ORAL ARGUMENT HAS BEEN SCHEDULED FOR NOVEMBER 15, 2012

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

Nos. 11-1422 and 11-1465 (consolidated)

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

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

MICHAEL A. BARDEE
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

LONA T. PERRY
SENIOR ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426

SEPTEMBER 4, 2012

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before the Commission and this Court are identified in the briefs of petitioners.

B. Rulings Under Review

1. *Devon Power LLC*, 134 FERC ¶ 61,208 (2011), JA 95; and

2. *Devon Power LLC*, 137 FERC ¶ 61,073 (2011), JA 135.

C. Related Cases

This case was previously before this Court in *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008), which was reversed in part and remanded to this Court in *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 130 S. Ct. 693 (2010). This Court in turn remanded the issues identified by the Supreme Court back to the Commission in *Me. Pub. Utils. Comm'n v. FERC*, 625 F.3d 754 (D.C. Cir. 2010). The rulings under review in this appeal are the orders issued by the Commission in response to this Court's and the Supreme Court's remand. Counsel is aware of no related cases currently pending in this Court or any other court.

/s/ *Lona T. Perry*
Lona T. Perry
Senior Attorney

September 4, 2012

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

---

* Cases chiefly relied upon are marked with an asterisk.

COURT CASES: **PAGE**

COURT CASES: **PAGE**

COURT CASES: **PAGE**

COURT CASES: **PAGE**

ADMINISTRATIVE CASES: **PAGE**

STATUTES: **PAGE**

REGULATIONS:

GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
Generator Br.	Brief For Petitioner New England Power Generators Association, Inc.
ISO	The New England Independent System Operator
JA	Joint Appendix
Memphis	*United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958)
Mobile	*United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956)
Remand Order	*Devon Power LLC*, 134 FERC ¶ 61,208 (2011)
Remand Orders	*Devon Power LLC*, 134 FERC ¶ 61,208, *reh'g denied*, 137 FERC ¶ 61,073 (2011)
Rehearing Order	*Devon Power LLC*, 137 FERC ¶ 61,073 (2011)
Settlement Order	*Devon Power LLC*, 115 FERC ¶ 61,340 (2006)
Settlement Orders	*Devon Power LLC*, 115 FERC ¶ 61,340, *on reh'g*, 117 FERC ¶ 61,133 (2006)
Settlement Rehearing Order	*Devon Power LLC*, 117 FERC ¶ 61,133 (2006)
Sierra	*FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956)
States Br.	Brief For State Petitioners

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

Nos. 11-1422 and 11-1465 (consolidated)

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

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

This consolidated appeal addresses issues raised on remand by the U.S. Supreme Court in *NRG Power Mktg. v. Me. Pub. Utils. Comm'n*, 130 S. Ct. 693 (2010), and this Court in *Me. Pub. Utils. Comm'n v. FERC*, 625 F.3d 754 (D.C. Cir. 2010). The issues remanded are the following:

1. Whether the auction results arising from a contested settlement approved by the Federal Energy Regulatory Commission (FERC or Commission) constitute contract rates that are presumed to meet the "just and reasonable"

standard of the Federal Power Act and that must be reviewed by the Commission under the *Mobile-Sierra*[1] public interest standard. (This is an issue raised by Generator Petitioners; State Petitioners agree with FERC.)

2. If the auction results are not contract rates, whether FERC acted within its discretion in approving a settlement provision imposing the *Mobile-Sierra* public interest standard of review on certain future challenges to the auction results. (This is an issue raised by State Petitioners; Generator Petitioners agree with FERC.)

STATUTES AND REGULATIONS

The relevant statutes and regulations are contained in the Addendum to this brief.

INTRODUCTION

In the challenged orders, *Devon Power LLC*, 134 FERC ¶ 61,208 (2011) (Remand Order), JA 95, *reh'g denied*, 137 FERC ¶ 61,073 (2011) (Rehearing Order), JA 135 (collectively the Remand Orders), the Commission answered the issues remanded by the Supreme Court in *NRG* and this Court in *Maine Pub. Utils. Comm'n*. The Commission determined that the generally-applicable capacity rates resulting from the auctions are not contract rates that, under *Mobile-Sierra*, require

[1] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*), and *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

application of the "public interest" standard of review. Rather, the rates more closely resemble tariff rates than contract rates.

In reviewing such rates, the Commission has full discretion to interpret and apply the statutory just and reasonable standard under the Federal Power Act. Here, a particularly stringent application of the just and reasonable standard (whether the rates remain consistent with the public interest), while not otherwise binding on the Commission and would-be rate challengers, was appropriate under the circumstances. The auction mechanism, the Commission found, would produce just and reasonable rates. Moreover, the rate stability resulting from approval of a contested settlement, which included a provision applying the public interest standard to certain future rate challenges, was critical to resolving the deficiencies in the New England capacity market.

STATEMENT OF FACTS

I. REGULATORY AND FACTUAL BACKGROUND

A. The *Mobile-Sierra* Doctrine

The Federal Power Act, modeled on the Interstate Commerce Act, "requires regulated utilities to file compilations of their rate schedules, or 'tariffs,' with the Commission, and to provide service to electricity purchasers on the terms and prices there set forth." *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No.*

1, 554 U.S. 527, 531 (2008) (citing Federal Power Act § 205, 16 U.S.C. § 824d). "Unlike the Interstate Commerce Act, however, the [Federal Power Act] also permits utilities to set rates with individual electricity purchasers through bilateral contracts." *Id*. *See* 16 U.S.C. § 824d(c) (utilities must file schedules of all rates and charges for FERC-jurisdictional service, "together with all contracts which in any manner affect or relate to" such rates and charges).

The Federal Power Act "'departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting.'" *Morgan Stanley*, 554 U.S. at 531 (quoting *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 479 (2002)). *See also, e.g*., *NRG*, 130 S. Ct. at 698 (The Federal Power Act "allows regulated utilities to set rates unilaterally by tariff; alternatively, sellers and buyers may agree on rates by contract."); *Mobile*, 350 U.S. at 339 (unlike the Interstate Commerce Act -- which requires that rates to all shippers be uniform -- the Natural Gas Act permits rates to be set either by uniform tariffs or by "individualized arrangements" between the utility and its customers).

When rates are set by an individualized "'freely negotiated'" contract, the *Mobile-Sierra* doctrine requires the Commission to presume that the rate meets the Federal Power Act's just and reasonable standard. *NRG*, 130 S. Ct. at 696 (quoting

Morgan Stanley, 554 U.S. at 556). "'The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest.'" *Id.* (quoting *Morgan Stanley*, 554 U.S. at 556). Conversely, contractual agreements to pay the tariff or "going" rate do not require application of the presumption. *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 109, 115 (1958) (*Memphis*).

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. The presumption is based on "the commonsense notion that '[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them.'" *Morgan Stanley*, 554 U.S. at 545 (quoting *Verizon*, 535 U.S. at 479). The doctrine rests on the "'stabilizing force of contracts.'" *NRG*, 130 S. Ct. at 696 (quoting *Morgan Stanley*, 554 U.S. at 548). *See Mobile*, 350 U.S. at 344 ("Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act. By preserving the integrity of contracts, it

permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry.")

B. The Installed Capacity Charge

"An abiding concern in regulating electricity supply is the need for adequate reserve capacity." *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 38 (1st Cir. 2001). "The goal is for [load-serving entities] to purchase sufficient capacity to easily meet expected peaks in electricity demand on their transmission systems." *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009). To avoid blackouts, regulators and utilities calculate reserve requirements based on estimates of how much generating capacity will be needed at the highest point of peak load. *Cent. Me.*, 252 F.3d at 38. To enforce this requirement, a mechanism must be adopted to assure that load-serving entities have adequate economic incentive to purchase the reserve capacity that they need, and to provide incentives to generating utilities to build as much capacity as is needed to supply peak demand. *Id*.

Dating back to 1971, the New England Power Pool (a voluntary association of New England electric utilities) set, subject to Commission review, capacity requirements for each individual utility and administered "deficiency charges" for those that failed to obtain their share. *Conn. Dep't*, 569 F.3d at 479. In 1998, the

New England Power Pool proposed to establish ISO New England -- a regional "Independent System Operator" (ISO) -- to administer the New England energy markets and bulk power transmission system, and to create markets for the sale of several products, including capacity. *Blumenthal v. FERC*, 552 F.3d 875, 878 (D.C. Cir. 2009).

Following the 1998 reforms, the New England market encountered problems with infrastructure weaknesses, outdated generating units, and insufficient supply to meet increasing demand. *Id*. In some areas, transmission constraints often made it difficult to transmit available supply to where it was needed. *Id*. Additionally, the inability of many high cost (and typically older) generating units to earn a profit in the market threatened the reliability of the already overburdened system. *Id*.

To respond to short supply, ISO New England entered into reliability-must-run agreements with older and less efficient generators. *Conn. Dep't*, 569 F.3d at 479. Under a must-run agreement, a financially-troubled generator in a constrained area may recover up to its full cost-of-service in order to remain in operation. *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 468 (D.C. Cir. 2008), *rev'd in part sub nom. NRG Power Mktg. v. Me. Pub. Utils. Comm'n*, 130 S. Ct. 693 (2010).

These proceedings began in response to the February 26, 2003 filing by certain generators of reliability-must-run agreements. *Devon Power LLC*, 115 FERC ¶ 61,340 P 7 (Settlement Order), JA 33, *on reh'g*, 117 FERC ¶ 61,133 (2006) (Settlement Rehearing Order), JA 72 (collectively Settlement Orders). In a series of orders, the Commission rejected the majority of these and other proposed reliability-must-run agreements out of concern over the effect widespread use of such contracts could have on the competitive market. Settlement Order P 7, JA 33. The Commission instituted interim bidding rules to give higher-cost generating units in congested areas an opportunity to recover their costs in the market, and directed ISO New England to propose a mechanism that implements locational requirements in the installed capacity market to appropriately compensate generators. *Id*. In a locational market, prices are set separately for sub-regions, so that prices are highest in the regions with the most severe capacity shortages, to encourage new entry. *Me. Pub. Utils. Comm'n*, 520 F.3d at 468.

On March 1, 2004, ISO New England proposed a locational installed capacity mechanism, with monthly auctions for capacity in four sub-regions. Settlement Order PP 8-9, JA 34. The proposal was controversial as the auctions were based on an administratively-determined "demand curve." *Me. Pub. Utils. Comm'n*, 520 F.3d at 468. The Commission ultimately established settlement

procedures to allow the parties to develop a new market mechanism, which resulted in a settlement establishing the Forward Capacity Market at issue in this case (the Settlement). *Id*. at 469.

C. The Settlement Orders

The Settlement Orders accepted a contested settlement establishing the Forward Capacity Market, which would use annual auctions to set the price of capacity. Settlement Order PP 15-29, JA 35-37. In these auctions, capacity is procured three years in advance of its use, with the first auction procuring capacity for the one-year period beginning June 1, 2010. *Id*. P 30, JA 37. To address the period between December 1, 2006 -- the Settlement effective date -- and June 1, 2010, the Settlement included a transition mechanism that provided fixed payments to capacity suppliers. *Id*. PP 30-31, JA 37. (As the transition payments ended in 2010, the controversy as to these payments is moot, Rehearing Order P 28, JA 139; *Me. Pub. Utils. Comm'n*, 625 F.3d at 757 n.1, and will not be further addressed in this brief.)

Only eight of 115 parties to the Settlement proceedings opposed the Settlement. Settlement Order P 15, JA 35. The Commission approved the Settlement because, "as a package, it present[ed] a just and reasonable outcome for this proceeding consistent with the public interest." *Id*. P 2, JA 33. The Settlement

provided a necessary solution to serious deficiencies in the New England market that were impairing critical infrastructure development and threatening reliability. *Id*. PP 62-65, JA 43-44. In particular, Section 4.C of the Settlement imposed the *Mobile-Sierra* public interest standard of review on certain future challenges to the auction results. The Commission found that this provision appropriately balanced the need for rate stability with the requirement that rates be just and reasonable. Settlement Order PP 182-186, JA 64; Settlement Rehearing Order PP 88-95, JA 86-87.

D. The Appeal Of The Settlement Orders

On appeal, this Court rejected most of the challenges to the Settlement Orders. *Me. Pub. Utils. Comm'n*, 520 F.3d at 467. However, this Court found that Settlement Section 4.C, applying *Mobile-Sierra* to non-settling parties, "unlawfully deprived non-settling parties of their rights under the Federal Power Act." *Id*.

The Supreme Court reversed that determination, finding that the *Mobile-Sierra* public interest standard is not "a standard independent of, and sometimes at odds with, the 'just and reasonable' standard"; rather, it "defines 'what it means for a rate to satisfy the just and reasonable standard in the contract context.'" *NRG*, 130 S. Ct. at 700 (quoting *Morgan Stanley*, 554 U.S. at 546). Thus, *Mobile-Sierra*

"is not limited to challenges to contract rates brought by contracting parties. It applies, as well, to challenges initiated by third parties." *Id*. at 701.

The Supreme Court remanded for this Court's further consideration, however, the question of whether the auction results subject to the *Mobile-Sierra* clause in the Settlement are contract rates to which the Commission is required to apply the *Mobile-Sierra* standard. *Id*. If not, this Court was to consider whether FERC has discretion, under the circumstances, to approve the Settlement provision imposing the *Mobile-Sierra* standard on future challenges to those results. *Id*. This Court in turn remanded the challenged orders to the Commission, finding that "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 here." *Me. Pub. Utils. Comm'n*, 625 F.3d at 759.

> However FERC justifies its decision to approve the *Mobile-Sierra* clause, FERC must explain why, if the auction rates are not contract rates, they are entitled to *Mobile-Sierra* treatment. Just how do the auction rates reflect market conditions similar to freely negotiated rates? Or does FERC base its asserted discretion on some other ground?

Id. at 759-60.

II. THE REMAND ORDERS ON REVIEW

A. The Auction Results Are Not Contract Rates

In the Remand Orders, the Commission found that the auction results are not "contract rates" that necessarily are subject to the *Mobile-Sierra* public interest standard. Remand Order P 2, JA 95; Rehearing Order P 21, JA 138. While the auction results possess certain characteristics of contracts, they are more properly viewed as tariff rates. Rehearing Order PP 21- 22, JA 138; Remand Order PP 12-13, JA 97.

Rather than resulting in individual contracts between buyers and sellers, the results of the auctions are generally-applicable rates, applying to all suppliers and purchasers of capacity in the ISO New England market. Rehearing Order PP 22, 25, JA 138, 139; Remand Order P 12, JA 97. Moreover, the auction rates are determined under the ISO's tariff. Rehearing Order P 21, JA 138; Remand Order P 13, JA 97. The "demand" side of each auction is set by the ISO, which determines the amount of capacity required for reliability. Rehearing Order P 22, JA 138; Remand Order P 13, JA 97. The ISO sets the initial auction price at two times new entry, capacity providers state how much capacity they would offer at the initial price, and ISO New England lowers the offer price (a "descending clock" auction) until the offered capacity equals the installed capacity requirement

(the market clearing price). Rehearing Order P 22, JA 138; Remand Order P 13, JA 97.

Although the auction creates a multilateral process of suppliers and bidders, the ultimate capacity purchases are made unilaterally via the ISO's tariff. Rehearing Order P 24, JA 139. The ISO procures the necessary capacity in the auction, and then assesses each load-serving utility a capacity charge equal to that utility's share of the installed capacity requirement, multiplied by the market clearing price. Rehearing Order PP 22-24, JA 138-39; Remand Order P 13, JA 97. The utilities thus pay the rate that the ISO charges to recover the ISO's cost of buying capacity -- a standard rate based upon the intersection of the installed capacity requirement set by the ISO and the offers made by capacity sellers. Rehearing Order P 23, JA 138. The utilities buying capacity do not participate in the auction, nor are they required to satisfy their installed capacity requirement through capacity acquired in the auction; they may satisfy their required capacity obligations through other means, including self-supply. Rehearing Order PP 23-24, JA 138-39; Remand Order P 13, JA 97.

Thus, ISO New England cannot be said to be acting as an agent for capacity buyers in the auction, nor can utilities buying capacity in the market be said to be contracting with capacity sellers. Rehearing Order P 24, JA 139. "[I]ndeed, 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." *Id.* P 23, JA 138. The standard capacity charge paid by each "buying" utility in the system for its share of the installed capacity requirement more closely resembles a tariff rate paid to the ISO to compensate the ISO for costs incurred in procuring capacity. *Id*.

B. The Commission's Discretion To Apply The *Mobile-Sierra* Standard

Notwithstanding that the auction rates do not constitute contract rates to which *Mobile-Sierra* necessarily applies, the Commission found that it had discretion to apply the *Mobile-Sierra* standard of review to future challenges to the auction rates. Remand Order P 9, JA 96. Under the statutory "just and reasonable" standard, the Commission is not "'bound to any one ratemaking formula.'" Rehearing Order P 30, JA 140 (quoting *Morgan Stanley*, 554 U.S. at 532); Remand Order P 15, JA 97. Rather, the Commission must interpret, and necessarily has the discretion to interpret, how that statutory standard is to be implemented. Rehearing Order P 30, JA 140 (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842 (1984)); Remand Order P 15, JA 97.

Given the flexibility inherent in the just and reasonable standard, the Commission may require varying types and degrees of justification for challenges

to particular rates or practices, depending on the circumstances. Rehearing Order P 31, JA 140; Remand Order P 16, JA 97-98. The *Mobile-Sierra* public interest standard is an application of the statutory just and reasonable standard, representing a "point on a broad continuum of approaches employed to meet the statute's requirement that rates, terms and conditions be just and reasonable." Rehearing Order P 29, JA 140; Remand Order P 10, JA 96. While application of the *Mobile-Sierra* standard is not required outside of contractually agreed-to rates, nothing in the Federal Power Act or in court precedent precludes the Commission from applying a similar more rigorous standard when faced with a challenge to other rates as a matter of discretion, if considerations relevant to what is "just and reasonable" make that approach appropriate. Rehearing Order P 31, JA 140; Remand Order P 16, JA 98.

The Commission approved the Settlement here, including Section 4.C applying the *Mobile-Sierra* standard in limited circumstances, because, as a package, the Settlement presented a just and reasonable outcome for this proceeding. Remand Order P 17, JA 98 (citing Settlement Order PP 62, 69-71, JA 43, 45). Application of the public interest standard to the specified types of future challenges balanced the need for rate stability with the requirement that rates be just and reasonable. *Id*.

Although the auctions do not result in contract rates, they have certain market-based features that tend to assure just and reasonable rates. Rehearing Order P 32, JA 140; Remand Order P 19, JA 98 (citing decisions of this Court that recognize that rates disciplined by a market are consistent with the statute's requirements). The auctions' market-based mechanism appropriately values capacity resources based on their location, satisfying cost-causation principles. Rehearing Order P 32, JA 140 (citing Settlement Order P 65, JA 44); Remand Order P 19, JA 98. The forward-looking nature of the Forward Capacity Market provides appropriate signals to investors when infrastructure resources are necessary with sufficient lead time to allow that infrastructure to be added before reliability is compromised. Rehearing Order P 32, JA 140 (citing Settlement Order P 65, JA 44); Remand Order P 19, JA 98. The locational component of the market assures that the addition of new infrastructure is targeted to where reliability problems are most imminent. Rehearing Order P 32, JA 140 (citing Settlement Order P 65, JA 44); Remand Order P 19, JA 98.

Additionally, the Commission determined that applying a more rigorous just and reasonable standard to the auction results would promote rate stability, which the Supreme Court has recognized as an important goal under the Federal Power Act. Rehearing Order P 33, JA 140; Remand Order P 20, JA 98 (citing *Morgan*

Stanley, 554 U.S. at 551). Rate stability was particularly important in this case, which was initiated in part because of the unstable nature of capacity revenues and the effect that instability has on generating units, particularly those critical to maintaining reliability. Rehearing Order P 33, JA 140; Remand Order P 20, JA 98 (citing Settlement Order P 186, JA 64; Settlement Rehearing Order P 95, JA 87). That finding, coupled with the design of the auction, which yields market-disciplined results consistent with the Federal Power Act, amply supports the Commission's decision to approve the Settlement with Section 4.C. Remand Order P 20, JA 99.

The Commission's discretion is grounded in public policy as well. Remand Order P 23, JA 99. Because the Commission has discretion to approve the *Mobile-Sierra* standard, the Commission was able to approve a settlement that as an overall package advanced the interests of all New England market participants. *Id*. The Settlement, which was the result of extensive negotiations among market participants, might not have been reached without the inclusion of the "public interest" standard provided in Section 4.C. Rehearing Order P 35, JA 141; Remand Order P 23, JA 99. If the Settlement had not been reached, many of the deficiencies within the ISO market would have persisted and the ISO might not have been able to retain the resources needed for reliability. Rehearing Order P 35,

JA 141. In addition, the already-protracted litigation would have continued and would have caused further instability in the ISO market thereby thwarting other market enhancements. Rehearing Order P 35, JA 141 (citing Settlement Order P 66, JA 44 (noting that over 175 representatives of interested parties participated in settlement negotiations)).

Nor are the Commission's hands tied. Remand Order P 25, JA 99. In any circumstance where the Commission believes that it is unjust and unreasonable to lock in a more stringent application of the just and reasonable standard to future rate challenges, then the Commission has the discretion to reject the more stringent standard of review. *Id*. P 24, JA 99. The focus will be on the particular circumstances presented. Rehearing Order P 37, JA 141; Remand Order P 24, JA 99. Following the Remand Order here, the Commission has in several cases required settling parties to remove the *Mobile-Sierra* provisions from their settlements where the circumstances did not rise to the compelling level presented here. Rehearing Order P 36, JA 141 (citing cases). Even if the more stringent standard is approved, the Commission retains the right to respond as necessary to the threat of serious harm to the public interest. Rehearing Order P 38, JA 142; Remand Order P 25, JA 99.

SUMMARY OF ARGUMENT

On remand from the Supreme Court and this Court, the Commission has fully explained its position on the two remaining issues. Its explanation is principled and even-handed -- which is why each set of petitioners supports the Commission as to arguments raised by the other set of petitioners -- and is fully consistent with the agency's statutory responsibility to assure just and reasonable rates.

This is not a case in which the Federal Power Act itself, as construed over 50 years ago by the Supreme Court in *Mobile* and *Sierra*, and recently in *Morgan Stanley* and *NRG*, requires application of the public-interest standard. The auction results at issue are not set by contract between capacity buyers and sellers. Rather, the obligations of both buyers and sellers are specified in ISO New England's tariff, under which the ISO sets the reserve requirement, procures necessary capacity in the Forward Capacity Market, and charges buyers who do not otherwise self-supply a standard tariff rate for that capacity. The Commission therefore was not required to presume that the auctions results are just and reasonable and not compelled to apply the public-interest standard to future challenges to the auction results.

Nevertheless, the Commission properly acted within its broad discretion in choosing to approve the *Mobile-Sierra* clause in the contested Settlement. The Commission's determination represents a permissible application of the Federal Power Act's "just and reasonable" standard in the circumstances of this case, because the auction mechanism at issue will produce just and reasonable rates. Moreover, the interests in promoting market stability and assuring an adequate supply of energy that underlie the *Mobile-Sierra* requirement are also present here. The Settlement -- of which the *Mobile-Sierra* clause was simply one non-severable piece -- advanced the public interest, and was acceptable under the Commission's just and reasonable review, because it offered a package of initiatives that worked together to the overall benefit of all New England market participants.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The relevant inquiry is whether the agency has "examine[d] the relevant data and articulate[d] a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). FERC's factual findings are

conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b).

This case fundamentally concerns application of the just and reasonable standard under the Federal Power Act, in particular whether the *Mobile-Sierra* "application" of the just and reasonable standard applies to the auction rates resulting from the Forward Capacity Market. *See Morgan Stanley*, 554 U.S. at 535 ("the term 'public interest standard' refers to the differing *application* of that just-and-reasonable standard to contract rates.") "The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions." *Id.* at 532. "Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them." *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994). FERC's reasonable interpretation must therefore be upheld so long as it represents "a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

Likewise, while the Federal Power Act permits ratesetting both through uniform "rate schedules, or 'tariffs,'" and "bilateral contracts" with "individual electricity purchasers," *Morgan Stanley*, 554 U.S. at 531, the *Mobile-Sierra*

presumption only applies automatically to rates set by contract, rather than by tariff. *Id*. at 532. Because the Federal Power Act does not define the line of demarcation between "rate schedules, or 'tariffs'" on the one hand and "contracts" on the other, the Commission is responsible for drawing the line between the two. *See, e.g.*, *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 323 (D.C. Cir. 2006) (where the Natural Gas Act does not define gathering and transportation, FERC "is responsible for drawing the 'not always clear' line between the two"). The question for the Court is whether the Commission has drawn a reasonable line of demarcation. In such a case, "[t]he burden is on the petitioners to show that the Commission's choices are unreasonable and its chosen line of demarcation is not within a 'zone of reasonableness.'" *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1084 (D.C. Cir. 2002) (affording deference to Commission jurisdictional "line-drawing") (quoting *Hercules Inc. v. EPA*, 598 F.2d 91, 107 (D.C. Cir. 1978)). *See also Pub. Utils. Comm'n v. FERC*, 143 F.3d 610, 615 (D.C. Cir. 1998) (affording deference to FERC's determination of the jurisdictional "line of demarcation" drawn by the statute); *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 828 (D.C. Cir. 2006) ("in drawing the jurisdictional lines" pursuant to the Federal Power Act, "some practical accommodation is necessary"); *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010) ("We

recognize the Commission enjoys broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines.").

Indeed, the Supreme Court's remand in *NRG* suggests, if not compels, the conclusion that the statute is ambiguous in this context. *See NRG*, 130 S. Ct. at 701 (remanding the issue of whether the auction rates "are prescriptions of general applicability rather than 'contractually negotiated rates'"). If the auction rates here unambiguously constituted contracts subject to the *Mobile-Sierra* presumption, the Supreme Court could have ruled so definitively, as it did with respect to the bilateral contracts at issue in *Morgan Stanley*. *See Morgan Stanley*, 554 U.S. at 544-45 ("we conclude that the Commission was *required*, under our decision in *Sierra*, to apply the *Mobile-Sierra* presumption in its evaluation of the contracts here.") Thus, the Commission's interpretation of the line of demarcation between tariffs and contracts here is entitled to *Chevron* deference. *See, e.g, Conn. Dep't*, 569 F.3d at 481 (affording *Chevron* deference to the Commission's jurisdictional determination that the installed capacity requirement is a "practice" affecting rates under Federal Power Act § 206, 16 U.S.C. § 824e).

Generators argue that the Court should not defer to the Commission's determination that the auction results are not "contracts" under the statute, based on FERC's alleged "self-interest" in avoiding application of *Mobile-Sierra*. *See*

Brief For Petitioner New England Power Generators Association, Inc. (Generator Br.) 19-20. This argument has little credibility here, where the Commission approved application of the *Mobile-Sierra* standard when it did not believe it was required to do so. Even giving credence to this assertion, this Court has expressly rejected limiting *Chevron* deference based upon an agency's self-interest. *See Indep. Petroleum Ass'n v. DeWitt*, 279 F.3d 1036, 1040 (D.C. Cir. 2002) ("our application of [*Chevron*] deference in the face of a recognized risk of agency self-aggrandizement, such as interpretations of their own jurisdictional limits, necessarily means that self-interest alone gives rise to no automatic rebuttal of deference") (citation omitted). Rather, "it is the law of this circuit that the deferential standard" established in *Chevron* applies to "an agency's interpretation of its own statutory jurisdiction." *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 694 (D.C. Cir. 2000) (citing *Okla. Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-1284 (D.C. Cir. 1994)). *See also Me. Pub. Utils. Comm'n*, 520 F.3d at 479 ("The Commission's interpretation of the scope of its jurisdiction is entitled to *Chevron* deference.").

II. THE COMMISSION REASONABLY DETERMINED THAT THE AUCTION RESULTS ARE NOT CONTRACTS REQUIRING APPLICATION OF THE *MOBILE-SIERRA* STANDARD.

The first issue presented is whether the auction results arising from the contested Settlement approved by the Commission constitute "contract rates" that necessarily are subject to the *Mobile-Sierra* standard of review. Remand Order P 1, JA 95. *See, e.g.*, *NRG*, 130 S. Ct. at 701 (remanding issue of whether the auction rates "are prescriptions of general applicability rather than contractually negotiated rates"); *Me. Pub. Utils. Comm'n*, 625 F.3d at 759 (noting FERC position that "auction rates are not contract rates, but rather closely resemble a conventional 'cost based tariff rate'"). The Commission reasonably concluded in the challenged orders that the rates set by the forward capacity auction are tariff rates, rather than contract rates. Remand Order P 13, JA 97; Rehearing Order PP 9, 21, JA 136, 138.

A. The *Mobile-Sierra* Standard Of Review Is Not Required For Generally-Applicable Tariff Rates.

The Commission reasonably determined that the *Mobile-Sierra* public interest standard of review is not required for rates set in a generally-applicable tariff rather than in a negotiated contract. Remand Order PP 11-13, JA 97; Rehearing Order P 21, JA 138. As the Supreme Court explained in *Mobile*, unlike the Interstate Commerce Act -- which requires that rates to all shippers be uniform

-- the Natural Gas Act permits rates to be set either by uniform tariffs or by "individualized arrangements" between the utility and its customers. *Mobile*, 350 U.S. at 339. The Federal Power Act likewise permits ratesetting either by uniform tariffs or individualized contracts. *Morgan Stanley*, 554 U.S. at 531 (The Federal Power Act "requires regulated utilities to file compilations of their rate schedules, or 'tariffs,' with the Commission, and to provide service to electricity purchasers on the terms and prices there set forth," but it "also permits utilities to set rates with individual electricity purchasers through bilateral contracts").

Where rates are set by individual contracts, as opposed to "a single schedule of rates applicable to all shippers," the utility cannot unilaterally change the contract rate. *Mobile*, 350 U.S. at 339-40. In *Sierra*, the Court found this holding equally applicable to the Federal Power Act, and further concluded that the Commission may not find the contract rate unjust and unreasonable except where the rate will "adversely affect the public interest." 350 U.S. at 355. This "public interest standard" refers to "the differing *application* of the just-and-reasonable standard to contract rates." *Morgan Stanley*, 554 U.S. at 535.

Thus, under *Mobile* and *Sierra*, the Commission must apply the public interest standard to rates set in a freely-negotiated "individualized" agreement. Remand Order P 10, JA 96 (citing *Morgan Stanley*, 554 U.S. at 530) (*Mobile*-

Sierra presumption applies to "a freely negotiated wholesale-energy contract"). *See also Morgan Stanley*, 554 U.S. at 545 (the public interest standard applies to a "mutually agreed-upon contract rate"). This standard is based on "the commonsense notion that '[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them.'" Remand Order P 11, JA 97 (quoting *Morgan Stanley*, 554 U.S. at 545).

However, the Commission is not required to apply the public interest standard to rates set in a uniform, generally-applicable tariff. Remand Order PP 11-13, JA 97. *See, e.g.*, Remand Order P 13, JA 97 (citing *NRG*, 130 S. Ct. at 698) (the Federal Power Act differentiates between rates set "unilaterally by tariff" and rates set "by contract" between a seller and a buyer). *See also Verizon*, 535 U.S. at 478-79 (generally-applicable tariff schedules are reviewed under the ordinary just and reasonable standard, whereas negotiated contracts are subject to the *Mobile-Sierra* public interest standard); *Memphis*, 358 U.S. at 110, 113, 115 (*Mobile Sierra* does not apply to pipeline "tariff and service" agreements, which do not contain a price term but rather refer to "rate schedules of general applicability on file with the Commission").

B. The Forward Capacity Market Auction Rates Are Tariff Rates, Not Contract Rates To Which *Mobile-Sierra* Necessarily Applies.

The Commission reasonably determined that the rates set by the Forward Capacity Market auctions represent tariff, not contract, rates. Rehearing Order P 21, JA 138; Remand Order P 13, JA 97. Although the auction results possess certain contractual characteristics, they do not create *Mobile-Sierra* contractual relationships -- either between buyers and sellers or between sellers and ISO New England -- but rather constitute rates determined unilaterally by the ISO New England tariff. Rehearing Order PP 21-22, JA 138.

1. The Auction Rates Are Generally-Applicable Rates Determined Unilaterally Under The ISO Tariff.

The results of the capacity auctions are not individualized arrangements between capacity buyers and sellers, but rather are generally-applicable rates applying to all suppliers and purchasers of capacity in the ISO New England market. Rehearing Order PP 22-25, JA 138-39; Remand Order P 12, JA 97.

The rates are, moreover, determined unilaterally under the ISO's tariff. Rehearing Order P 21, JA 138; Remand Order P 13, JA 97. *See, e.g.*, *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 206 (D.C. Cir. 2011) ("ISO New England's tariff implements the market's auction mechanism."). This finding

directly answers Generators' arguments that the auction rates are not unilateral. Generator Br. 30-33.

The "demand" side of each Forward Capacity Market auction is set, not by the load-serving entities that ultimately pay for the capacity, but by the ISO under its tariff, which determines the estimated amount of capacity -- the installed capacity requirement -- that the system as a whole will require for reliability three years in the future. Rehearing Order P 22, JA 138 (citing *Conn. Dep't*, 569 F.3d at 480 (describing the auction mechanism)); Remand Order P 13, JA 97. *See* Settlement § 11, Part I.A, JA 25 (the ISO is required to conduct an annual Forward Capacity Auction to procure 100 percent of the installed capacity requirement for the Power Year beginning three years later).

The methodology for calculating the installed capacity requirement is part of the ISO's tariff, and must be filed with the Commission for approval. *Me. Pub. Utils. Comm'n*, 520 F.3d at 480. The Forward Market takes the capacity requirement as a given and uses it as an input into the auction mechanism. *Id*. As FERC explained, "[the Forward Market] only establishes a market design for determining capacity charges; it does not alter [the capacity requirement] or in any way determine the appropriate amount of capacity that must be available." *Id*. (quoting Settlement Rehearing Order P 108, JA 90).

The ISO announces the auction starting price as calculated under its tariff, which is initially twice the estimated cost of new entry, and capacity providers state how much capacity they would offer at that price. Rehearing Order P 22, JA 138; Remand Order P 13, JA 97. The cost of new entry "is used to commence the auction because it approximates reasonable compensation for existing as well as new generators." *Me. Pub. Utils. Comm'n*, 520 F.3d at 473. If more capacity is offered than required to meet the installed capacity requirement, the ISO employs a "descending clock" process, lowering the offering price until the quantity of capacity offered equals the installed capacity requirement. Rehearing Order P 22, JA 138; Remand Order P 13, JA 97. The ISO promptly files the detail of the awards and the market clearing price with the Commission, which for 45 days thereafter can be challenged under the ordinary just and reasonable standard. Settlement § 11, Part II.G.3.b, JA 30.

The Commission recognized that the auction creates a multilateral process of suppliers bidding into the installed capacity market. Rehearing Order P 24, JA 139. *See* Generator Br. 32 (arguing that the auction process is multilateral). However, the ultimate purchases are made unilaterally via the ISO New England tariff. Rehearing Order P 24, JA 139. Once the ISO procures capacity to meet its installed capacity requirement in the Forward Capacity Market, the ISO then

assesses each load-serving entity a standard rate, based upon the intersection of the installed capacity requirement set by the ISO and the offers made by capacity sellers. *Id*. P 23, JA 138; Remand Order P 13, JA 97.

Utilities buying capacity have no role in the auction and cannot be said to be contracting with capacity sellers. Rehearing Order P 23, JA 138; Remand Order P 13, JA 97. "Indeed, it can be said that they themselves are not 'buying' capacity but rather are merely paying the rate that [ISO New England] charges to recover [the ISO's] costs of buying capacity." Rehearing Order P 23, JA 138. "Thus, the standard capacity charge paid by each 'buying' utility in the system for its share of the installed capacity requirement more closely resembles a tariff rate paid to [the ISO] to compensate [the ISO] for costs that [the ISO] has incurred." *Id*.

Indeed, the auction simply is the latest mechanism employed to determine the appropriate level for the installed capacity charge to be assessed to load-serving entities for the administratively-determined capacity requirement. The "enforcement [of resource adequacy requirements] through a substantial [installed capacity] charge . . . ha[s] been standard practice in New England" for decades. *Cent. Me.*, 252 F.3d at 43. Over the years, the charge had been determined by various means, including administratively-determined deficiency charges as well as rates set by auction. *See, e.g., id.* at 39; *Groton v. FERC*, 587 F.2d 1296, 1302

(D.C. Cir. 1978) (a deficiency charge was imposed on transmission providers who failed to procure the specified amount of capacity).

At the time of these proceedings, the current market was failing to produce rates that adequately compensated generating resources needed for reliability. Settlement Order P 62, JA 43. To address "New England's difficulties in maintaining the reliability of its energy grid," the Settlement Agreement established new "rate-setting mechanisms for sales of energy capacity." *NRG*, 130 S. Ct. at 696. Just as the Commission "may directly establish prices for capacity," the Commission also has the power "to do so indirectly by setting a target for capacity demand and using a market mechanism to locate the price appropriate to that quantity." *Conn. Dep't*, 569 F.3d at 482. *See also id*. at 484 ("the point of an auction mechanism like the Forward Market is to use a best approximation of demand and the power of competitive bidding to help locate [the long-run competitive price]").

Generators challenge the statement that capacity purchasers have no role in the auction, *see* Rehearing Order P 23, JA 138; Remand Order P 13, JA 97, asserting that purchasers can affect auction outcomes through their decision to self-supply. Generator Br. 23. The Commission was, however, expressly referring to the fact that the auction "involves [the ISO] first setting and then lowering the

prices at which it will buy capacity," rather than buyers bidding into the market. Remand Order P 13, JA 97. Moreover, the ability of purchasers to self-supply evidences the lack of contractual relationship between purchasers and sellers, because load does not even have a contractual obligation to fulfill its capacity obligation in the auction. Rehearing Order P 24, JA 139.

2. The Auction Creates No *Mobile-Sierra* Contractual Relationship Between Buyers And Sellers.

Based on the foregoing, "there is nothing that can reasonably be viewed as voluntary agreements of any sort between the sellers of the capacity and the 'buyers' in the auction." Rehearing Order P 23, JA 138. The auction results and the obligations arising therefrom are not recorded in separate agreements between a particular generator and a particular purchasing entity -- or even separate agreements between any of those participants and the ISO. *See* State Br. 35. Rather, the obligations of sellers and buyers are documented in the ISO's tariff. *See* Settlement § 11, Part II.G.3.a, JA 29 ("the capacity delivery obligations of suppliers, the payment obligations of [Load Serving Entities] and the [Forward Capacity Auction] process and rules shall be documented in the Tariff"). Instead of individual contracts, the results of the auction are filed at FERC and those results, unless challenged within 45 days, become the rate the ISO charges to load-

serving entities for capacity. Remand Order P 19 n.38, JA 98 (citing Settlement Order PP 179, 185, JA 63, 64).

Bidding into the capacity market commits sellers to supply the amount offered at the clearing price. Rehearing Order P 23, JA 138. Likewise, choosing to purchase capacity through the auction obligates buyers to make payments under the ISO's tariff. *Id*. P 25, JA 139. The ISO assesses the buyer a capacity charge equal to the utility's share of the installed capacity requirement multiplied by the market-clearing price. *Id*. P 22, JA 138. However, the auction results are not mandatory for load-serving entities because they have other options for meeting their capacity obligations, including self-supply. *Id*. P 24, JA 139. Accordingly, ISO New England cannot be said to be acting as an agent for capacity buyers in contracting with capacity sellers; there is no contractual obligation for load to procure capacity in the auction, and the auction rates are themselves more compensation to the ISO for costs the ISO has incurred in procuring capacity, rather than any agreement by agency with any capacity seller. *Id*. PP 23-24, JA 138-39.

In an effort to establish a contractual relationship between capacity buyers and sellers, Generators point to two Court of Federal Claims decisions that, as Generators concede, Generator Br. 36, were issued after the challenged orders. *See*

Pac. Gas & Elec. Co. v. United States, No. 07-157C, 2012 U.S. Claims LEXIS 462 (Fed. Cl. May 2, 2012) and *Cal. ex rel. Brown v. United States*, No. 07-184C, 2012 U.S. Claims LEXIS 461 (Fed. Cl. May 2, 2012). Although the Commission had no opportunity to address these cases, they do not in any event support Generators' claims. If anything, the proceedings in California out of which the cases arise -- the Commission's investigation of California energy auction rates during the western energy crisis of 2000-01 -- validate the Commission's position.

Pac. Gas and *California* did not address whether the California energy auction prices result in "contract" rates that must be reviewed under the *Mobile-Sierra* public interest standard -- which is the issue here. To the contrary, the California energy auction rates were reviewed under the ordinary just and reasonable standard. *See Pub. Utils. Comm'n v. FERC*, 462 F.3d 1027, 1045 (9th Cir. 2006) (just and reasonable standard applied in FERC investigation of California auction rates). In contrast, the Commission was required to apply the *Mobile-Sierra* presumption in its review of long-term bilateral contracts entered into during the western energy crisis. *Morgan Stanley*, 554 U.S. at 544-45.

The *Pac. Gas* and *California* decisions resulted from the Ninth Circuit's determination that FERC lacked jurisdiction at that time to order governmental entities that sold in the challenged auctions to pay refunds. *See Bonneville Power*

Admin. v. FERC, 422 F.3d 908 (9th Cir. 2005) (jurisdictional determination). At the suggestion of the Ninth Circuit, *see id*. at 925, certain purchasers brought breach of contract claims against those governmental entities to obtain refunds, based upon the governmental entities' contractual agreement to be bound by the California ISO and California Power Exchange tariffs governing market operations. *Pac. Gas* and *California* upheld the buyers' breach of contract claims, finding that the buyers were beneficiaries of those contracts. *Pac. Gas*, 2012 U.S. Claims LEXIS 462 at *11; *California*, 2012 U.S. Claims LEXIS 461 at *11.

Thus, the contractual relationship found in *Pac. Gas* and *California* arose from contracts executed by the governmental entities, not the fact of participating in the auction, which is the claim Generators make here. Further, that contractual relationship still did not result in application of the *Mobile-Sierra* public interest standard -- the Court found that defendants' contractual agreement to abide by the tariffs constituted a so-called "Memphis clause." *See Pac. Gas*, 2012 U.S. Claims LEXIS 462 at *42; *California*, 2012 U.S. Claims LEXIS 461 at *42. In *Memphis*, 358 U.S. at 115 & n.8, the Supreme Court found that an agreement containing no price term, but referring "to rate schedules of general applicability on file with the Commission," precludes application of *Mobile-Sierra* to the contract at issue.

3. The Auction Creates No *Mobile-Sierra* Contractual Relationship Between The ISO And Capacity Sellers.

Absent a contractual relationship between buyers and sellers, Generators argue that "at a minimum" there is a contractual relationship between sellers and ISO New England, because participation in the auction creates an obligation to supply capacity to the ISO. Generator Br. 37. *See also id*. at 33-34. Certainly, as the Commission recognized, bidding into the capacity market commits sellers to supply the amount offered at the clearing price. Rehearing Order P 23, JA 138. *See Conn. Dep't*, 569 F.3d at 480 (cited Generator Br. 27) ("[Suppliers'] bids commit them to supply the amount they offer at the clearing price.") Likewise, choosing to purchase capacity through the auction, as opposed to self-supply, obligates buyers to make payments. Rehearing Order P 25, JA 139. *See Duquesne Light Co*., 122 FERC ¶ 61,039 PP 88-89 (2008) (cited Generator Br. 28) (discussing obligation of withdrawing load-serving entity in regional system to pay for its share of acquired capacity).

The critical distinction, however, is that these obligations arise under the ISO's generally-applicable tariff, not by individualized contract. Rehearing Order P 27, JA 139. The terms of the purchase through the Forward Capacity Market are set unilaterally by tariff -- the ISO both purchases capacity to meet its administratively-determined installed capacity requirement and establishes rates

for this capacity in its tariff. *Id*. While tariffs, like contracts, create binding obligations, the Supreme Court established that the *Mobile-Sierra* presumption that attaches automatically to freely-negotiated individualized arrangements does not attach automatically to generally-applicable tariffs. *See, e.g., Morgan Stanley*, 554 U.S. at 532 (*Mobile* and *Sierra* "addressed the authority of the Commission to modify rates set bilaterally by contract rather than unilaterally by tariff.")

"The tariff is an offer that the customer accepts by using the product." *Metro E. Ctr. for Conditioning & Health v. Qwest Commc'n Int'l, Inc.*, 294 F.3d 924, 926 (7th Cir. 2002). *See also, e.g., Atl. & Gulf Stevedores, Inc. v. Alter Co.*, 617 F.2d 397, 401 n.16 (5th Cir. 1980) ("A party who make use of the facilities or service offered and rendered by another under the terms of a validly promulgated tariff impliedly consents to be bound by the tariff's terms"). Thus, this Court has described a "tariff" as "the contract which governs a pipeline's service to its customers." *ANR Pipeline Co. v. FERC*, 931 F.2d 88, 90 n.1 (D.C. Cir. 1991).

Tariffs differ from private contracts, however, in that they "are not subject to alteration one customer (or one clause) at a time." *Metro East*, 294 F.3d at 926. A tariff is a "take-it-or-leave-it proposition" and thus not an "agreement" in the sense that it is reached by individual negotiation. *Id*. *See, e.g*. 18 C.F.R. § 35.2(b), (c)(1)-(2) (cited Generator Br. 31) (while a "rate schedule" may "take the physical

form of a contract," 18 C.F.R. § 35.2(b), a "tariff" means electric service "offered on a generally applicable basis," 18 C.F.R. § 35.2 (c)(1)). For purposes of applying the *Mobile-Sierra* standard, the distinction drawn by the Supreme Court is between uniform tariffs or "individualized arrangements" between the utility and customers. *Mobile*, 350 U.S. at 339. It is the negotiated contract, not the generally-applicable tariff provision, that receives automatic *Mobile-Sierra* protection. *Verizon*, 535 U.S. at 478-79. Indeed, the *Mobile-Sierra* standard does not even apply to a contract if it incorporates the tariff or "going" rate as the contract rate. *Memphis*, 358 U.S. at 109, 115 & n.8.

Generators err in arguing that the holding here is inconsistent with the Settlement Orders. Generator Br. 40-41 (quoting Settlement Rehearing Order P 90, JA 87 (FERC rejected "'contention that market rules and tariffs are not contracts to which *Mobile-Sierra* can apply.'")). This Court in *Me. Pub. Utils. Comm'n*, 625 F.3d at 758, expressly rejected the argument that the quoted language represented any resolution by FERC of this issue:

> FERC, when presented with intervenors' more precise formulation that the auction rates were not contract rates, said "we also reject [intervenors'] contention that market rules and tariffs are not contracts to which *Mobile-Sierra* can apply," yet ambiguously also said that "tariffs have been held to be analogous to contracts." [quoting Settlement Rehearing Order P 90, JA 87]. The Commission apparently did not see intervenors' contention that the auction rates were not contract rates as separate from petitioners' general challenge

to the *Mobile-Sierra* clause because it never actually resolved the former question.

Likewise, Generators' discussion of the Illinois auction proposal, Generator Br. 27, does not further their claims. *Schafer v. Exelon Corp*., 619 F. Supp. 2d 507, 512 (N.D. Ill. 2007), hardly constitutes precedent supporting their position -- the quoted language is the Court's description of the allegations of complaints that the Court then dismissed. *Commonwealth Edison Co*., 113 FERC ¶ 61,278 (2005), further reveals that the Illinois auction is not comparable to the Forward Capacity Market auction, as it is a competitive process used by a particular utility to procure energy and capacity. *See id*. PP 3-7 ("the proposed [Illinois Auction Proposal] allows potential suppliers to bid against each other to serve tranches of [the utility's] load"). To qualify for the auction, bidders must "agree to the terms of the supplier forward contracts" they will enter into with the utility. *Id*. P 21.

III. THE COMMISSION REASONABLY DETERMINED, WITHIN ITS DISCRETION, TO APPROVE APPLICATION OF *MOBILE-SIERRA* TO FUTURE CHALLENGES TO THE AUCTION RESULTS.

The second issue remanded by the Supreme Court and this Court is the issue of whether FERC had discretion to treat the auction rates "analogously" to contracts in applying the *Mobile-Sierra* presumption. *See NRG*, 130 S. Ct. at 701. *See also Me. Pub. Utils. Comm'n*, 625 F.3d at 759 ("FERC must explain why, if

the auction rates are not contract rates, they are entitled to *Mobile-Sierra* treatment.")

As demonstrated below, the Commission reasonably concluded that it had such discretion. In particular, the Commission reasonably concluded that it had discretion to approve a contested settlement that included a provision subjecting certain future challenges to New England auction results to the *Mobile-Sierra* public interest standard. That discretion is based on the flexibility inherent in the just and reasonable standard. The Commission's exercise of that discretion is justified here, where market-based auctions can be expected to produce just and reasonable rates, and where rate stability is particularly important in assuring reliability in the New England market.

A. The Commission Reasonably Concluded That It Has Discretion To Apply The *Mobile-Sierra* Standard To Non-Contract Rates.

The Commission reasonably concluded that it has discretion to apply the *Mobile-Sierra* standard to challenges to non-contract rates. In approving Section 4.C of the Settlement, the Commission specified the standard of review applicable to future complaints about the auction results. Remand Order P 18, JA 98 (citing Settlement Order P 172, JA 62). Because such complaints would invoke FERC's authority under Federal Power Act section 206 to set aside rates that are "unjust, unreasonable, unduly discriminatory or preferential," 16 U.S.C. § 824e(a), as well

as its authority under Federal Power Act section 205 to ensure that "[a]ll rates and charges . . . shall be just and reasonable," 16 U.S.C. § 824d(a), in approving Section 4.C the Commission interpreted and applied those sections of the statute. Remand Order P 18, JA 98.

The statute does not speak directly to the application of the statutory "just and reasonable" standard when the Commission must apply it to future complaints about rates, including the auction results here. Remand Order P 15, JA 97. Accordingly, the Commission must interpret, and necessarily has the discretion to interpret, how that statutory standard is to be implemented. Rehearing Order P 30, JA 140 (citing *Chevron*, 467 U.S. at 842); Remand Order P 15, JA 97. *See, e.g.*, *FPC v. Texaco, Inc.*, 417 U.S. 380, 394-96 (1974) (recognizing Commission discretion to interpret the "just and reasonable" standard). FERC's interpretation must be upheld so long as it represents "a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Indeed, because "[t]he statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition," courts "afford great deference to the Commission in its rate decisions." Rehearing Order P 30, JA 140 (quoting *Morgan Stanley*, 554 U.S. at 532); Remand Order P 15, JA 97.

Such deference to the Commission's reasoned judgment in approving this limited application of the *Mobile-Sierra* standard is appropriate here. Under the "just and reasonable" standard, the Commission is not "bound to any one ratemaking formula." Rehearing Order P 30, JA 140 (quoting *Morgan Stanley*, 554 U.S. at 532); Remand Order P 15, JA 97. *Accord Texaco*, 417 U.S. at 387 ("The Act directs that all producer rates be just and reasonable but it does not specify the means by which that regulatory prescription is to be attained."); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) ("[T]he Commission [i]s not bound to the use of any single formula or combination of formulae in determining rates."); *Am. Pub. Power Ass'n v. FPC*, 522 F.2d 142, 146 (D.C. Cir. 1975) ("Congress carefully eschewed tying 'just and reasonable' rates to any particular method of deriving the rates. Certainly there is nothing in the Federal Power Act specifically endorsing historic test year ratemaking or any other technique of ratemaking. Congress clearly intended to allow the Commission broad discretion in regard to the methodology of testing the reasonableness of rates.") Indeed, in the first round of litigation in this case (as to a disposition that affirmed the Commission and did not ascend to the Supreme Court), this Court similarly held that "[t]he Supreme Court has disavowed the notion that rates must depend on

historical costs and has held that rates may be determined by a variety of formulae." *Me. Pub. Utils. Comm'n*, 520 F.3d at 471.

Given the flexibility inherent in the just and reasonable standard, the Commission may require varying types and degrees of justification for challenges to particular rates or practices, depending on the circumstances. Rehearing Order P 31, JA 140; Remand Order P 16, JA 97. The public interest standard of review is simply one application -- albeit a particularly rigorous application -- of the more general just and reasonable standard in the Act; it is not a separate or otherwise extra-statutory standard. Rehearing Order P 29, JA 140 (citing *Morgan Stanley*, 554 U.S. at 535); Remand Order P 10, JA 96.

Thus, the *Mobile-Sierra* public interest standard represents a "point on a broad continuum of approaches employed to meet the statute's requirement that rates, terms and conditions be just and reasonable." Rehearing Order P 29, JA 140; Remand Order P 10, JA 96-97. *See, e.g.*, *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) ("Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high."); *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) ("[C]ourts are without authority to set aside any rate selected by the Commission which is

within a 'zone of reasonableness.'"); *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1116 (D.C. Cir. 2002) ("[T]he court may only set aside a rate that is outside the zone of reasonableness, bounded on one end by investor interest and the other by the public interest against excessive rates.").

The Commission approved the Settlement here, including Section 4.C applying the *Mobile-Sierra* standard in limited circumstances, because, as a package, the Settlement presented a just and reasonable outcome for this proceeding. Remand Order P 17, JA 98 (citing Settlement Order PP 62, 69-71, JA 43, 45). Application of the public interest standard to the specified types of future challenges balanced the need for rate stability with the requirement that rates be just and reasonable. *Id*. (citing Settlement Order P 183, JA 64). The Commission reasonably interpreted its authority under Federal Power Act sections 205 and 206 to assure that rates are just and reasonable. *Id*. P 18, JA 98.

States contend that the public interest standard can only be applied to negotiated contract rates, because *NRG* and *Morgan Stanley* found that the standard was only required in the contract context. Brief For State Petitioners (States Br.) 23-25. While application of the *Mobile-Sierra* standard is not *required* outside of contractually agreed-to rates, nothing in the Federal Power Act or in court precedent precludes the Commission from applying a similar rigorous

standard when faced with challenges to other rates as a matter of discretion, if considerations relevant to what is "just and reasonable" make that approach appropriate. Rehearing Order P 31, JA 140; Remand Order P 16, JA 98.

B. The Commission Reasonably Exercised Its Discretion To Apply The *Mobile-Sierra* Standard To Future Challenges To The Auction Results.

Under the Settlement, ISO New England is required to file the auction results with the Commission, and parties have 45 days to object under the just and reasonable standard. Remand Order P 19, JA 98 (citing Settlement Order PP 179, 185, JA 63, 64). For the reasons discussed below, the Commission reasonably acted within its discretion to approve Section 4.C and make it more difficult to challenge the auction results after 45 days. *Id*.

1. The Auction Mechanism Will Produce Just And Reasonable Rates.

The Commission reasonably determined that, though the auctions do not result in contract rates, they have market-based features that tend to assure just and reasonable rates. Rehearing Order P 32, JA 140; Remand Order P 19, JA 98. *See also* Rehearing Order P 32, JA 140 ("the Commission determined that it would be appropriate to accept the *Mobile-Sierra* public interest language in part because of the similarities between the Settlement rates and contract rates"); *Me. Pub. Utils. Comm'n*, 625 F.3d at 760 (asking the Commission to address on remand "[j]ust

how do the auction rates reflect market conditions similar to freely-negotiated contract rates?"). The auctions provide a market-based mechanism to appropriately value capacity resources based on their location, satisfying cost-causation principles. Rehearing Order P 32, JA 140 (citing Settlement Order P 65, JA 44); Remand Order P 19, JA 98. The forward-looking nature of the Forward Capacity Market provides appropriate signals to investors when additional infrastructure resources are needed with sufficient lead time to allow that infrastructure to be put into place before reliability is compromised. Rehearing Order P 32, JA 140 (citing Settlement Order P 65, JA 44); Remand Order P 19, JA 98. The locational component of the market assures that the addition of new infrastructure is targeted to where reliability problems are most imminent. Rehearing Order P 32, JA 140 (citing Settlement Order P 65, JA 44); Remand Order P 19, JA 98.

This Court has recognized that rates disciplined by a market are consistent with the Federal Power Act's just and reasonable requirement. Remand Order P 19, JA 98 (citing *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 871 (D.C. Cir. 1993) (market discipline provides strong reason to believe that utility will only be able to charge a just and reasonable rate); *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998) (where there is a competitive market, FERC may

rely on market-based rates to ensure that rates satisfy the just and reasonable requirement); *Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 176, 179, 180 (D.C. Cir. 1994) (same)). *See also Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 917 (9th Cir. 2011) (affirming final rule codifying FERC's electric market-based rate program; finding that if buyers and sellers do not have market power, it is rational to assume that the terms of their voluntary exchange are reasonable), *cert. denied, Pub. Citizen, Inc. v. FERC*, No. 11-1009 (June 25, 2012).

States suggest that this conclusion is undermined by the fact that capacity purchasers do not participate in the auction. States Br. 27. Prices for capacity established in the descending clock auctions nevertheless are established via competitive bidding, Settlement Rehearing Order P 111, JA 90, which provides the basis for concluding that the resulting rates will be just and reasonable. *See* Rehearing Order P 32, JA 140. *See also, e.g., Pub. Util. Comm'n v. FERC*, 254 F.3d 250, 255 (D.C. Cir. 2001) (individual rate review unnecessary when the ISO enters into reliability-must-run contracts with generators because the Commission could rely upon the ISO's bid-based process to assure that the contract rates are just and reasonable). Accordingly, the Commission reasonably could presume, and did conclude, after review and approval of the Forward Capacity Market process,

that the Forward Capacity Market auctions would result in just and reasonable rates. Remand Order P 19, JA 98.

The States further contend that the Commission is trying "to impute a reasonableness presumption" based on the Commission's initial review of the tariff auction mechanisms, in the "estoppel" view of *Mobile-Sierra* rejected in *Morgan Stanley*. States Br. 22-23 (citing *Morgan Stanley*, 554 U.S. at 544-46). As the States themselves describe, however, the public interest standard arises from dual considerations of the reasonableness of negotiated arrangements and the benefits of rate stability. States Br. 23-24. *See Morgan Stanley*, 554 U.S. at 545, 551 (*Mobile-Sierra* presumption is premised on the expectation that sophisticated businesses will negotiate just and reasonable rates, and that consumers benefit from contract stability). Here, the Commission is applying the *Mobile-Sierra* standard to future auction results for the same reasons that the standard is applied in the contract context -- the circumstances under which the rates are determined give confidence that the rates will be just and reasonable, and the application of the *Mobile-Sierra* public interest standard of review supports critical rate stability. Remand Order PP 19-20, JA 98-99.

2. Approving The Settlement Advanced Public Policy.

The Commission reasonably concluded that approving the Settlement, including Section 4.C, would have benefits furthering public policy. Because the Commission has discretion to approve the *Mobile-Sierra* standard, the Commission was able to approve a settlement that as an overall package advanced the interests of all market participants, even non-settling participants. Remand Order P 23, JA 99. The Commission initiated these proceedings in response to the compensation problems faced by generating resources that are needed for reliability but could not obtain sufficient revenues in the New England market to continue operation. Rehearing Order P 35, JA 141. The Settlement "provided a necessary solution to serious deficiencies in the New England market that were impairing critical infrastructure development and threatening reliability." Remand Order P 4, JA 96 (citing Settlement Order PP 62-65, JA 43-44).

The Settlement was the result of extensive negotiations among market participants and might not have been reached without the inclusion of the "public interest" standard provided in Section 4.C. Rehearing Order P 35, JA 141; Remand Order P 23, JA 99. If the Settlement had not been reached, many of the deficiencies within the ISO New England market would have persisted and the ISO might not have been able to retain the resources needed for reliability. Rehearing

Order P 35, JA 141. *See Arctic Slope Reg'l Corp. v. FERC*, 832 F.2d 158, 164 (D.C. Cir. 1987) (Commission may consider "public-interest advantages" in approving settlement); *Blumenthal*, 552 F.3d at 883 (approving consideration of non-cost factors in the determination of just and reasonable rates).

In addition, if the Settlement had not been reached, the already-protracted litigation concerning the New England market would have continued and would have caused further instability in the ISO market thereby thwarting other market enhancements. Rehearing Order P 35, JA 141 (citing Settlement Order P 66, JA 44 (noting that 175 representatives of interested parties participated in settlement negotiations)). *See, e.g., Laclede Gas Co. v. FERC*, 997 F.2d 936, 947 (D.C. Cir. 1993) (Commission may take prospect of further litigation into account in deciding whether to accept settlement); *Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 276 (D.C. Cir. 2007) (FERC settlement approval affirmed based on the benefits of earlier commencement of new ISO market operations, increased reliability, and avoiding lengthy and difficult proceedings; FERC is not required to quantify the length and nature of proceedings to be avoided through settlement).

In particular, applying the Section 4.C public interest application of the just and reasonable standard to the auction results would promote rate stability, which the Supreme Court has recognized as an important goal under the Federal Power

Act. Rehearing Order P 33, JA 140; Remand Order P 20, JA 98 (citing *Morgan Stanley*, 554 U.S. at 551 ("[t]he FPA recognizes that contract stability ultimately benefits consumers")). Rate stability was particularly important in this case, due to the unstable nature of capacity revenues in the New England market and the effect that the instability has on generating units, particularly those critical to maintaining system reliability. Rehearing Order P 33, JA 140; Remand Order P 20, JA 98-99 (citing Settlement Order P 186, JA 64; Settlement Rehearing Order P 95, JA 872). *See NRG*, 130 S. Ct. at 701 (quoting Settlement Order P 186, JA 64).

The States concede that "[i]n this industry characterized by investment in long-lived, capital intensive resources, there is almost *always* some legitimate interest in rate stability." States Br. 24 n.17. The Commission's finding, coupled with the design of the auction, which yields market-disciplined results consistent with the Federal Power Act, amply supports the Commission's decision to approve the Settlement with a provision that makes it more difficult to prevail on a challenge to the auction results that is raised after the initial 45-day period. Remand Order P 20, JA 99.

Although States assert that Congress has already set the balance between stability and just and reasonable rates in the Federal Power Act, States Br. 24, the Courts have held that the just and reasonable standard provides FERC discretion to

determine the balance between such interests, which FERC exercised here. As this Court recognized in *Blumenthal*, 552 F.3d at 885, "[t]he Connecticut electricity market presents 'intensely practical difficulties' demanding a solution from FERC," and "the Commission must be given the latitude to balance the competing considerations and decide on the best resolution." *See also, e.g., Permian Basin*, 390 U.S. at 767 (The Commission "must be free, within the limitations imposed by pertinent constitutional and statutory concerns, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests.").

Rate-making agencies "are permitted, unless their statutory authority otherwise plainly indicates, 'to make the pragmatic adjustments which may be called for by particular circumstances.'" *Texaco*, 417 U.S. at 389 (quoting *Permian Basin*, 390 U.S. at 776-77). "'Considerations of feasibility and practicality are certainly germane'" to setting just and reasonable rates. *Permian Basin*, 390 U.S. at 777 (quoting *Bowles v. Willingham*, 321 U.S. 503 (1944)). *See also FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942). The Supreme Court has found that the Commission has the authority to rely upon methods of indirect regulation to keep rates within just and reasonable levels, *Texaco*, 417 U.S. 380, and authority to prescribe different rate requirements for different classes of persons or matters, and to adopt policies needed to respond to the demands of

changing circumstances. *Permian Basin*, 390 U.S. at 787, 790. Here, the Commission pragmatically balanced the need to address serious deficiencies in the New England market, including by providing rate stability, with the statutory requirement that rates be just and reasonable. Remand Order P 4, JA 96 (citing Settlement Order PP 182-86, JA 64).

3. The States' Concerns Are Unfounded.

The States' concerns regarding the Commission's action in this case are unfounded.

The States fear that the Commission's discretion to apply *Mobile-Sierra* "could apply to a vast array of transactions." States Br. 28. However, in any circumstance where the Commission believes that it is unjust and unreasonable to lock in a more stringent application of the just and reasonable standard (outside of contract rates necessarily subject to *Mobile-Sierra*), then the Commission has the discretion to reject the more stringent standard of review. Remand Order P 24, JA 99. "In other words, the Commission could find that a 'public interest' standard of review that is tolerable in the context of the broader goals and purposes of the settlement at issue here might be intolerable in the context of other circumstances." *Id*. As in any just and reasonable inquiry, the focus will be on the particular

circumstances presented. Rehearing Order P 37, JA 141; Remand Order P 24, JA 99.

The Commission will accept a more stringent application of the statutory "just and reasonable" standard, outside of the contract rates context, only when the applicant can demonstrate compelling circumstances, such as those found in this proceeding, that merit such protection from challenges. Rehearing Order P 37, JA 141. The Commission will not use its discretion to accept a more rigorous application of the just and reasonable standard unless it finds, based on the facts presented, that the package offers sufficient benefits to consumers to warrant taking such action. *Id*. The Commission's assessment, as in any just and reasonable analysis, must be responsive to the arguments presented and based on the administrative record compiled. *Id.*

For example, here, the Commission had discretion in how to address the contested Settlement. Remand Order P 17, JA 98 (citing Settlement Order PP 62, 69-71, JA 43, 45). Where a settlement resolves a contested proceeding, the settlement cannot be effective until the Commission makes an independent determination on the record that the settlement is just and reasonable. *See Mobil Oil Corp. v. FPC*, 417 U.S. 283, 312-14 (1974); 18 C.F.R. § 385.602(h). Here, the Commission assessed the logistics and likely effect of the settlement, including its

auction mechanism and transition-payment framework, on all participants in the New England capacity market, including those objecting to the settlement. If the Commission believed that the overall settlement was not just and reasonable, it could have refused to approve it, or it could have approved it on condition that it be modified, such as by requiring that all future challenges to rates be subject to the ordinary just and reasonable standard of review.

Following the Remand Order, the Commission in several cases has required settling parties to remove *Mobile-Sierra* provisions from their settlements where the circumstances did not rise to the compelling level presented here. Rehearing Order P 36, JA 141 (citing *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105 P 24 (2011) (disallowing *Mobile-Sierra* provision, where, unlike here, price certainty was not critical to assuring reliability, the settlement did not correct serious deficiencies in the market, and no "demonstrable market forces contributed to the derivation of the Settlement rates"); *Petal Gas Storage, LLC*, 135 FERC ¶ 61,152 P 17 (2011) (same); *Southern LNG Co.*, 135 FERC ¶ 61,153 P 24 (2011) (same); *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 P 18 (2011) (lacking the "compelling circumstances" of *Devon Power*, the Commission finds it unjust and unreasonable to impose the *Mobile-Sierra* standard with regard to future changes

to the Settlement sought by FERC or non-settling parties)). *See also* Generator Br. 21 (discussing recent orders).

Nor are the Commission's hands tied if the more stringent standard is approved. Remand Order P 25, JA 99. While the States express concern about "limit[ing] a future FERC's discretion to review tariff changes," States Br. 29, approving the public interest standard here does not mean that the Commission is unable to review the rate. Remand Order P 25, JA 99. "The 'public interest' standard respects the settled expectations of parties, but still allows the Commission to respond as necessary to the threat of serious harm to the public interest." *Id*.; *see also* Rehearing Order P 38, JA 142. *See, e.g.*, *NRG*, 130 S. Ct. at 700 ("the *Mobile-Sierra* doctrine does not overlook third-party interests; it is framed with a view to their protection"). The Commission has taken such action in the past, and retains the ability to do so in the future. Rehearing Order P 38 & n.68, JA 142 (citing *Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952 (D.C. Cir. 2005) (modifying the terms of earlier settlements, despite presence of *Mobile-Sierra* public interest standard, to prevent excessive burden on third parties); Remand Order P 25, JA 99.

States further contend that the Commission does not have discretion "to establish rebuttable presumptions that form a barrier to Section 206 relief." States

Br. 30. However, all FERC has done is to apply the public-interest standard, which is appropriate in these particular circumstances, as a means to promoting just and reasonable rates (now and in the future) and in a manner consistent with the agency's statutory responsibilities.

In any event, the Federal Power Act does not prohibit FERC from using appropriate presumptions to guide its decisionmaking. This Court has affirmed the Commission's adoption and application of evidentiary presumptions under the Federal Power Act and parallel provisions of the Natural Gas Act. *See, e.g.*, *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 970-72 (D.C. Cir. 2000) (affirming presumption of rolled-in pricing to "provide parties with greater certainty about the rate design that will be applied"); *E. Tenn. Natural Gas Co. v. FERC*, 863 F.2d 932, 938 (D.C. Cir. 1988) (presumption of anticompetitiveness applied in review of minimum bills); *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1030-37 (D.C. Cir. 1987) (applicants agreeing to assume full economic risk receive rebuttable presumption that facility or service meets statutory prerequisites for certification). *Cf. W. Res., Inc. v. Surface Transp. Bd.*, 109 F.3d 782, 788 (D.C. Cir. 1997) ("The use of presumptions that capture reality in the general run of cases enable the Commission to do its work efficiently, and we have, on a number of occasions, approved its reliance on them.") The Commission's careful review

of the New England settlement gave it ample reason to believe that the auction mechanism and the results it was designed to produce would be just and reasonable.

CONCLUSION

For the reasons stated, this Court should find that the Commission properly exercised its discretion in approving the contested New England settlement, including its provision applying a *Mobile-Sierra* public interest standard to certain future rate challenges, and affirm the Commission orders on all remaining issues.

Respectfully submitted,

Michael A. Bardee
General Counsel

Robert H. Solomon
Solicitor

/s/ Lona T. Perry

Lona T. Perry
Senior Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-6600
Fax: 202-273-0901
lona.perry@ferc.gov

September 4, 2012

New England Power Generators Association, Inc. v. FERC
Docket No. ER03-563
D.C. Cir. Nos. 11-1422*, et al.*

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 12,818 words, not including the cover page, tables of contents and authorities, the glossary, the certificate of counsel, and this certificate.

/s/ Lona T. Perry
Lona T. Perry
Senior Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel: (202) 502-6600
Fax: (202) 273-0901
Email: lona.perry@ferc.gov

September 4, 2012

ADDENDUM

TABLE OF CONTENTS

PAGE

§ 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.

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Pub. L. 95–617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142.)

AMENDMENTS

1978—Subsec. (d). Pub. L. 95–617, § 207(a), substituted ''sixty'' for ''thirty'' in two places.

Subsec. (f). Pub. L. 95–617, § 208, added subsec. (f).

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95–617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

§ 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 Commission 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

Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 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.

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85–791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, §16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, §16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this

are subject to the filing requirements of this part.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 541, 40 FR 56425, Dec. 3, 1975; Order 541–A, 41 FR 27831, July 7, 1976; 46 FR 50520, Oct. 14, 1981; Order 337, 48 FR 46976, Oct. 17, 1983; Order 541, 57 FR 21734, May 22, 1992; Order 2001, 67 FR 31069, May 8, 2002; Order 714, 73 FR 57530, 57533, Oct. 3, 2008; 74 FR 55770, Oct. 29, 2009]

§ 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 understanding 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 greement 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 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 increased 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

the hearing session, the presiding officer may, with due regard for the convenience of the participants, direct advance distribution of the exhibits by a prescribed date. The presiding officer may also direct the preparation and distribution of any briefs and other documents which the presiding officer determines will substantially expedite the proceeding.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.602 Submission of settlement offers (Rule 602).

(a) *Applicability.* This section applies to written offers of settlement filed in any proceeding pending before the Commission or set for hearing under subpart E. For purposes of this section, the term ''offer of settlement'' includes any written proposal to modify an offer of settlement.

(b) *Submission of offer.* (1) Any participant in a proceeding may submit an offer of settlement at any time.

(2) An offer of settlement must be filed with the Secretary. The Secretary will transmit the offer to:

(i) The presiding officer, if the offer is filed after a hearing has been ordered under subpart E of this part and before the presiding officer certifies the record to the Commission; or

(ii) The Commission.

(3) If an offer of settlement pertains to multiple proceedings that are in part pending before the Commission and in part set for hearing, any participant may by motion request the Commission to consolidate the multiple proceedings and to provide any other appropriate procedural relief for purposes of disposition of the settlement.

(c) *Contents of offer.* (1) An offer of settlement must include:

(i) The settlement offer;

(ii) A separate explanatory statement;

(iii) Copies of, or references to, any document, testimony, or exhibit, including record citations if there is a record, and any other matters that the offerer considers relevant to the offer of settlement; and

(2) If an offer of settlement pertains to a tariff or rate filing, the offer must include any proposed change in a form suitable for inclusion in the filed rate schedules or tariffs, and a number of copies sufficient to satisfy the filing requirements applicable to tariff or rate filings of the type at issue in the proceeding.

(d) *Service.* (1) A participant offering settlement under this section must serve a copy of the offer of settlement:

(i) On every participant in accordance with Rule 2010;

(ii) On any person required by the Commission's rules to be served with the pleading or tariff or rate schedule filing, with respect to which the proceeding was initiated.

(2) The participant serving the offer of settlement must notify any person or participant served under paragraph (d)(1) of this section of the date on which comments on the settlement are due under paragraph (f) of this section.

(e) *Use of non-approved offers of settlement as evidence.* (1) An offer of settlement that is not approved by the Commission, and any comment on that offer, is not admissible in evidence against any participant who objects to its admission.

(2) Any discussion of the parties with respect to an offer of settlement that is not approved by the Commission is not subject to discovery or admissible in evidence.

(f) *Comments.* (1) A comment on an offer of settlement must be filed with the Secretary who will transmit the comment to the Commission, if the offer of settlement was transmitted to the Commission, or to the presiding officer in any other case.

(2) A comment on an offer of settlement may be filed not later than 20 days after the filing of the offer of settlement and reply comments may be filed not later than 30 days after the filing of the offer, unless otherwise provided by the Commission or the presiding officer.

(3) Any failure to file a comment constitutes a waiver of all objections to the offer of settlement.

(4) Any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the

offer of settlement, or items not included in the settlement, that are relevant to support the claim. Reply comments may include responding affidavits.

(g) *Uncontested offers of settlement.* (1) If comments on an offer are transmitted to the presiding officer and the presiding officer finds that the offer is not contested by any participant, the presiding officer will certify to the Commission the offer of settlement, a statement that the offer of settlement is uncontested, and any hearing record or pleadings which relate to the offer of settlement.

(2) If comments on an offer of settlement are transmitted to the Commission, the Commission will determine whether the offer is uncontested.

(3) An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.

(h) *Contested offers of settlement.* (1)(i) If the Commission determines that any offer of settlement is contested in whole or in part, by any party, the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.

(ii) If the Commission finds that the record lacks substantial evidence or that the contesting parties or contested issues can not be severed from the offer of settlement, the Commission will:

(A) Establish procedures for the purpose of receiving additional evidence before a presiding officer upon which a decision on the contested issues may reasonably be based; or

(B) Take other action which the Commission determines to be appropriate.

(iii) If contesting parties or contested issues are severable, the contesting parties or uncontested portions may be severed. The uncontested portions will be decided in accordance with paragraph (g) of this section.

(2)(i) If any comment on an offer of settlement is transmitted to the presiding officer and the presiding officer determines that the offer is contested, whole or in part, by any participant, the presiding officer may certify all or part of the offer to the Commission. If any offer or part of an offer is contested by a party, the offer may be certified to the Commission only if paragraph (h)(2)(ii) or (iii) of this section applies.

(ii) Any offer of settlement or part of any offer may be certified to the Commission if the presiding officer determines that there is no genuine issue of material fact. Any certification by the presiding officer must contain the determination that there is no genuine issue of material fact and any hearing record or pleadings which relate to the offer or part of the offer being certified.

(iii) Any offer of settlement or part of any offer may be certified to the Commission, if:

(A) The parties concur on a motion for omission of the initial decision as provided in Rule 710, or, if all parties do not concur in the motion, the presiding officer determines that omission of the initial decision is appropriate under Rule 710(d), and

(B) The presiding officer determines that the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues.

(iv) If any contesting parties or contested issues are severable, the uncontested portions of the settlement may be certified immediately by the presiding officer to the Commission for decision, as provided in paragraph (g) of this section.

(i) *Reservation of rights.* Any procedural right that a participant has in the absence of an offer of settlement is not affected by Commission disapproval, or approval subject to condition, of the uncontested portion of the offer of settlement.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 541, 57 FR 21734, May 22, 1992; Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.603 Settlement of negotiations before a settlement judge (Rule 603).

(a) *Applicability.* This section applies to any proceeding set for hearing under subpart E of this part and to any other proceeding in which the Commission

New England Power Generators Association, Inc. v. FERC Docket No. ER03-563
D.C. Cir. Nos. 11-1422, *et al*.

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 4th day of September 2012, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, as indicated below:

John L. Shepherd, Jr. EMAIL
John N. Estes, III
Paul F. Wight
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave., NW
Washington, DC 20005

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

Ashley Charles Parrish EMAIL
King & Spalding, LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006-4706

Sherry A. Quirk EMAIL
Schiff Hardin LLP
1666 K St., NW, Suite 300
Washington, DC 20006-4390

Jesse S. Reyes
Bruce F. Anderson
Office of the Attorney General,
Commonwealth of
Massachusetts
One Ashburton Place
Boston, MA 02108-1598

EMAIL

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

EMAIL

Paul Franklin Wright
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, NW
Washington, DC 20005

EMAIL

John S. Wright
Michael C. Wertheimer
Office of the Attorney General, State of Connecticut
10 Franklin Square
New Britain, CT 06051-0000

EMAIL

/s/ Lona T. Perry
Lona T. Perry
Senior Attorney

Federal Energy Regulatory Commission
Washington, DC 20426
TEL: (202) 502-6600
FAX: (202) 273-0901
September 4, 2012
lona.perry@ferc.gov