional, cost-of-service model, regulators and utilities were widely understood to have entered into what was known as "the 'regulatory compact' under which utility shareholders accepted lower rates of return on their investment in exchange for the certainty of regulated rates and resulting ability to recover prudently incurred costs."²²²

217. See *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 411 (D.C. Cir. 2000) (stating that "the relevance of uneven bargaining power to the *Mobile-Sierra* analysis remains unclear"). See also *Ne. Utils. Serv. Co. v. FERC*, 993 F.2d 937, 961 (1st Cir. 1993).

As for the seller's market power, reliance on this factor threatens to erode the *Mobile-Sierra* doctrine so substantially that a fuller explanation from the Commission is required before proceeding down this route. After all, some measure of market power could be present in a large number of contracts. A case-by-case inquiry into the presence and extent of market power would inject a new and potentially time-consuming element into the *Mobile-Sierra* analysis, and it is not entirely clear in any event why the Commission should protect a buyer who voluntarily enters into an agreement with a dominant seller.

Id.

218. Albert L. Foer & Diana L. Moss, *Electricity in Transition: Implications for Regulation and Antitrust*, 24 ENERGY L.J. 89, 92 (2003) (discussing traditional regulation as a "response to an actual (or perceived) failure of the market to ensure socially desirable outcomes" and "to concerns that a natural monopoly exists") [hereinafter *Electricity in Transition*].

219. See, e.g., *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012–13 (9th Cir. 2003); *Pub. Util. Dist. No. 1 v. IDACORP, Inc.*, 379 F.3d 641, 651–52 (9th Cir. 2004).

220. *Lockyer*, 383 F.3d at 1014–15 (asserting that the "FERC abdicate[d] its regulatory responsibility" during the 2000–2001 energy crisis).

221. While the First Circuit endorsed the notion that a less stringent public interest standard may apply in at least certain high-rate cases, see *Ne. Util. Serv. Co. v. FERC*, 55 F.3d 686, 690–91 (1st Cir. 1995), no court has ever expressly endorsed such a policy rationale or otherwise adopted a blanket rule lowering the standard in all high-rate cases. To the contrary, since the First Circuit issued its 1995 *Ne. Utility Service Co.* decision, the D.C. Circuit has continued to apply a "practically insurmountable" public interest standard in high-rate cases. See *Potomac*, 210 F.3d at 412. See also *The Mobile-Sierra Rule*, *supra* note 70, at 363 ("The doctrine . . . is as protective of contracts that contain high rates as it is of contracts that contain low rates.").

222. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 700 (D.C. Cir. 2000) (internal citation omitted). See also, e.g., Jim Rossi, *The Common Law "Duty to Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1263–64 (1998) ("The regulatory compact, a fictional contract between the utility and the state, views the utility as consensually agreeing to certain obligations, such as the duty to serve, in return for its geographic franchise and expected recovery of its costs of service through regulated rates."). The regulatory compact has been understood as

Because the regulatory compact entailed an implicit commitment by regulators "to protect the regulated firm from a broad class of losses as an offset to their preclusion of large profits,"²²³ one could argue that depriving a regulated seller of contract benefits in a high-rate case would not have the same detrimental impact on investment as would depriving an unregulated buyer or its unregulated customers²²⁴ of contract benefits in a low-rate case.²²⁵ Any such policy basis for distinguishing between low-rate and high-rate contracts should disappear entirely in a market-based rate setting, in which neither the buyer nor the seller enjoys the protections of the regulatory compact.²²⁶

Fourth, termination of the regulatory compact all but nullifies one of the three prongs of the public interest test enunciated in *Sierra*,²²⁷ thus effectively eliminating one means of justifying contract reformation. Specifically, as the FERC's reasoning in *NRG-PMI* suggests, it is difficult, if not impossible, to envision circumstances in which the FERC would find a contract rate "so low as to adversely affect the public interest . . . [by] impair[ing] the financial ability of the public utility to continue its service"²²⁸ While a utility's financial difficulties might threaten continued service where the regulatory compact imposed barriers to entry and exit,²²⁹ no such concern should be present under a

arising, at least in part, from the monopoly afforded to utilities by the grant of exclusive geographic franchises. See *id.* at 1264 (discussing an early commentator's view of utility service "obligations as attaching to utilities by virtue of their monopoly status" and stating, more broadly, that "[t]he regulatory compact rationale is most powerful when united with other economic justifications for public utility law, particularly rationales related to the law and economics of contract and the firm"). While there are fair questions as to whether and the extent to which the regulatory compact ever existed with respect to the FERC regulation under the FPA, there is little doubt that the perceived existence of the compact informed such regulation. See Harvey L. Reiter, *Competition Between Public and Private Distributors in a Restructured Power Industry*, 19 ENERGY L.J. 333, 335-37 (1998).

223. William J. Baumol & J. Gregory Sidak, *Stranded Costs*, 18 HARV. J.L. & PUB. POL'Y 835, 840 (1995) [hereinafter *Stranded Costs*].

224. It appears that the Supreme Court had the interests of the distributor-buyer's customers, more so than the interests of the distributor-buyer itself, in mind when it articulated its concerns about contract sanctity as a basis for investment in *Mobile*. Specifically, the Supreme Court stated:

Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate.

United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 344 (1956).

225. While the regulatory compact may thus serve to offset the deterrent effect of contract modification on investment, it would not necessarily address another policy concern expressed about adopting a bias against seller's interests in contract sanctity—namely, that such a bias will act as a "deterrent to service providers entering into long-term contracts" *The Mobile-Sierra Rule*, *supra* note 70, at 373.

226. Interestingly, it was the buyers—not the sellers—under the contracts at issue in the Forward Contracts Proceedings who enjoyed the protections of the regulatory compact or something like it (The California Department of Water Resources, for example, enjoyed a statutory guarantee of full recovery of its purchased power costs, see, e.g., CAL. WATER CODE § 80134 (West 2004)). The policy argument for denying relief to sellers protected by the regulatory compact does not necessarily apply equally to buyers so protected, however, because, as discussed *supra* at note 224, the *Mobile-Sierra* doctrine serves the interests not only of the contracting parties but of parties downstream (and, presumably, upstream) of the transaction as well.

227. *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956).

228. *Id.*

229. See J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851, 907 (1996) (describing barriers to entry by the utility's prospective competitors as "standard feature[s]" of the regulatory compact); *Id.* at 916 (describing restrictions on exit as

regime that is predicated upon the idea that market forces will operate to ensure that new suppliers will enter the market when needed and, conversely, that unneeded suppliers will exit the market.²³⁰ In fact, in *NRG-PMI*, to date the only low-rate case involving market-based rates, the FERC found that even the threatened liquidation of an already-bankrupt seller was insufficient to satisfy this prong of the public interest test.²³¹

Finally, if the Commission is going to apply *Mobile-Sierra* as stringently in “low-rate” cases as its orders in the *NRG-PMI* Proceeding suggest (and, indeed, as it should), it needs to apply the doctrine no less stringently in “high-rate” cases. At least in the short term, the risks of unwarranted regulatory intervention on behalf of buyer interests (i.e., in “high-rate” cases)—whether in contracts or other market outcomes—may be greater where regulators have elected to rely on market forces to ensure entry and exit²³² in lieu of “regulating the natural monopolist [to] balance[] the efficiency garnered by least-cost production by a single seller against the inefficiency of monopoly pricing.”²³³ Consequently, the need for the protections from such intervention afforded by the *Mobile-Sierra* doctrine may be even more important in a market-based rate setting than was previously the case under a traditional cost-of-service paradigm. While the long-term impact on investment of an excessively heavy regulatory hand may be the same in either case,²³⁴ the impact of regulatory intervention in a market-based rate setting is likely to be more direct and immediate. As the D.C. Circuit observed in a recent decision: “If prices are suppressed in a competitive market, a natural inference is that suppliers who could otherwise profitably enter will be deterred from entry.”²³⁵ From this observation followed the D.C. Circuit’s concern about the FERC’s failure to consider the risk that indiscriminate mitigation of market-clearing prices could “wreak substantial harm—in curtailing price increments attributable to genuine scarcity that could be cured only by attracting new sources of supply.”²³⁶ Because regulatory intervention for

“significant but neglected implication[s]” of the obligation to serve that arises under the regulatory compact).

230. See STEVEN STOFT, *POWER SYSTEM ECONOMICS: DESIGNING MARKETS FOR ELECTRICITY* 58–59 (IEEE Press 2002) (describing the long-run dynamic of a competitive market in which, among other things, expected market prices too low to permit full cost recovery will lead to “a gradually diminishing supply of generation (due to retirements of old plants)” and expected market prices “so high that costs are more than covered” will cause suppliers to “build new generating units”). See also, e.g., *Ameren Energy Generating Co.*, 108 F.E.R.C. ¶ 61,081, 61,410 (2004) (“In a competitive market, the less efficient generator would exit, resulting in more efficient dispatch and lower prices.”); *ISO New England, Inc.*, 104 F.E.R.C. ¶ 61,130, 61,468 (2003) (“Over the long run . . . [a higher price] will encourage new generators to enter the market.”).

231. *NRG-PMI III*, *supra* note 18, at 61,731.

232. *Electricity in Transition*, *supra* note 218, at 93–94.

233. *Id.* at 92.

234. Traditional regulation attempts “to offer investors the same sort of actuarially expected return that a competitive market provides . . .” William J. Baumol & J. Gregory Sidak, *Stranded Costs*, 18 HARV. J.L. & PUB. POL’Y 835, 840 (1995). To the extent that regulators are successful in this endeavor, the long-term impact of unwarranted regulatory intervention should be roughly the same under a traditional, cost-of-service approach as they would be in a competitive market.

235. *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 969 (D.C. Cir. 2005).

236. *Id.* See also, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 109 F.E.R.C. ¶ 61,157, 61,704 (2005).

Over-mitigation would mean that generators will not be able to recover all of the costs that they should, and generators may exit the market, or be less likely to enter. Even the threat of over-mitigation may keep market participants out of the market. Fewer competitors can mean less system flexibility and thus ultimately less reliability, and for this reason it is also appropriate to avoid over-

the benefit of buyers under bilateral contracts can have precisely the same price-suppressing effect, such intervention could be expected to deter entry of new supply. Indeed, just the increased threat of such intervention, such as that which would result from any erosion of the *Mobile-Sierra* doctrine, could be expected to have such a deterrent effect, especially where long-term contracts are concerned.

VI. CONCLUSION

The *Mobile-Sierra* doctrine is an “old world” rule whose application to the “new world” of market-based ratemaking has generated considerable controversy, in large part because its application has frustrated efforts to obtain rate relief for Western consumers in the aftermath of the 2000–2001 Western energy crisis. For all the controversy, however, what is perhaps most remarkable about the Forward Contracts Proceedings and the NRG-PMI Proceeding is how unremarkable the outcomes were in certain major respects. In truth, the arguments raised in those proceedings challenging the applicability of the *Mobile-Sierra* doctrine to market-based rate contracts are no different from those that have been advanced for decades in challenges to cost-based rate contracts. Perhaps more importantly, while there is nothing about market-based rate contracts that should make these legal arguments any more compelling than they were in the “old world,” there are numerous aspects of the “new world” that should make the policies underlying *Mobile-Sierra* even more valid today than they were previously.

mitigation.

Id.