ORAL ARGUMENT NOT YET SCHEDULED

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

NEW ENGLAND POWER GENERATORS ASSOCIATION, INC., *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Nos. 11-1422, 11-1465 (Consolidated)

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

BRIEF FOR PETITIONER NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.

John N. Estes III
John Lee Shepherd
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005-2111
(202) 371-7000

Counsel for New England Power Generators Association, Inc.

May 15, 2012

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

The parties before the Court are as follows:

Electric Power Supply Association (amici)
Federal Energy Regulatory Commission
George Jepsen, Attorney General for the State of Connecticut
ISO New England Inc.
Maine Public Utilities Commission
Martha Coakley, Attorney General for the Commonwealth of Massachusetts
New England Power Generators Association, Inc.
New England Power Pool Participants Committee

The parties in the proceeding before the Federal Energy Regulatory Commission ("FERC") in Docket No. ER03-563 were as follows:

American Forest & Paper Association
American National Power, Inc.
Berkshire Power Company, LLC
Black Oak Capital, LLC
Boston Generating, LLC
Braintree Electric Light Department
Bridgeport Energy, LLC
Calpine Eastern
Cape Wind Associates, LLC
Casco Bay Energy Company, LLC
Central Vermont Public Service Corporation
Concord Municipal Light Plant
Connecticut Department of Public Utility Control
Connecticut Industrial Energy Consumers
Connecticut Jet Power, LLC
Connecticut Municipal Electric Energy Cooperative
Connecticut Office of Attorney General
Connecticut Office of Consumer Counsel
Conservation Services Group Inc.
Consolidated Edison Energy, Inc.
Constellation Power Source LLC

Constellation Mystic Power, LLC
CPV Milford, LLC
Devon Power LLC
Dighton Power, LLC
Dominion Energy Marketing, Inc.
Dominion Resources, Inc.
DTE Energy Trading, Inc.
Duke Energy Corporation (p/k/a Duke Energy North America, LLC)
Electric Power Supply Association
Electricity Consumers Resource Council
Energy Management, Inc.
Entergy Nuclear Generation Company, LLC
Entergy Nuclear Vermont Yankee, LLC
EPIC Merchant Energy, LP
Exelon Business Services
Exelon Generating Company, LLC
FirstLight Hydro Generating Company
FirstLight Power Resources Management, LLC
Fitchburg Gas & Electric Light Co.
Fortistar LLC
Granite Ridge Energy, LLC
H.Q. Energy Services (U.S.) Inc.
Independent Energy Producers of Maine
Industrial Energy Consumer Group
IRH Management Committee
ISO New England Inc.
Kennebec Hydro Resources
KeySpan Ravenwood, Inc.
Kleen Energy Systems, LLC
Lake Road Generating Company, L.P.
Long Island Power Authority
Massachusetts Municipal Wholesale Electric Co.
Maine Office of the Public Advocate
Maine Public Utilities Commission
Massachusetts Department of Telecommunications and Energy
Massachusetts Office of Attorney General
MASSPOWER
Metropolitan Water District of Southern California
Middletown Power LLC
Milford Power Company, LLC

Millenium Power Partners, LLC
Mirant Energy Trading, LLC
Mirant Kendall, LLC
Mirant Canal, LLC
Montville Power LLC
Morgan Stanley Capitol Group Inc.
Mt. Tom Generating Company LLC
National Grid USA
NEPOOL Industrial Customer Coalition
New England Conference of Public Utility Commissioners
New England Consumer-Owned Entities
New England Demand Response Providers
New England Power Pool Participants Committee
New Hampshire Electric Cooperative, Inc.
New Hampshire Office of Consumer Advocate
New Hampshire Public Utilities Commission
New Orleans City Council
New York Independent System Operator, Inc.
NextEra Energy Resources, LLC (f/k/a FPL Energy, LLC)
Northeast Utilities Service Company
Norwalk Power LLC
NRG Energy, Inc.
NRG Power Marketing, Inc.
NSTAR Electric & Gas Corporation
Nxegen, LLC
Pinpoint Power, LLC
PPL EnergyPlus, LLC, et al.
PPL Wallingford Energy LLC
PSEG Energy Resources & Trade LLC
PSEG Power LLC
Public Service Commission of Maryland
Reading Municipal Light Department
Rhode Island Office of Attorney General
Rhode Island Division of Public Utilities & Carriers
Select Energy, Inc.
Shell Energy North America (US), L.P. (p/k/a Coral Power L.L.C.)
Somerset Power LLC
Southwestern Area Commerce and Industry Association of Connecticut
Strategic Energy, LLC
Taunton Municipal Lighting Plant

The Energy Consortium
The United Illuminating Company
TransCanada Power Marketing Ltd.
Unitil Service Corporation
Vermont Department of Public Service
Wellesley Municipal Light Plant
Wisconsin Electric Power Company

II. RULINGS UNDER REVIEW

Petitioners seek judicial review of the following orders:

Devon Power LLC, Docket No. ER03-563-066, Order on Remand, 134 FERC ¶ 61,208 (Mar. 17, 2011) ("Remand Order"), JA____; and

Devon Power LLC, Docket No. ER03-563-067, Order Denying Rehearing, 137 FERC ¶ 61,073 (Oct. 20, 2011) ("Rehearing Order"), JA____.

III. RELATED CASES

On November 29, 2011, this petition was consolidated with *George Jepsen, Attorney General for the State of Connecticut v. FERC*, No. 11-1465 (filed Nov. 29, 2011), which challenges the same orders. With that exception, the undersigned is not aware of any other related cases pending before this or any other court.

Respectfully Submitted,
/s/ *John N. Estes III*
John N. Estes III
Skadden, Arps, Slate,
Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

Counsel for New England Power Generators Association, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of both the Federal Rules of Appellate Procedure and the local rules of this Court, the undersigned, counsel of record for New England Power Generators Association, Inc. ("NEPGA"), hereby states as follows:

NEPGA, a non-profit entity duly organized and existing under the laws of the Commonwealth of Massachusetts, is a trade organization that advocates for the business interests of non-utility electric power generators in New England. NEPGA's member companies represent approximately 28,000 megawatts of electrical generating capacity throughout the New England region. NEPGA is not publicly traded.

For purposes of this disclosure statement, NEPGA respectfully submits that it is a trade association pursuant to Circuit Rule 26.1(b).

Respectfully submitted,
/s/ *John N. Estes III*
John N. Estes III
Skadden, Arps, Slate, Meagher
& Flom LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000

Counsel for New England Power Generators Association, Inc.

May 15, 2012

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GLOSSARY

APA	Administrative Procedure Act
Chevron	*Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984)
Commission	Federal Energy Regulatory Commission, the Respondent.
CONE	Cost of New Entry. A proxy estimate of the cost to construct a new generation resource.
Conn. DPUC	*Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009).
Electric Capacity	The ability to generate or transmit electric energy.
FCA	Forward Capacity Auction.
FCM	Forward Capacity Market.
FCM Order	*Devon Power LLC*, 115 FERC ¶ 61,340 (2006), JA___-__.
FCM Rehearing	*Devon Power LLC*, 117 FERC ¶ 61,133 (2006), JA___-__.
FCM Orders	The FCM Order and the FCM Rehearing Order.
FERC	Federal Energy Regulatory Commission, the Respondent.
FPA	Federal Power Act, 16 U.S.C. §§ 791a-825r.
ICR	Installed Capacity Requirement. The capacity expected to be necessary to preserve the reliability of the system during the Capacity Commitment period three years later.
ISO-NE	ISO New England Inc., a Commission-approved Regional Transmission Organization covering Connecticut, Vermont, New Hampshire, Massachusetts, and Maine.
ISO-NE Tariff	ISO New England Inc. Transmission, Markets and Services Tariff.

Memphis	*United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958).
Mobile	*United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956).
MPUC I	*Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008).
MPUC II	*Me. Pub. Utils. Comm'n v. FERC*, 625 F.3d 754 (D.C. Cir. 2010).
NEPGA	New England Power Generators Association, Inc., the Petitioner
NRG	*NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 130 S. Ct. 693 (2010)
PSEG	*PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203 (D.C. Cir. 2011)
Rehearing Order	*Devon Power LLC*, 134 FERC ¶ 61,208 (2011), JA___-__.
Remand Order	*Devon Power LLC*, 137 FERC ¶ 61,073 (2011), JA___-__.
Remand Orders	The Remand Order and the Rehearing Order.
Sierra	*FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

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On Petitions for Review of Orders of the
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BRIEF FOR PETITIONER NEW ENGLAND POWER GENERATOR ASSOCIATION, INC.

JURISDICTIONAL STATEMENT

The New England Power Generators Association, Inc. ("NEPGA") seeks review of two orders issued by the Federal Energy Regulatory Commission ("FERC" or "Commission") on remand from this Court and the Supreme Court. *See Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008) ("*MPUC I*"), *rev'd sub nom. NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 130 S. Ct. 693, *remanded to Me. Pub. Utils. Comm'n v. FERC*, 625 F.3d 754 (D.C. Cir. 2010) ("*MPUC II*"). The orders on review are *Devon Power LLC*, 134 FERC ¶ 61,208 ("Remand Order"), JA___, *reh'g denied*, 137 FERC ¶ 61,073 (2011) ("Rehearing Order"), JA___ (collectively, "Remand Orders").

The Remand Orders are final and aggrieved the members of NEPGA by holding that the auctions for electric generation capacity administered by ISO New England, Inc. ("ISO-NE") do not create contracts and therefore are not entitled to protection from subsequent modification by FERC under the *Mobile-Sierra* standard of review. Instead, FERC maintains that it has the discretion to grant or deny the use of that standard by deciding whether a contract has been formed. NEPGA timely filed a request for rehearing of the Remand Order on April 18, 2011 and timely filed this petition for review on October 31, 2011. This Court has jurisdiction to review the Remand Orders under section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*(b).

QUESTIONS PRESENTED

1. Whether electric generation capacity prices set by auction are contract rates entitled to protection against abrogation or modification by FERC under the *Mobile-Sierra* standard of review.

2. Whether FERC has discretion to apply *Mobile-Sierra* review to non-contract rates.

STATUTORY ADDENDUM

An addendum to this brief reproduces (i) Administrative Procedure Act ("APA") section 10(e), 5 U.S.C. § 706; (ii) FPA sections 205, 206 and 313, 16 U.S.C. §§ 824d, 824e, 825l; and (iii) 18 C.F.R. § 35.2.

STATEMENT OF THE FACTS

I. THE NEW ENGLAND FORWARD CAPACITY MARKET SETTLEMENT

In 2006, FERC approved a contested settlement agreement that redesigned the New England market for installed electric generation capacity by creating a Forward Capacity Market ("FCM") in which the Capacity Clearing Price for a given year is set through a Forward Capacity Auction ("FCA"). *See Devon Power LLC*, 115 FERC ¶ 61,340 ("FCM Order"), JA___-__, *order on reh'g*, 117 FERC ¶ 61,133 (2006), JA___-__ ("FCM Rehearing Order") (together, the "FCM Orders"). "Managing the auction is the responsibility of ISO New England, which is a '"'private, non-profit entity that administers New England energy markets and operates the region's bulk power transmission system.'"' *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 205-06 (D.C. Cir. 2011) (alterations omitted) (quoting a series of prior FCM cases). The auction process is governed by Section III.13 of ISO-NE Transmission, Markets and Services Tariff ("ISO-NE Tariff") Market Rule 1.

ISO-NE's FCAs are held three years before the Capacity Commitment Period when the capacity must be provided. This delay permits the financing and construction of new generation units that compete with existing resources. *See, e.g.*, *MPUC I*, 520 F.3d at 469. ISO-NE also conducts Reconfiguration Auctions that allow market participants to adjust their obligations in response to changes in

system requirements during the intervening period. *See* ISO-NE Tariff § III.13.4. This Court has summarized the mechanics of the ISO-NE capacity auctions as follows:

> Under the settlement and tariff, a descending auction sets the price that capacity suppliers . . . receive. The basic mechanism is straightforward. After the auctioneer, ISO New England, announces a starting price, suppliers respond with bids for how much capacity they are willing to provide at that price. The auctioneer gradually reduces the price, and suppliers reduce their capacity bids accordingly. The auction ends when the suppliers' bids just equal the amount of capacity that ISO New England has determined to be necessary to maintain the reliability of the regional system. This amount is known as the "installed capacity requirement," or ICR. Each supplier is then committed to provide capacity equal to its bid.

PSEG, 665 F.3d at 206. This case is about the standard of review that FERC must apply before it can modify or abrogate the results of those auctions.

Section II.G.3.b of the FCM Settlement Agreement requires ISO-NE to file the results of each FCA and permits parties to object to those results within 45 days. *See* FCM Order at P 179, JA___. Filing an objection within that period is "the only means of challenging [the FCA] results" under FPA section 205. *Id.* at P 37, JA___; *see id.* at P 185, JA___. Once the auction results are final, Section 4.C of the FCM Settlement Agreement governs the standard of review applied to any later complaint to change the auction results under FPA section 206:

> [A]bsent the agreement of all Settling Parties to the proposed change, the standard of review for . . . challenges to the Capacity Clearing Prices derived through the FCA and prices resulting from reconfiguration auctions . . . shall be the "public interest" standard of

> review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (the "Mobile-Sierra" doctrine), whether the change is proposed by a Settling Party, a non-Settling Party, or the FERC acting *sua sponte*.

FCM Order at P 172, JA___.

Section 4.C limits *Mobile-Sierra* review to complaints seeking changes to final capacity auction results and to a class of capacity charges that no longer exists—the rates fixed in advance to bridge the transition period between the settlement and the first FCM Capacity Commitment Period that began on June 1, 2010. *See id.* at PP 172, 182, JA___, ___.[1] ISO-NE and others may seek prospective changes to the auction rules by filing amendments under FPA section 205, 16 U.S.C. § 824d, or complaints under FPA section 206, 16 U.S.C. § 824e. *See, e.g.*, FCM Order at P 182, JA___. The agreement also permits protests to the auction parameters ISO-NE is required to announce 90 days before an FCA runs. *See id.* at P 36, JA___. The standard applied to these pre-auction procedures and prospective rule changes is "ordinary" just and reasonable review, in contrast to the *Mobile-Sierra* "public interest standard" applied to contract rates. *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 535 (2008).

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[1] Any dispute over the standard of review applicable to the FCM transition rates has been rendered moot. *See MUPC II*, 625 F.3d at 757 n.1; Rehearing Order at P 28, JA___. Therefore, this brief does not discuss FCM transition rates and elides quotations accordingly.

When FERC approved the FCM Settlement Agreement it specifically rejected the "contention that market rules and tariffs are not contracts to which *Mobile-Sierra* can apply." FCM Rehearing Order at P 90, JA___.

II. JUDICIAL REVIEW OF THE FORWARD CAPACITY MARKET ORDERS

This Court upheld the FCM Orders in nearly all respects, but rejected FERC's decision to permit *Mobile-Sierra* review for complaints filed by non-settling parties because doing so would "deprive them of their statutory right to challenge rates under the 'just and reasonable' standard." *MPUC I*, 520 F.3d at 476; *see id.* at 477 (quoting 16 U.S.C. § 824e(a)). The Court did not reach the question whether capacity auctions produce contract rates, but instead held more broadly that non-settling parties are not bound by settlement agreements they oppose, finding that "when a rate challenge is brought by a non-contracting third party, the *Mobile-Sierra* doctrine simply does not apply." *Id.* at 478.

The Supreme Court "reverse[d] the D.C. Circuit's judgment to the extent that it rejects the application of *Mobile-Sierra* to noncontracting parties." *NRG*, 130 S. Ct. at 696. The decision in *Morgan Stanley* "announced three months after the D.C. Circuit's disposition, made clear that the *Mobile-Sierra* public interest standard is not an exception to the statutory just-and-reasonable standard; it is an application of that standard in the context of rates set by contract." *NRG*, 130 S. Ct. at 696. Thus, "the *Mobile-Sierra* presumption does not depend on the identity of

the complainant who seeks FERC investigation." *Id.* at 701. "To retain vitality, the doctrine must control FERC itself, and . . . challenges to contract rates brought by noncontracting as well as contracting parties. *Id.* at 696-97.

The Supreme Court declined to determine whether "auction rates . . . are prescriptions of general applicability rather than 'contractually negotiated rates.'" *Id.* at 701 (quoting the Respondent's brief). The Supreme Court also declined to address the government's position that FERC has discretion to impose *Mobile-Sierra* review even in the absence of contract rates: "Whether the rates at issue qualify as 'contract rates,' and, if not, whether FERC had discretion to treat them analogously are questions raised before, but not ruled upon by, the Court of Appeals. They remain open for that court's consideration on remand." *Id.*

On remand before this Court, FERC removed the first question from the table. "FERC's counsel . . . concede[d] flatly that the auction rates are not contract rates, but rather closely resemble a conventional 'cost based tariff rate' because . . . a capacity buyer is simply assessed a standard market rate." *MPUC II*, 625 F.3d at 759. FERC contrasted ISO-NE's capacity auctions with a "typical auction," on the ground that "the buyers do not agree to pay a seller a specific price set by a voluntary bid, so therefore no voluntary agreements develop." *Id.* This Court declined to address the second question on remand because, notwithstanding FERC's *post hoc* litigation position, "FERC never articulated *in its orders* a

rationale for its discretion to approve a *Mobile-Sierra* clause outside the contract context, or an explanation for exercising that discretion . . . ." *Id.* As a result, "FERC's orders approving the settlement agreement's *Mobile-Sierra* provision [we]re remanded for further proceedings." *Id.* at 760.

III. THE PROCEEDINGS BELOW

FERC's Remand Order gave short shrift to the notion that ISO-NE's capacity auctions result in contract rates, offering two reasons why they do not. *See* Remand Order at PP 12-13, JA___. First, FERC essentially adopted arguments it previously rejected in the FCM Orders and opposed in *MPUC I*. In doing so, FERC emphasized that the auctions results "apply to all suppliers and purchasers of capacity . . . , not just to the settling parties. . . . and, thus, a non-settling party's obligation to make a payment cannot be said to be based on a contract executed by that party." *Id.* at P 12, JA___. Thus, under FERC's revised analysis, "the rates set through the forward capacity auction more closely resemble a tariff rate than a contract rate." *Id.* at P 13, JA___. Second, FERC found that because "utilities buying capacity in the forward capacity market do not participate in the auction," they "cannot be said to be contracting with the capacity sellers." *Id.*

The remainder of the Remand Order addressed why FERC "has discretion to apply a more rigorous application of the 'just and reasonable' standard of review to future challenges to [auction] rates and that it was appropriate to exercise that

discretion" in approving the FCM Settlement. *Id.* at P 14, JA___. FERC explained that the capacity auctions "share with freely-negotiated contracts certain market-based features that tend to assure just and reasonable rates." *Id.* at P 19, JA___. In particular, auctions provide a forward-looking "market-based mechanism to appropriately value capacity resources based on their location, satisfying cost-causation principles." *Id.* In addition, FERC "determined that use of a more rigorous [standard of review for] auction results, making them more difficult to challenge in the future, would promote rate stability, which the Supreme Court has recognized as an important goal under the FPA." *Id.* at P 20, JA___ (citing *Morgan Stanley*, 554 U.S. at 545-46).

On rehearing, NEPGA specified five reasons FERC erred in holding that ISO-NE's capacity auctions do not create contract rates. First, it is black-letter law under the Uniform Commercial Code and every relevant treatise that sales made at auction are contracts. NEPGA Rehearing Request at 2-3, JA___-__. In addition, FERC failed to distinguish its precedent enforcing capacity auction obligations in other markets and failed to compare the characteristics of unilateral rates and contract rates identified in Supreme Court precedent. *Id.* at 3, JA___.

Second, NEPGA explained that FERC's heavy emphasis on the contested nature of the FCM Settlement "irrationally conflate[d] the question whether the

FCM Settlement is a contract with the question whether ISO-NE Forward Capacity Auctions result in contacts." *Id.*

Third, NEPGA contended that FERC erred to the extent the Remand Order suggested that capacity auctions produce tariff rates, not contract rates, because the auctions are conducted using rules in ISO-NE's tariff and create a market-wide clearing price. *See id.* at 3-4, JA___-__. NEPGA explained that all auctions are run according to rules and all contracts are formed within the rules of the relevant jurisdiction. Thus, tariff rules do not unmake the contractual nature of capacity auction obligations.

Fourth, NEPGA contested FERC's determination that ISO-NE's capacity auctions do not create contract rates because buyers do not participate in the auction. *See id.* at 4, JA___. NEPGA explained that reverse auctions with passive buyers are a well-recognized auction format and that, if the capacity auctions do not create a contract between capacity suppliers and electric utilities, then they must instead result in a contract between suppliers and ISO-NE itself or ISO-NE as agent for the utilities. *See id.* Moreover, the notion that ISO-NE should be regarded as the suppliers' counterparty is consistent with FERC's rulemaking guidance in Order No. 741 and the acknowledged practice in ISO-NE's sister market that uses a materially identical auction mechanism. *See id.*

Finally, NEPGA objected that the Remand Order did not acknowledge or explain its reversal of the FCM Orders, which expressly "reject[ed] IECG's contention that market rules and tariffs are not contracts to which *Mobile-Sierra* can apply." *Id.* at 5, JA___ (quoting FCM Rehearing Order at P 90, JA___).

The Commission denied NEPGA's request for rehearing and reaffirmed its finding that rates set by an FCA "represent tariff, not contract, rates." Rehearing Order at P 21, JA___. FERC continued to reason that "forward capacity auctions bear little resemblance to a conventional auction" because the "utilities 'buying' capacity in the forward capacity market have no role in the auction at all." *Id.* at P 23, JA___. The Commission also rejected, for the first time, NEPGA's argument that a contract is formed because ISO-NE purchases capacity on behalf of, and as agent for, utilities that purchase capacity in the auction. *See id.* at P 24, JA___. The Commission also denied a joint request for rehearing filed by several state agencies, a utility, and two industrial groups who together challenged FERC's assertion of discretion to confer *Mobile-Sierra* review on anything other than "contract rates." *Id.* at P 29, JA___. NEPGA and three state agencies then petitioned for review.

SUMMARY OF THE ARGUMENT

The question presented in this case is whether the Commission is required to honor the *Memphis* clause in the FCM Settlement Agreement stating that, after an

initial 45-day period of ordinary review, subsequent attempts to change forward capacity auction results are subject to *Mobile-Sierra* review. *See* FCM Order at P 172, JA___. If the Forward Capacity Auctions create contracts, then FERC has no discretion to reject *Mobile-Sierra* review. NEPGA respectfully submits that the Court owes little or no deference to FERC's determination whether FCAs create contracts: the *Mobile-Sierra* doctrine exists to control FERC and that purpose is thwarted if FERC is permitted to circumvent the doctrine by deciding for itself what a contract is or whether one exists.

It is concretely established that sales made at auction create contracts. *See, e.g.*, U.C.C. § 2-328 (2012); 7A C.J.S. *Auctions and Auctioneers* § 53 (2004). The Remand Orders evades this core principles by holding that capacity auctions do not resemble "conventional" auctions and utilities obtaining capacity have "no role" in the auction. The Commission is wrong on both counts.

First, capacity purchasers certainly do have a role in capacity auctions. Before the auctions are ever held, capacity purchasers shape auction outcomes by determining whether to enter bilateral capacity contracts. During the auction, they actively participate as Self-Supply Resources and Demand Response resources, and buyer conduct has a significant effect on the auction clearing price.

Second, the Commission's conclusion that reverse auctions are not "conventional auctions" has no significance for contract formation purposes and,

moreover, it is demonstrably wrong. Reverse auctions—in which suppliers compete by driving prices down—are a ubiquitous method of purchasing goods and services in both the private and public sectors. The federal government considers reverse auctions a "best practice" precisely because they are so effective at driving prices down to the lowest level the market will bear. With the exception of the Remand Orders themselves, every decision we have found discussing reverse auctions explicitly states or implicitly presumes they create contracts. This Court has recognized that the purpose of the ISO-NE capacity auctions is to permit "competitive bidding for future capacity *contracts*" and that "capacity providers bid for *contracts*." *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 480 (D.C. Cir. 2009) ("*Conn. DPUC*") (emphasis added). Other federal courts and FERC itself have reached the same conclusion when describing reverse auctions used to sell energy and capacity in other markets. The Remand Orders are outliers in reaching a contrary conclusion.

FERC insists that ISO-NE's capacity auction creates duties that more closely resemble tariff rates than contractual rates. The Commission, however, fails to explain why this is the case and also whitewashes the real issue for *Mobile-Sierra* doctrine purposes: whether the capacity auction creates unilateral rates. The Supreme Court has long instructed that the relevant distinction for the *Mobile-Sierra* doctrine is between rates set by contract and rates set "unilaterally by tariff."

The Rehearing Order conspicuously fails to address NEPGA's argument regarding the characteristics of unilateral rates that have been identified by the Supreme Court. The Commission thus fails to explain how auctions result in unilateral rates when: (1) auctions are a multilateral, iterative process; (2) the capacity auction prices are not dictated by a single seller; and (3) unlike unilateral rates filed by sellers, which may never result in a sale to anyone, the auction results impose a real obligation on suppliers to deliver a specific product at a specific price, place, and time. In short, the rates created through the capacity auction process bear no resemblance to unilateral tariff rates.

The Commission also erred in holding that Forward Capacity Auctions do not create contracts because utilities buying capacity "cannot be said to be contracting with the capacity sellers." Remand Order at P 13, JA___; Rehearing Order at P 23, JA___. The Commission's myopic focus on the relationship between ISO-NE and the utilities that buy capacity in the auction distorts its analysis because it ignores the fact that *ISO-NE itself purchases capacity from sellers*. In other words, ISO-NE is either the purchaser itself or the agent for entities that must fulfill capacity obligations. Either way, the sellers have formed a contract. FERC's failure to recognize ISO-NE's contractual role disregards and undermines the agency's close attention to this issue in other orders addressing the same concerns.

Finally, we agree that FERC has discretion to "ratchet up" its protection of market outcomes from retroactive attack, outside of the *Mobile-Sierra* doctrine, counseled by principles of finality and the need for certainty, but caution that FERC has no discretion to "ratchet down" the protection that the *Mobile-Sierra* doctrine confers upon contract rates.

STANDING

NEPGA is a trade association of electric power generators that sell energy, capacity, and ancillary services in the market administered by ISO-NE. The Remand Orders hold that NEPGA's members do not create contracts to supply capacity to anyone through their participation in capacity auctions, but that FERC can treat those obligations as contracts if the agency so chooses. To hold that capacity suppliers have obligations, but deny that they have contracts, undermines the rights and remedies the FPA and the *Mobile-Sierra* doctrine were designed to protect. "The regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies." *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968) (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) ("*Mobile*")).[2] And the purpose of the

[2] *Permian Basin* and *Mobile* both involved the Natural Gas Act, rather than the FPA. That distinction is immaterial for purposes of the *Mobile-Sierra* doctrine because the statutes "are substantially identical" with regard to contract formation principles. *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 350 (1956) ("*Sierra*").

Mobile-Sierra doctrine is to "subordinate the statutory filing mechanism to the broad and familiar dictates of contract law." *Borough of Landsdale v. FPC,* 494 F.2d 1104, 1113 (D.C. Cir. 1974). In keeping the last word on the threshold issue, after the courts have spoken, FERC has aggrieved NEPGA's members in several ways this Court can remedy on judicial review.

"The FPA recognizes that contract stability ultimately benefits consumers," and the Remand Orders "threaten to inject more volatility into the electricity market by undermining a key source of stability." *Morgan Stanley*, 554 U.S. at 551. This will increase suppliers' costs of capital because "'uncertainties regarding rate stability and contract sanctity can have a chilling effect on investments . . . and this, in turn, can harm customers in the long run.'" *Id.* (quoting *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 6 (2007)). Moreover, the Remand Orders deny market participants their long-recognized right to determine for themselves the standard of review that will apply to their commercial arrangements. *See United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 110-13 (1958) ("*Memphis*").

Finally, regardless of the resolution of the *Mobile-Sierra* issue, FERC's decision to deny contract status to capacity auction results voids the fundamental concomitant rights of contract holders to sue on the contract, either at FERC for

jurisdictional claims, *see, e.g., Consumers Energy Co. v. FERC*, 428 F.3d 1065, 1069 (D.C. Cir. 2005) (finding standing based on rights conferred by *contract*), or in the courts for other claims, *see, e.g., Pac. Gas & Elec. Co. v. United States*, ___ Fed. Cl. ___ (2012) (finding privity of contract between market buyers and federal agencies that sell hydroelectric power based on market participation agreements); *California ex rel. Brown v. United States*, ___ Fed. Cl. ___,2012) (same), and to enforce their claims in bankruptcy courts, *see In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004) (holding that a bankruptcy court may permit rejection of a FERC-jurisdictional power sale contract).[3] *Cf. DIRECTV, Inc. v. FCC*, 110 F.3d 816, 829 (D.C. Cir. 1997) (equating "standing of an unsuccessful bidder for a government contract" with "an unsuccessful bidder at a government auction").

ARGUMENT

I. STANDARD OF REVIEW

NEPGA contends that the Commission's Remand Orders are arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A). "To withstand review under this standard, FERC must have 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a "rational connection between the

[3] Lower courts in the Second Circuit hold otherwise. *See In re Boston Generating, LLC*, 2010 WL 4288171 (S.D.N.Y. Nov. 1, 2010); *In re Calpine Corp.*, 337 B.R. 27 (S.D.N.Y. 2006); *Enron Power Mktg., Inc. v. Luzenac Am. Inc.*, 2006 WL 2548453 (S.D.N.Y. Aug. 31, 2006).

facts found and the choice made."'" *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted)). "The Commission's discretion is, however, bounded by the requirements of reasoned decisionmaking." *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010) (citing cases). In addition, "the Commission must respond to objections and address contrary evidence in more than a cursory fashion." *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 543-44 (D.C. Cir. 2010).

In a typical case, the Court "review[s] claims that the Commission acted arbitrarily and capriciously in interpreting contracts within its jurisdiction by employing the familiar principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, [] (1984)." *Entergy Servs., Inc. v. FERC*, 568 F.3d 978, 981-82 (D.C. Cir. 2009). But there is no dispute about what Section 4.C of the FCM Settlement says or means: it expressly states that, after an initial 45-day period of ordinary review, subsequent attempts to change capacity auction results are subject to *Mobile-Sierra* review. FCM Order at P 172, JA___. The question presented here is whether the Commission is required to honor that provision.

If Forward Capacity Auctions create contracts, then FERC has no discretion to reject *Mobile-Sierra* review. On the contrary, "FERC must presume that a rate

set by 'a freely negotiated wholesale-energy contract' meets the statutory 'just and reasonable' requirement." *NRG*, 130 S. Ct. at 696 (quoting *Morgan Stanley*, 554 U.S. at 530); *accord Morgan Stanley*, 554 U.S. at 534 ("[T]he Commission was *required*, under our decision in *Sierra*, to apply the *Mobile-Sierra* presumption in its evaluation of the contracts here."). The Supreme Court has long "held that parties could contract out of the *Mobile-Sierra* presumption." *Morgan Stanley*, 554 U.S. at 544-45 (citing *Memphis*, 358 U.S. at 110-13). However, "[t]he law is quite clear: absent contractual language 'susceptible to the construction that the rate may be altered while the contract[] subsist[s],' the *Mobile-Sierra* doctrine applies." *Texaco Inc. v. FERC*, 148 F.3d 1091, 1096 (D.C. Cir 1998) (quoting *Appalachian Power Co. v. FPC*, 529 F.2d 342, 348 (D.C. Cir. 1976)).

NEPGA respectfully submits that the Court owes little or no deference to FERC's determination whether ISO-NE's FCAs create contracts. The *Mobile-Sierra* doctrine was devised by the Supreme Court to limit the Commission's discretion to modify contractual obligations and this Court has long observed that the Commission "very much dislikes" it. *Borough of Landsdale*, 494 F.2d at 1110 & n.28 (citing cases). "To retain vitality, the doctrine must control FERC itself." *NRG*, 130 S. Ct. at 696-97. Thus, in our view, this case starts at "*Chevron* step

zero"[4] and FERC should be given no more than *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), deference when the agency renders a decision releasing itself from statutory and judicial constraints. *Cf. United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (holding "that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency," and that *Skidmore* deference may be appropriate when that delegation is absent).

The *Mobile-Sierra* doctrine cannot control FERC if this Court allows the agency to decide whether the doctrine applies by determining for itself what a contract is or whether one exists. To defer to FERC on either question clashes with the Supreme Court's rejection of the notion that "the Commission must have an initial opportunity to review a contract without the *Mobile-Sierra* presumption." *Morgan Stanley*, 554 U.S. at 544. It would also undermine the Supreme Court's insistence that "[t]he regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies." *Permian*

[4] Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 836 (2001) (inventing this term to describe the analysis of "whether courts should turn to the *Chevron* framework at all"); *see* Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 209-10 (2006) ("[W]hen an agency's self-interest is so conspicuously at stake, Congress should not be taken to have implicitly delegated law-interpreting power to the agency.").

Basin, 390 U.S. at 822; *accord, e.g.*, *Mobile*, 350 U.S. at 344; *Borough of Landsdale*, 494 F.2d at 1113.

This is not an imagined menace. Since issuing the Remand Orders, FERC has repeatedly rejected *Mobile-Sierra* clauses, even when parties enter into *uncontested* settlements to resolve their rate disputes, by exercising the agency's newly-asserted discretion to determine whether the settlement relates to or results in a "contract rate." And the Commission is taking a very broad view of the "tariff rates" it now automatically excludes from *Mobile-Sierra* review. *See Fla. Power & Light Co.*, 138 FERC ¶ 61,063 at P 11 (2012) ("Because the Settlement provisions . . . pertain entirely to *FP&L's Tariff and service provided thereunder*, we find that the *Mobile-Sierra* presumption . . . does not apply . . . . As we have stated in several recent orders, . . . the Commission has discretion as to whether to approve . . . the *Mobile-Sierra* 'public interest' standard of review.") (emphasis added); *accord MidAmerican Energy Co.*, 138 FERC ¶ 61,028 at PP 6-7 (2012) (repeating the now-routine routine mantra); *South Carolina Elec. & Gas Co.*, 137 FERC ¶ 61,081 at P 5 (2011); *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 at P 17 (2011); *Petal Gas Storage, L.L.C.*, 135 FERC ¶ 61,152 at P 17 (2011); *Southern LNG Co.*, 135 FERC ¶ 61,153 at P 24 (2011); *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105 at PP 22-25 (2011).

II. THE ISO-NE FORWARD CAPACITY AUCTIONS CREATE CONTRACT RATES ENTITLED TO MOBILE-SIERRA *PROTECTION*

The Uniform Commercial Code and every leading treatise on contract law concur that "[a]n auction sale is the making of a contract, in which the bid is the offer and the action of the auctioneer in accepting the bid . . . results in the formation of a contract." 3A Anderson U.C.C. § 2-328:7 (3d ed. 2011) (footnotes omitted); *see* U.C.C. § 2-328;[5] *Restatement (Second) of Contracts* § 28(1)(a) (1981); 1 *Williston on Contracts* § 4:12 (4th ed. 2007); 1 J. Perillo, *Corbin on Contracts* § 4.14 (rev. ed. 1993). Thus, the failure to fulfill obligations undertaken at auction is uniformly regarded as a breach of contract. *See* 7 Am. Jur. 2d *Auctions and Auctioneers* §§ 49, 52 (2007); 7A C.J.S. *Auctions and Auctioneers* § 53 (2004).

The Remand Orders contradict these fundamental principles by holding that "[t]he results of the capacity auctions, although possessing certain contractual characteristics, do not constitute contracts between buyers and sellers." Rehearing Order at P 22, JA___. FERC's rationale for this holding is that although

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[5] Every state in ISO-NE's footprint has adopted U.C.C. § 2-328. *See* Conn. Gen. Stat. § 42a-2-328(2); Me. Rev. Stat. tit. 11, § 2-328(2); Mass. Gen. Laws ch. 106, § 2-328(2); N.H. Rev. Stat. § 382-A:2-328(2); R.I. Gen Laws § 6A-2-328(2); Vt. Stat. Ann. tit. 9A, § 2-328(2). Further, the courts of those states have uniformly held that sales at auction form contracts. *See, e.g.*, *Dall v. Certified Sales, Inc.*, 2011 WL 572387, at *2 (D. Conn. Feb. 15, 2011); *Conway Sav. Bank v. Vinick*, 192 N.E. 81, 83 (Mass. 1934); *Freeman v. Poole*, 93 A. 786, 794 (R.I. 1915); *Clark v. Greeley*, 62 N.H. 394 (1882).

"*conventional* auctions can result in a contract between a buyer and a seller," *id.* at P 21 & n.31, JA___ (emphasis added) (citing *In re GWI PCS 1 Inc.*, 230 F.3d 788, 807 (5th Cir. 2000)); *id.* at P 23 & n.34, JA___ (same), "the forward capacity auctions bear little resemblance to a *conventional* auction" because "[t]he utilities 'buying' capacity in the forward capacity market have *no role in the auction at all*, and cannot be said to be 'contracting' with the capacity sellers." *Id.* at P 23, JA___ (emphasis added). This analysis is factually inaccurate and legally flawed.

A. Forward Capacity Auctions Create Contracts with the Mutual Participation of Buyers and Sellers

It is simply not true that capacity purchasers "have no role in the auction at all." *Id.* Before the auctions are ever held, capacity purchasers shape auction outcomes by determining whether to enter bilateral capacity contracts with suppliers. *See* ISO-NE Tariff § III.13.5 (describing extensive rules for "Bilateral Contracts in the Forward Capacity Market"). After the auction parameters are established, capacity purchasers then actively participate in the auction as Self-Supplied FCA Resources, which cover their capacity requirements through generating resources they own, *see* ISO-NE Tariff § III.13.1.6, and as Demand Resources, which bid to reduce consumption from ISO-NE based on price, *see id.* § 13.1.4. ISO-NE's rules for buyer conduct in the FCM have been the subject of extension litigation at FERC for the past two years. *See ISO New England Inc.*, 131 FERC ¶ 61,065, *clarified*, 132 FERC ¶ 61,122 (2010), *clarified*, 135 FERC

¶ 61,029 (2011), *clarified*, 138 FERC ¶ 61,027 (2012), *appeal docketed sub nom. New England Power Generators Ass'n v. FERC*, Nos. 12-1060 *et al.* (D.C. Cir. Jan. 27, 2012).[6] It is therefore unclear how FERC could claim that capacity purchasers "have no role in the auction at all." Rehearing Order at P 23, JA___.

B. Reverse Auctions Are a Proper, Widely-Utilized Type of Auction

FERC stops short of claiming that ISO-NE's capacity auctions are not really auctions, but says they are not "conventional auctions." *Id.* That distinction has no significance for contract formation purposes and is also demonstrably wrong.

Descending price (or "Dutch") auctions are well-recognized alternatives to ascending price (or "English") auctions. *See, e.g.*, Paul Klemperer, AUCTIONS: THEORY AND PRACTICE 11-12 (2004);[7] Ralph Cassaday, Jr., AUCTIONS AND

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[6] The Demand-Reduction-Induced Price Effect ("DRIPE") on capacity prices is significant. *See, e.g.*, Rick Hornby *et al*., Avoided Energy Supply Costs in New England: 2007 Final Report, at 1-7 to 1-8, 6-22 to 6-25 (Jan. 3, 2008), http://www.synapse-energy.com/Downloads/SynapseReport.2007-08.AESC.Avoided-Energy-Supply-Costs-2007.07-019 (devising the price suppression strategy for New England capacity buyers). Demand response is also key to energy prices, which prompted FERC's recent rulemaking proceeding in *Demand Response Compensation in Organized Wholesale Energy Mkts.*, Order No. 745, FERC Stats. & Regs. ¶ 31,322, *order on reh'g*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh'g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012), *review pending sub nom. Electric Power Supply Ass'n v. FERC*, Nos. 11-1486 *et al.* (D.C. Cir. Dec. 23, 2011).

[7] Klemperer's classification of auctions into four basic types—ascending (English), descending (Dutch), first sealed bid, and second sealed bid (Vickrey)—is frequently cited in legal and economic literature. *See, e.g.*, J. Russel Denton,

AUCTIONEERING 8, 32 (1967). The same is true of "reverse auctions," which are a common type of descending price auction in which "bidders are vying for the right to sell something *to the auction holder*." Susan L. Turley, *Wielding the Virtual Gavel—DOD Moves Forward With Reverse Auctions*, 173 Mil. L. Rev. 1, 3 (2002). FERC's claim that reverse auctions are not "conventional" is simply inaccurate.

In the private sector, reverse auctions are routinely used to purchase goods and services precisely because they are recognized as an effective method for driving prices down to the lowest sustainable level.[8] In 1997, the Office of Management and Budget (OMB) eliminated the regulation that once barred the use of auctions in federal procurement. *See, e.g.*, *DGS Contract Serv., Inc. v. United States*, 43 Fed. Cl. 227, 239 (1999). The use of reverse auctions for major government purchases became widespread soon thereafter. *See, e.g.*, Turley, *supra*, at 7-65 (describing the explosive growth of reverse auctions for military

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Stacked Deck: Go-Shops and Auction Theory, 60 Stan. L. Rev. 1529, 1532-33 & nn. 18-22 (2008); *cf., e.g.*, Randall S. Thomas & Robert G. Hansen, *A Theoretic Analysis of Corporate Auctioneers' Liability Regimes*, 1992 Wis. L. Rev. 1147, 1151-52 & nn. 16-18 (1992) (citing Cassaday).

[8] *See, e.g.*, Max Chafkin, *How to Compete in a Reverse Auction*, INC. (May 1, 2007), http://www.inc.com/magazine/20070501/salesmarketing-pricing.html; Andy Moorhouse, *Playing the game: effective strategies for combating reverse auctions*, 10 VELOCITY, No. 2 (2008), http://www. huthwaite.co.uk/pdf/articles/playing-the-game.pdf.

procurement after 1997).[9] The federal courts have upheld reverse auctions as a lawful government contracting practice, *see MTB Group, Inc. v. United States*, 65 Fed. Cl. 516 (2005), and OMB considers reverse auctions to be a best practice. *See* Memorandum from Paul A. Denett, Administrator, Office of Federal Procurement Policy, Attach. A at 3 (July 18, 2008), http://www.ago.noaa.gov/ago/acquisition/docs/effective_practices_for_enhancing_competition.pdf.

Indeed, with the exception of the Remand Orders themselves, every decision we have found discussing reverse auctions explicitly states or implicitly presumes they create contracts. *See, e.g., GLA Water Mgt. v. Univ. of Toledo*, 963 N.E.2d 207, 209 n.3 (Ohio App. 2011); *Gulf Coast Waste Disposal Auth. v. Four Seasons Equip., Inc.*, 321 S.W.3d 168 (Tex. App. 2010); *Imagistics Int'l, Inc. v. Dep't of Gen. Servs.*, 150 Cal. App. 4th 581, 584-85 (Cal. Ct. App. 2007); *Superl Sequoia Ltd. v. C.W. Carlson Co.*, 2008 WL 2940734 (W.D. Wis. July 22, 2008); *DePaola v. Nissan North Am., Inc.*, 2006 WL 1181131 (M.D. Ala. May 2, 2006).

Moreover, when this Court upheld FERC's jurisdiction to regulate ISO-NE's capacity market, it expressly described ISO-NE's capacity auction as a mechanism for creating contracts:

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[9] *See also, e.g.*, Ina R. Merson, *Reverse Auctions: An Overview*, ACQUISITIONS DIRECTIONS (July 2000), http://www.hertz-sef.org/files/Library/General/Reverse%20Auctions.pdf.

> In the Forward Market—the details of which are at issue here—capacity providers bid for *contracts* three years in the future as part of a "descending clock auction." . . . . [Suppliers'] bids commit them to supply the amount they offer at the clearing price. By using competitive bidding for future capacity *contracts*, this system both incentivizes and accounts for new entry by more efficient generators, while ensuring a price both adequate to support reliability and fair to consumers.

Conn. DPUC, 569 F.3d at 480 (emphasis added).

A federal trial court reached the same conclusion when it held that the FPA preempted state law challenges to electricity prices set through "a descending clock, fixed price auction to purchase electricity" that mimics ISO-NE's capacity auctions. *Schafer v. Exelon Corp.*, 619 F. Supp. 2d 507, 512 (N.D. Ill. 2007) (observing that "suppliers submitted bids over the internet for 17-, 29-, and 41-month residential electric *contracts* and a 17-month industrial *contract*" (emphasis added)). FERC's orders approving the Illinois auction proposal noted the auctions would be memorialized in "standardized supplier forward contracts" agreed upon beforehand. *Commonwealth Edison Co.*, 113 FERC ¶ 61,278 at PP 2, 21, 45 (2005). However, FERC held it was unnecessary to accept those contracts for filing because wholesale suppliers with market-based rate authority are not required to file sales contracts with FERC. *See id.* at PP 45 & n.23 (citing *Revised Pub. Util. Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127 (2002)). FERC did not object that the contracts expressly invoked *Mobile-Sierra* review. *See* Application of Commonwealth Edison Co. and Exelon Generating Co., LLC, CPP-

A § 11.2 & CPP-B Supplier Forward Contracts § 11.2, FERC Docket No. ER06-43 (Oct. 17, 2005).

Furthermore, PJM Interconnection, L.L.C. ("PJM")—ISO-NE's counterpart in the Mid-Atlantic region—purchases capacity for utilities through a sealed bid reverse auction that closely resembles ISO-NE's FCM model. When FERC held utilities may not escape capacity purchase obligations by leaving PJM, FERC explained that PJM's Reliability Pricing Model ("RPM") "established new capacity procurement rules [that] *required LSEs to contract with suppliers* three years in advance and provided that prices would be set through an auction market."[10] *Duquesne Light Co.*, 122 FERC ¶ 61,039 at P 88 & n.74 (2008) (emphasis added). Duquesne's capacity *purchaser* status did not excuse the utility from honoring the auction results because "PJM is responsible for procuring capacity on behalf of [utilities] in each zone three years in advance based on the auction results, and PJM's obligation to pay the generators is fixed at the time of the auction." *Id.* at P 89 & n.75. FERC held that "Duquesne understood that PJM was procuring capacity on its behalf and therefore should be obligated to pay for

[10] FERC's order approving the RPM Settlement likewise stated "that companies providing service to customers *must contract with suppliers* three years in advance to ensure that reliability goals are met and that current generators as well as new generators can be assured of sufficient revenues to either retain their current investment in PJM, or invest in constructing new generating units." *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 6 (2006) (emphasis added).

that capacity." *Id.* Moreover, FERC held that a utility's purchase obligation "extends to all auctions in which its load forecasts are included" and "are set at the time that PJM establishes its RPM auction parameters" two months before the auction is held because suppliers and other purchasers "make business decisions and enter into binding contracts, including financial hedges and bilateral arrangements, based on these auction parameters." *Id.* at P 92.

Although NEPGA emphasized below that the Remand Order directly clashed with the Commission's order in *Duquesne*, *see* Rehearing Request at 6-7, 9, JA___-__, ___, FERC ignored NEPGA's argument. This defect alone is sufficient to require remand. As this Court often has explained, "'unless the [agency] answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned.'" *PSEG*, 665 F.3d at 209 (quoting a series of cases).

In sum, FERC erroneously found that ISO-NE's capacity auctions do not create contracts because they are not "conventional" auctions and "[t]he utilities 'buying' capacity in the forward capacity market have no role in the auction at all." Rehearing Order at P 23, JA___. That holding is plainly incorrect as a factual matter, contradicts well-established common law principles, disregards the opinions of this Court and other federal courts, and departs from FERC precedent without explanation.

III. FERC FAILED TO EXPLAIN WHY AN AUCTION RESULT "MORE CLOSELY RESEMBLES A TARIFF RATE" AND IGNORED THE RELEVANT FACTORS DISTINGUISHING UNILATERAL RATES CITED BY NEPGA BELOW

The Remand Orders state that "rates set through the forward capacity auction more closely resemble a tariff rate than a contract rate." Remand Order at P 13, JA___; Rehearing Order at P 23, JA___. In support of this conclusion, FERC offers only a cursory analysis and fails to address the Supreme Court precedent that NEPGA identified below as guiding the required inquiry.

FERC observes that the auction "rate methodology applies even to parties who did not agree contractually to its adoption," Remand Order at P 13, JA___, and from that observation concludes that "there is nothing that can be reasonably viewed as voluntary agreements of any sort between the sellers of the capacity and the 'buyers' in the auction," Rehearing Order at P 23, JA___. In addition to overlooking the fact that FCM participants voluntarily sign ISO-NE's Market Participant Agreement, FERC's continued use of the term "tariff rate" obfuscates the real issue: whether the auction rates are unilateral.

The Supreme Court has long instructed that, for purposes of determining whether the *Mobile-Sierra* presumption applies, the relevant distinction is between rates set "by contract rather than unilaterally by tariff." *Morgan Stanley*, 554 U.S. at 532 (citing *Mobile*, 350 U.S. 332); *id.* at 546 n.3 (citing *Sierra*, 350 U.S. at 355); *id.* at 551 n.6 (same); *id.* at 556 (Stevens, J., dissenting) (arguing the statute does

"not distinguish between rates set unilaterally by tariff and rates set bilaterally by contract"); *id.* at 559-60 ("*Mobile* merely held that utilities cannot unilaterally abrogate contracts with purchasers by filing new rate schedules . . . ."); *NRG*, 130 S. Ct. 693, 698 ("The Act allows regulated utilities to set rates unilaterally by tariff; alternatively, sellers and buyers may agree on rates by contract."); *id.* at 701-02 (Stevens, J., dissenting) (arguing that *Mobile* and *Sierra* "correctly held that a seller . . . could not unilaterally repudiate its contract obligations").

Despite this wealth of guidance, the Remand Order did not examine the characteristics of unilateral rates, instead juxtaposing the term "tariff rates" with "contract rates." Even then, the distinction drawn in the Remand Orders is poorly articulated and applied. The Commission's own regulations plainly state that contracts can create tariffs and that tariffs can contain contracts in the form of rate schedules and service agreements. *See* 18 C.F.R. § 35.2(b), (c)(1)-(2). Tariffs and contracts both can bind an entire market generally, often even uniformly. The difference between them is whether the rate is set "unilaterally by tariff" with a single entity in control, or "by contract" reflecting action by at least two parties. *NRG*, 130 S. Ct. at 698.

On rehearing, NEPGA specifically pointed to FERC's lopsided failure to examine the characteristics of unilateral rates. *See* Rehearing Request at 3, 8-9, JA___,___-__. Once again, however, FERC declined to respond. Although that is

a sufficient basis in itself to require remand, we raise those points again here so that the Court can assess whether remand could actually change the result. We do not believe it would.

First, all auctions are, by definition, bilateral or multilateral, never unilateral.

Second, conspicuously unlike a unilateral rate, capacity auction prices are not dictated by a single seller. *See Mobile*, 350 U.S. at 343 (noting that the statutory scheme allows sellers to "establish *ex parte*, and change at will, the rates offered to prospective customers").

Third, no single supplier dictates when the auction will end or what the clearing price will be. To the contrary, suppliers compete against one another in an iterative, multilateral process to determine the outcome. Auctions are a more sophisticated, arm's-length, and competitive contracting process than bilateral negotiations, but they still result in contracts through which a buyer (or buyers[11]) agree to purchase capacity from sellers at a specified rate. *Cf. Richmond Power & Light v. FPC*, 481 F.2d 490, 496-97 (D.C. Cir. 1973) (*Mobile-Sierra* "appl[ies] whether the parties agree to a specific rate or whether they agree to a rate changeable in a specific manner").

[11] This depends on whether one views ISO-NE as the purchaser or as agent for numerous load-serving entity purchasers. *See infra* Part IV.

And fourth, unlike unilateral rates, which may never result in a sale to anyone (but must nevertheless be on file beforehand), the ISO-NE Forward Capacity Auction imposes an enforceable obligation on suppliers to deliver a specific product at a specific price, place, and time.

In sum, while the Commission concedes that the capacity auction results display numerous explicit contract characteristics, the auction process and the resulting rates exhibit none of the characteristics of unilateral rates except that the auction results reflect only one clearing price. The Commission places great weight on that point to no avail because it is equally true of contracts.

IV. CAPACITY AUCTION SUPPLIERS HAVE A CONTRACT WITH ISO-NE AS BUYER OR WITH ISO-NE AS AGENT FOR LOAD; EITHER WAY, A CONTRACT IS FORMED

The Remand Orders hold that ISO-NE's Forward Capacity Auction does not produce contract rates because "utilities 'buying' capacity in the forward capacity market . . . cannot be said to be 'contracting' with the capacity sellers; indeed, it can be said that they themselves are not 'buying' capacity but rather are merely paying the rate that ISO-NE charges to recover ISO-NE's costs of buying capacity." Rehearing Order at P 23, JA___; *accord* Remand Order at P 13, JA___. The Commission's myopic focus on the relationship between ISO-NE and the utilities that buy capacity in the auction distorts its analysis because it ignores the fact that *ISO-NE itself purchases capacity from sellers*. In other words, ISO-NE is

either the purchaser itself or the agent for entities that must fulfill capacity obligations. Either way, the sellers have formed a contract with a purchaser or purchasers. If the ISO is the contracting party, there is privity between each supplier and the ISO; if the ISO is an agent, there is privity between each supplier and the load-serving entities that chose to acquire capacity through the auction using the ISO as their agent. *See Restatement (Second) of Contracts* § 52 cmt. C (1981); *Restatement (Third) of Agency* § 6.01 (2006). The Commission's response on rehearing failed to demonstrate the absence of a contract on any level.

First, the Commission is wrong that there is no contractual relationship between buyers and suppliers because the buyers "are merely paying the rate that ISO-NE charges to recover ISO-NE's costs of buying capacity." Rehearing Order at P 23, JA___; *see* Remand Order at P 13, JA___. The Court of Federal Claims has squarely rejected the notion that utility purchasers in organized energy markets lack privity with wholesale suppliers. That was the defense raised by federal agency power marketers against two suits alleging that the agencies must pay damages for their role as wholesale suppliers during the California Energy Crisis. The court denied that defense, explaining that market participants on both sides had signed contracts to abide by the terms and conditions of the market they agreed to join:

> [T]he applicable Tariffs in this case, which were filed with FERC, specified the rules to abide by in order to participate in these markets.

> The Tariffs included when and in what form participants would submit bids to buy and sell power, and the formulas used to establish prices for all purchase-sale transactions as well as prescribing the financial settlements resulting from market transactions. The Tariffs also allocated risks as between the markets and the market participants. . . .
>
> At trial, the evidence was clear that in order for the Agencies to have access to the PX and ISO markets, the Agencies were required to sign written contracts that incorporated these Tariffs, as well as agreeing to abide by the Tariffs' terms and subsequent changes to those Tariffs. . . . [T]he evidence is clear and uncontested that when the Agencies signed [these] Agreements, they agreed to accept the prices, terms, and conditions established by the Tariffs, as determined and modified from time to time by FERC. Thus the facts at trial proved that the PX and ISO were facilitators only, and that the payment obligations were between the buyer and seller. Since the PX and ISO were pass-through entities or clearinghouses, the contractual relationships of offer, acceptance, and mutual intent ran between the Agencies and the [Investor Owned Utilities], the Plaintiffs. The Defendant's argument is illogical that there is no relationship between the Agencies and Plaintiffs. For example, when one pays a bill with a check, the money may go into the creditor's bank account, but it is the legal property of the creditor. It meets the debtor's legal obligations. The same relationship existed here. The PX and ISO were like a bank, and the Agencies and the Plaintiffs had the obligations.

Pacific Gas & Elec. Co., ___ Fed. Cl. at ___-___ (footnote omitted). The Court then dropped a footnote, explaining that "[i]n light of this finding, the Court need not address whether the Plaintiffs are third party beneficiaries as the evidence proved that they are direct beneficiaries." *Id.* n.2. The court reached precisely the same conclusion on the same day in *California ex rel. Brown*, ___ Fed. Cl. at ___-___, a related case brought on behalf of the utilities' end-use consumers.

The Commission did not consider these cases because they were decided after the Rehearing Order issued. However, NEPGA fails to see how the Commission could reach a contrary result on remand, particularly when they hold what this Court already recognized in its description of the mutual contractual obligations arising from the forward capacity market in *Connecticut DPUC*, 569 F.3d at 481.

Second, the Rehearing Order makes a token response to our argument that ISO-NE is not acting as an agent for the utilities who purchase capacity, claiming that "it cannot be said that ISO-NE is acting as an agent for capacity buyers" because "the ultimate purchases are made unilaterally via ISO-NE's tariff [and] ISO-NE is at the center of this capacity market." Rehearing Order at P 24, JA___. The Court of Federal Claims—quoted at length above—has already rejected that argument. And, while FERC also states that "there is no contractual obligation for load to fulfill its capacity obligations directly through the auctions," *id.*, that fails to advance FERC's argument. The ISO-NE tariff *does* require utilities to purchase needed capacity that they cannot supply themselves, and, if they fail to purchase it through a bilateral contract, the tariff requires that they purchase it at the price set at auction. This, once again, brings the contractual nature of the utilities' obligations squarely within the holding of the Court of Federal Claims.

Moreover, the Commission's claim that ISO-NE is not the utilities' agent is belied by the ISO-NE tariff itself. *See* ISO-NE Tariff, Attach. A, Market Participant Service Agreement art. 5.1 ("The Market Participant appoints the ISO *as its agent* to purchase *on its behalf* Energy, *capacity* . . . or other related products . . . ." (emphasis added)); *accord id.* art. 4.1 (appointing ISO-NE agent for sellers); ISO-NE Tariff, § I, Ex. ID, Billing Policy § 1.1 ("ISO will act as agent" for Market Participants and other Covered Entities "in administering, managing and enforcing the ISO New England Billing Policy."); *cf.* ISO-NE Tariff §§ III.13.7.2, III.13.7.3, III.13.7.3.1 (describing payment procedures).

Third, despite the fact that the argument was squarely raised on rehearing, FERC entirely failed to address NEPGA's contention that—at a minimum—the auction creates a contract to supply capacity *to the ISO*. This, once again, requires remand. *See PSEG*, 665 F.3d at 209. But it is unclear how the Commission could reach a contrary conclusion on remand because each argument FERC raised to deny a contractual relationship between capacity suppliers and the utility purchasers emphasizes the direct nature of the transaction between the suppliers and ISO-NE. *See, e.g.*, Rehearing Order at P 23, JA___ (stating that capacity rates "compensate ISO-NE for costs that ISO-NE has incurred"); *id.* at P 24, JA___ ("ISO-NE is at the center of this capacity market."). Moreover, ISO-NE's recent compliance filing in response to Order No. 741 will replace the current tariff

language that describes ISO-NE as the utilities' agent for capacity purchases with new language under which ISO-NE designates *itself* as the central counterparty ("CCP") for, among other things, "transactions in the Forward Capacity Market," where ISO-NE will "be inserted in the chain of title between the seller and purchaser." ISO-NE Tariff Compliance Filing Transmittal Letter at 4, Docket No. ER12-1651 (Apr. 30, 2012).

V. FERC IRRATIONALLY HOLDS THAT FORWARD CAPACITY AUCTIONS CANNOT CREATE CONTRACTS BECAUSE THE FCM SETTLEMENT WAS CONTESTED

FERC contends that capacity auctions do not create contracts because "[n]on-settling parties are equally obligated to pay the rates derived from the rate methodology resulting from the Settlement." Rehearing Order at P 25, JA___; *accord* Remand Order at PP 12, 13, JA___. As NEPGA explained on rehearing, this rationale is deeply flawed because the Commission erroneously conflates two distinct issues: (i) whether ISO-NE's Forward Capacity Auction produces a contract rate; and (ii) whether a contested settlement (or a contested rulemaking) can impose a contract obligation on those who oppose it. *See* Rehearing Request at 3-4, 9-12, JA___-__, ___-__. In any event, FERC has conceded that "the non-settling parties objected only to the use of the *Mobile-Sierra* public interest standard," not the auction mechanism. Rehearing Order at P 27 n.39, JA___. This

concession leaves us wondering why FERC continues to write that opposition to the FCM Settlement undermines the contractual nature of capacity obligations.

Rather than attempt to decipher what FERC meant to say on rehearing, we will simply reiterate two arguments FERC chose not to answer. First, it cannot be true that opposing a regulatory requirement (e.g., an interconnection rulemaking) impairs the validity of contracts made to satisfy that requirement. States require drivers to purchase auto insurance; that does not mean agreements between insurance companies and drivers are not contracts. Second, *NRG* forecloses the notion that opposing the FCM Settlement determines whether capacity auctions create contracts because it holds that *Mobile-Sierra* review may be imposed on non-settling objectors or other third parties. *See NRG*, 130 S. Ct. at 698. If opposition to the FCM Settlement controls whether the auctions create contracts, the Supreme Court would not have remanded that question. *See id.* at 701.[12]

[12] FERC's solicitude of the "non-settling parties" needs illumination. The FCM Settlement was joined by 107 parties and opposed by 8. FCM Order at P 15, JA____-__. Only one of those eight—NSTAR Electric and Gas Corp.—is a utility that actually purchases capacity. *Id.* at P 38 n.32, JA____. The other objectors—state government agencies and some special interest groups—are indirectly affected by capacity rates. *See id.* P 38 nn.31-32. Now, after enjoying years of low capacity auction prices, NSTAR strongly advocates "*Mobile-Sierra* protection" and "a market-based approach to the pricing and acquisition of capacity." *ISO New England Inc.*, 138 FERC ¶ 61,027 at PP 63, 64 (2012). Thus, FERC's continued focus on non-settling parties serves a narrow, if not vanished, constituency of actual capacity auctions participants.

VI. FERC DID NOT ACKNOWLEDGE OR EXPLAIN WHY IT REVERSED ITS HOLDING IN THE FCM ORDERS

The Remand Orders cannot be reconciled with the FCM Orders on the question whether capacity auctions create contracts. In the FCM Orders, FERC expressly "reject[ed] IECG's contention that market rules and tariffs are not contracts to which *Mobile-Sierra* can apply." FCM Rehearing Order at P 90, JA___; FCM Order at PP 184-86, JA___. Indeed, the Commission emphasized in the earlier phase of the proceeding below that "the *Mobile-Sierra* provision [at issue in this case] is fully consistent with current Commission policy," noting that "the Commission has routinely permitted the use of similar provisions in settlement agreements, *including contested settlements*." FCM Order at 183 & n.150 (listing ten examples), JA___; *accord* FCM Rehearing Order at P 92 & n.103 (same), JA___. The Supreme Court approved the FCM Orders' general approach to *Mobile-Sierra* in *NRG*, but remanded the question whether auction rates are contract rates after government counsel changed course to argue that auction rates are not contract rates after all.

Counsel cannot erase the Commission's holding in the FCM Orders by "agree[ing]," *NRG*, 130 S. Ct. at 701, or "conced[ing] flatly," *MPUC II*, 625 F.3d 759, that auction rates are not contract rates on judicial review. Counsel may no more change FERC's position on appeal than supply "'post hoc rationalizations'" to cure an absence of reasoning in FERC's orders. *TNA Merch. Projects, Inc. v.*

FERC, 616 F.3d 588, 593 (D.C. Cir. 2010) (quoting *FPC v. Texaco, Inc.*, 417 U.S. 380, 397 (1974) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962))). Of course, FERC itself may reverse the holding in the FCM Orders—and, along with them, numerous other precedents upon which the FCM Orders relied—but FERC is at least required to acknowledge the fact that it is reversing course and to explain that reversal in order to sustain its new policy on review. *See, e.g., Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-44. The Remand Order failed to do either of these things, simply ignoring the conflict.

On rehearing, NEPGA requested that the Commission acknowledge its reversal of the FCM Orders and explain its departure from a significant body of precedent upon which those orders relied. *See* Rehearing Request at 15-16, JA___-__. FERC did not even acknowledge our request, much less respond to it. That requires remand. FERC "glosses over or swerves from prior precedents without discussion" and thus "cross[es] the line from the tolerably terse to the intolerably mute." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

VII. ISO-NE CAPACITY AUCTION OBLIGATIONS MERIT HEIGHTENED PROTECTION EVEN IF THEY ARE NOT CONTRACT RATES

A settlement that resolves pending litigation is a contract and its approval by an agency or court can only augment that status, not diminish it. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994); *Int'l Ass'n of Firefighters*

v. Cleveland, 478 U.S. 501, 519 (1986); *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1135 (D.C. Cir. 1991) (noting "public interest gloss" of FERC approval) (citing cases). For that reason, "[t]he policies underlying the *Mobile-Sierra* doctrine apply with equal force to settlement agreements." *Cities of Newark v. FERC*, 763 F.2d 533, 546 (3d Cir. 1985) (citing *Cities of Bethany v. FERC*, 727 F.2d 1131, 1139 (D.C. Cir. 1984)). And, as discussed above, the FCM Orders emphasized that FERC has "routinely permitted the use of [*Mobile-Sierra*] provisions in settlement agreements, including contested settlements." *Id.* at P 92 & n.103 (citing cases), JA___.

CONCLUSION

For the reasons set forth above, this Court should vacate and remand the order on review.

Respectfully submitted,

/s/ *John N. Estes III*
John N. Estes III
John Lee Shepherd, Jr.
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005-2111
(202) 371-7000

Counsel for New England Power Generators Association, Inc.

May 15, 2012

CERTIFICATE AS TO LENGTH OF BRIEF

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, and Circuit Rule 32(a)(2), I hereby certify that the foregoing document contains no more than 10,000 words (9,892 using the word-count feature in Microsoft Word) not including the tables of contents and authorities, glossary, and certificates of counsel.

/s/

John Lee Shepherd, Jr.
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7338

Brief: May 15, 2012

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that on this 15th day of May, 2012, the foregoing brief was served upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system as indicated below:

Lona T. Perry
Federal Energy Regulatory Commission
(FERC) Office of the Solicitor
888 First Street, N.E.
Washington, DC 20426

Robert Solomon, Solicitor
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Michael C. Wertheimer
Office of the Attorney General, State of Connecticut
10 Franklin Square
New Britain, CT 06051

John Story Wright
Office of the Attorney General, State of Connecticut
10 Franklin Square
New Britain, CT 06051

Sherry Ann Quirk
Schiff Hardin LLP
1666 K Street, N.W.
Suite 300
Washington, DC 20006-4390

Bruce Folker Anderson
Office of the Attorney General,
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108-1598

Jesse Salvador Reyes
Office of the Attorney General, Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108-1598

Lisa C. Fink
Maine Public Utilities Commission
242 State Street
State House Station
Augusta, ME 04333-0018

Allan Bert Taylor
Day Pitney LLP
242 Trumbull Street
Hartford, CT 06103-1212

Ashley Charles Parrish
King & Spalding, LLP
1700 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006-4706

Respectfully Submitted,
/s/ *John Lee Shepherd*
John Lee Shepherd
Skadden, Arps, Slate,
Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

Counsel for New England
Power Generators Association, Inc.

Addendum

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 provides:

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Section 205 of the Federal Power Act, 16 U.S.C. § 824d provides:

16 U.S.C. § 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly

the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

Section 206 of the Federal Power Act, 16 U.S.C. § 824e provides:

16 U.S.C. § 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its

best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Com-mission orders to be thereafter observed and in force: *Provided,* That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided,* That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

(A) The term "short-term sale" means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term "applicable Commission rule" means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

Section 313 of the Federal Power Act, 16 U.S.C. § 825*l* provides:

16 U.S.C. § 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the

application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

FERC Regulation 18 C.F.R. § 35.2, provides:

18 C.F.R. § 35.2 Definitions.

(a) Electric service. The term electric service as used herein shall mean the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale for resale in interstate commerce, and may be comprised of various classes of capacity and energy sales and/or transmission services. Electric service shall include the utilization of facilities owned or operated by any public utility to effect any of the foregoing sales or services whether by leasing or other arrangements. As defined herein, electric service is without regard to the form of payment or compensation for the sales or services rendered whether by purchase and sale, interchange, exchange, wheeling charge, facilities charge, rental or otherwise.

(b) Rate schedule. The term rate schedule as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing and may take the physical form of a contract, purchase or sale or other agreement, lease of facilities, or other writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A rate schedule is designated with a Rate Schedule number.

(c)(1) Tariff. The term tariff as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section offered on a generally applicable basis, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A tariff is designated with a Tariff Volume number.

(2) Service agreement. The term service agreement as used herein shall mean an agreement that authorizes a customer to take electric service under the terms of a tariff. A service agreement shall be in writing. Any oral agreement or under-standing forming a part of such statement shall be reduced to writing and made a part thereof. A service agreement is designated with a Service Agreement number.

(d) Filing date. The term filing date as used herein shall mean the date on which a rate schedule, tariff or service agreement filing is completed by the receipt in the office of the Secretary of all supporting cost and other data required to be filed in compliance with the requirements of this part, unless such rate schedule, tariff or service agreement is rejected as provided in § 35.5. If the material submitted is found to be incomplete, the Director of the Office of Energy Market Regulation will so notify the filing utility within 60 days of the receipt of the submittal.

(e) Posting

(1) The term posting as used in this part shall mean:

(i) Keeping a copy of every rate schedule, service agreement, or tariff of a public utility as currently on file, or as tendered for filing, with the Commission open and available during regular business hours for public inspection in a convenient form and place at the public utility's principal and district or division offices in the territory served, and/or accessible in electronic format, and

(ii) Serving each purchaser under a rate schedule, service agreement, or tariff either electronically or by mail in accordance with the service regulations in Part 385 of this chapter with a copy of the rate schedule, service agreement, or tariff. Posting shall include, in the event of the filing of in-creased rates or charges, serving either electronically or by mail in accordance with the service regulations in Part 385 of this chapter each purchaser under a rate schedule, service agreement or tariff proposed to be changed and to each State Commission within whose jurisdiction such purchaser or purchasers distribute and sell electric energy at retail, a copy of the rate schedule, service agreement or tariff showing such increased rates or charges, comparative billing data as required under this part, and, if requested by a purchaser or State Commission, a copy of the supporting data required to be submitted to this Commission under this part. Upon direction of the Secretary, the public utility shall serve copies of rate schedules, service agreements, or tariffs, and supplementary data, upon designated parties other than those specified herein.

(2) Unless it seeks a waiver of electronic service, each customer, State Commission, or other party entitled to service under this paragraph (e) must notify the public utility of the e-mail address to which service should be directed. A customer, State Commission, or other party may seek a waiver of electronic

service by filing a waiver request under Part 390 of this chapter providing good cause for its inability to accept electronic service.

(f) Effective date. As used herein the effective date of a rate schedule, tariff or service agreement shall mean the date on which a rate schedule, tariff or service agreement filed and posted pursuant to the requirements of this part is permitted by the Commission to become effective as a filed rate schedule, tariff or service agreement. The effective date shall be 60 days after the filing date, or such other date as may be specified by the Commission.

(g) Frequency regulation. The term frequency regulation as used in this part will mean the capability to inject or withdraw real power by resources capable of responding appropriately to a system operator's automatic generation control signal in order to correct for actual or expected Area Control Error needs.