January 2012

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BARGAINING FOR POWER: RESOLVING OPEN QUESTIONS FROM NRG POWER MARKETING, LLC V. MAINE PUBLIC UTILITIES COMMISSION

Michael Keegan

I. INTRODUCTION

II. RATE REGULATION UNDER THE FEDERAL POWER ACT AND THE MOBILE-SIERRA DOCTRINE
   A. The Federal Power Act
   B. The Mobile-Sierra Doctrine
      1. Mobile, Sierra, and Memphis
      2. Morgan Stanley

III. NRG POWER MARKETING, LLC V. MAINE PUBLIC UTILITIES COMMISSION
   A. Proceedings at FERC: Devon Power LLC
   C. Remand to FERC

IV. RESPONDING TO NRG’S REMANDED QUESTIONS
   A. Determining Whether the Mobile-Sierra Public Interest Presumption Should Apply Automatically
   B. BFRs vs. Unilateral Rates: Examples and Explanations
      1. Classic Bargained-For Rates (BFRs): Bilateral Fixed-Rate Contracts
      2. Classic Unilateral Rates: Tariffs
      3. Unilateral Rates in Bilateral Agreements
      4. Unilateral Rate Setting that Results in a Settlement: A Mixed Case
         a. FERC’s Rate Filing Procedures
         b. Settlement Practice at FERC
         c. Examples
   C. Addressing NRG’s Issues on Remand

V. PRACTICAL CONSEQUENCES OF FERC’S ORDERS ON REMAND IN DEVON POWER LLC

VI. CONCLUSION
BARGAINING FOR POWER: RESOLVING OPEN QUESTIONS FROM NRG POWER MARKETING, LLC V. MAINE PUBLIC UTILITIES COMMISSION

Michael Keegan*

I. INTRODUCTION

Many industries are subject to regulation, whether by the federal government, the state, or both. Electric utility companies’ retail rates are subject to regulation by the states, and their wholesale rates charged among enterprises involved in providing the electric power to retail sellers are regulated by the federal government.1 Under the Federal Power Act of 1935 (“FPA”), the Federal Energy Regulatory Commission (“FERC”) is responsible for ensuring that rates for wholesale electric power sales and electric transmission are “just and reasonable.”2

The “classic scheme” of administrative rate setting called for rates to be established unilaterally by the regulated companies and set forth in rate schedules of general applicability (i.e., “tariffs”), subject to oversight by the relevant administrative agency.3 However, the federal government has regulated rates for goods and services transferred between businesses differently from the way rates between businesses and the public are regulated.4 The Supreme Court has noted that “[i]n wholesale markets, the party charging the rate and the party charged were often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a ‘just and reasonable’ rate as between the two of them.”5 With the FPA, Congress departed from a strict scheme of tariff-only rate regulation,6 permitting wholesale arrangements between the parties to be established through individually-negotiated contracts, subject to FERC oversight.7

Over the years, the number of FERC-regulated transactions has grown, and FERC and electric utilities have developed new contractual vehicles under which to transact. Among other innovations, FERC has established organized markets, instituted a market-based rate program, and ordered electric industry restructuring (i.e., unbundling of power and transmission transactions). In addition, FERC has required electric utilities offering transmission service to do so pursuant to a standardized tariff of general applicability, with rates established under the “classic scheme” of administrative rate setting mentioned above.8

* J.D., Cornell Law School. Thanks to all those who provided comments on the ideas expressed in this article, and to the Maine Law Review and its editors for their work in the production of this article. All remaining errors are my own.

5. See id. at 479.
6. See id.
8. See New York v. Fed. Energy Regulatory Comm’n, 535 U.S. 1, 10 (2002) (noting that FERC had proposed and adopted the requirement “that public utilities owning and/or controlling facilities used
Another byproduct of the increase in FERC-regulated transactions is the greater reliance by FERC on the settlement process to resolve disputes involving jurisdictional rates. One observer has stated that, “among regulatory bodies, settlement is most pervasive at FERC,” and “negotiated settlement has become the standard process for setting interstate gas and electricity rates.” In recent years, “approximately 80% of the contested proceedings set for hearing at FERC are settled” and approximately 90 percent of FERC cases set for hearing achieved a partial or complete consensual agreement.

Within this regulatory scheme, the Supreme Court in 1956 established the Mobile-Sierra doctrine, which provides that when a challenge is brought to a rate that is set forth in a wholesale electric energy contract that is the result of negotiation and bargaining under FERC’s jurisdiction, FERC must presume that the rate satisfies the FPA’s requirement that all such rates must be “just and reasonable.” The presumption applies equally regardless of whether the challenge is brought by the buyer or the seller or by a third-party, and may be overcome only if FERC determines that the rate seriously harms the public interest. Courts have observed that the public interest presumption is “practically insurmountable” and that attempts to change rates when the presumption applies hold only a “dim prospect, hardly worthy of recognition.” If the presumption does not apply, FERC would examine the challenged rate under cost-of-service or other rate principles to determine whether the rate is just and reasonable.

Decided in 2010, NRG Power Marketing, LLC v. Maine Public Utilities Commission (“NRG”) is the latest Supreme Court case to address the Mobile-Sierra doctrine. The case in NRG arose when utilities in New England proposed to FERC the establishment of a regional capacity market in an attempt to alleviate shortages in electric power supply in the region. The FERC proceeding was the

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11. Id. at 88. The percentage of cases set for hearing that achieved a partial or complete consensual agreement were 91 percent for fiscal year 2008 and 90 percent for fiscal year 2009. Id. It was 88 percent for fiscal year 2007. Id.
19. “Capacity” is different from actual electric power. For purposes here, the D.C. Circuit has explained that when a retail electric utility purchases capacity—as opposed to electric power—from an electric generator, the utility “compensates the generator for the option of buying a specific quantity of power irrespective of whether it ultimately buys the electricity.” Me. Pub. Util. Comm’n v. Fed.
subject of much debate; but, ultimately, a settlement was achieved among 107 of
the 115 participants to the proceeding. The Settlement Agreement established a
Forward Capacity Market (“FCM”) under which there would be annual price-
setting auctions for capacity. On certiorari, the Supreme Court found that FERC
had failed to determine whether the rates produced by the FCM’s auction
mechanism were freely negotiated rates to which the Mobile-Sierra public interest
presumption would apply in future challenges to those rates, or were unilaterally-
established rates to which the public interest presumption would not apply. On
remand, FERC determined that the FCM auction rates were not freely negotiated
rates, but that it nonetheless possessed the discretion to determine in advance that it
would presume the auction rates were just and reasonable in future rate challenges.
A petition for review of FERC’s orders on remand is pending at the D.C. Circuit.

This article argues that FERC’s determination on remand was incorrect. FERC
failed to recognize that settlements are the result of negotiation and
bargaining. As such, rates established through a settlement agreement are imbued
with the characteristics that the Supreme Court previously has determined trigger
the application of the Mobile-Sierra public interest presumption. In this case, the
Settlement Agreement does not contain a numerical rate for capacity prices, but it
provides the mechanism through which the rate will be derived—the FCM auction.
Because the 107 parties to the Settlement Agreement consented to the use of the
FCM auction to produce the capacity prices, the rates paid by those parties should
be presumed to be just and reasonable if challenged in the future. If the rates paid
by any of the eight non-settling participants are challenged, the presumption would
not apply. The effects of FERC’s decision are potentially far-reaching because of
the number of rate disputes that are resolved through settlement.

Part II of this article reviews the regulatory scheme under the FPA and the
development of the Mobile-Sierra doctrine, up to the Supreme Court’s 2008 case,
The Supreme Court’s latest Mobile-Sierra doctrine case, NRG, is summarized in
Part III, including the underlying proceedings at FERC in Devon Power, review by
the D.C. Circuit and the Supreme Court, and FERC’s orders on remand.

In Part IV, the article evaluates how FERC resolved the questions remanded by
the Supreme Court and the D.C. Circuit. Part IV first summarizes the
characteristics of rates to which the Mobile-Sierra public interest presumption must
apply—namely, that the rates are the result of negotiations and bargaining among
the parties to the agreement. This should include rates set forth in a tariff where the
rates were established through a settlement, because settlements are the result of
negotiations and bargaining as well. Part IV explains that because the FCM
auction mechanism is the result of a settlement among most of the participants to
the FERC proceeding in Devon Power, the Mobile-Sierra public interest
presumption should automatically apply to challenges to the rates paid by the
settling parties.

Finally, Part V describes the practical consequences that will arise from

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Energy Regulatory Comm’n, 520 F.3d 464, 467 (D.C. Cir. 2008) [hereinafter Maine PUC I] (quoting
Keyspan-Ravenswood, LLC v. Fed. Energy Regulatory Comm’n, 474 F.3d 804, 806 (D.C. Cir. 2007));
NRG, 558 U.S. at ___, 130 S. Ct. at 697.
FERC’s determinations in Devon Power. Because FERC has failed to recognize that the Mobile-Sierra public interest presumption must apply to rates set forth in settlement agreements, those rates may be easily challenged. The effects may be far-reaching, particularly where such a large number of FERC rate proceedings are resolved through settlement.

II. RATE REGULATION UNDER THE FEDERAL POWER ACT AND THE MOBILE-SIERRA DOCTRINE

A. The Federal Power Act

Part II of the FPA20 vests FERC21 with jurisdiction over the electric utility industry, including over the transmission of electric energy in interstate commerce, the sale of electric energy at wholesale in interstate commerce, and facilities for such sales or transmission.22 “[A]ny person who owns or operates facilities subject to the jurisdiction of [FERC] under [Part II of the FPA]” is a “public utility.”23

Sections 205 and 206 of the FPA,24 which provide for the regulation by FERC of rates for the sale and transmission of electric power, are the “bread and butter” of the FPA.25 Sections 205 and 206 of the FPA are substantially identical to sections 4 and 5 of the Natural Gas Act (“NGA”),26 and decisions construing the analogous provisions of the two statutes are interchangeable.27 The fundamental command of these sections is that all rates charged must be “just and reasonable.”28 This standard is modeled on the Interstate Commerce Act (“ICA”),29 which has required that charges for services rendered by common carriers be “just and


21. Prior to October 1, 1977, jurisdiction under the FPA lay in the Federal Power Commission ("FPC"). However, on October 1, 1977, pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977), and Executive Order No. 12009, 42 Fed. Reg. 46,267 (September 13, 1977), the FPC ceased to exist and its regulatory functions were transferred to FERC, an independent agency within the Department of Energy that was activated on October 1, 1977. In this article, “FERC” generally will be used to describe both agencies.

23. Id. § 824(e).
24. Id. §§ 824d-824e.
27. Ark.-La. Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981) (citing Sierra, 350 U.S. at 350; Permian Basin Area Rate Cases, 390 U.S. 747, 820-21 (1968)). While NRG, Devon Power, and this article are primarily focused on the regulation of contracts for electric power and capacity under the FPA, cases interpreting the NGA are equally applicable to the arguments set forth herein. Likewise, the arguments set forth in this article are equally applicable to analogous contractual arrangements subject to regulation under the NGA.
reasonable” and has prohibited “every unjust and unreasonable charge” for such services.30

Public utilities generally have been subject to rate regulation due to their position as natural monopolies.31 The paradigm that developed included regulation over both retail rates charged directly to the public and wholesale rates charged among enterprises involved in providing the goods or services offered by the retail seller.32 Retail rates were generally regulated by the states or municipal governments, and the regulation of wholesale rates was taken up by the federal government, since the transmission or transportation involved was generally deemed to be interstate in nature.33

The “classic scheme” of administrative rate setting called for rates to be set forth by the regulated utility company in rate schedules of general applicability (i.e., “tariffs”), based on the model applied to railroad carriers under the ICA.34 This system was adopted by the federal government because the innumerable “retail transactions of railroads made the policing of individual transactions administratively impossible; effective regulation could be accomplished only by requiring compliance with a single schedule of rates applicable to all shippers.”35

However, the federal government has regulated rates for goods and services transferred between businesses differently from the way states and municipalities have regulated rates between businesses and the public.36 The Supreme Court has noted that “[i]n wholesale markets, the party charging the rate and the party charged were often sophisticated business enjoying presumptively equal bargaining power, who could be expected to negotiate a ‘just and reasonable’ rate as between the two of them.”37 With the FPA and the NGA, Congress departed from a strict scheme of tariff-only rate regulation.38 Under the FPA and NGA, Congress permitted wholesale arrangements between the parties to be established initially


32. See Verizon, 535 U.S. at 478.
33. See id. at 477 (citing CHARLES F. PHILLIPS, REGULATION OF PUBLIC UTILITIES 111-12 & n.5 (1984)).
34. See id. at 478.
36. See Verizon, 535 U.S. at 479.
37. Id.
38. See id. But cf. Mobil Oil Corp. v. Fed. Power Comm’n, 417 U.S. 283, 301 (1974) (“The [NGA] was patterned after earlier regulatory statutes that applied to traditional public utilities and transportation companies and that provided for setting rates equal to such companies’ costs of service plus a reasonable rate of return.”).
through individually-negotiated contracts. Protection of the public interest would be achieved through supervision by FERC of the individual contracts.

To that end, the FPA requires public utilities to file their individual contracts with FERC and grants to FERC the power to review rates subject to its jurisdiction that have been set initially by public utilities. The relevant subsections here are FPA sections 205(c), 205(d), 205(e), and 206(a). Section 205(c) requires public utilities to file all rates and contracts with FERC. Under section 205(d), changes in previously-filed rates or contracts generally must be filed with FERC at least sixty days before they go into effect. However, FERC may under section 205(e) suspend the operation of a new rate for up to five months, pending a determination of the new rate’s reasonableness. If FERC has not reached a decision before the suspension period has expired, the filed rate shall go into effect, subject to a refund or adjustment to be made retroactive to that date. Section 206(a) authorizes FERC to modify any rate or contract which it determines to be “unjust, unreasonable, unduly discriminatory or preferential.”

In 1956, in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.* (“Mobile”), the Supreme Court explained that sections 205 and 206 are part of a “statutory scheme under which all rates are established initially by the [public utilities], by contract or otherwise, and all rates are subject to being modified by [FERC] upon a finding that they are unlawful.” However, FPA section 205 “purports neither to grant nor to define the initial rate-setting powers of [public utilities].” Instead, the FPA (1) defines FERC’s review powers, and (2) imposes duties on public utilities as are necessary for FERC to effectuate its powers.

FERC’s powers are defined by sections 205(e) and 206(a). Under section 206(a), FERC may set aside and modify any rate or contract which it determines to be “unjust, unreasonable, unduly discriminatory, or preferential.” The Court in *Mobile* stated that this was “neither a ‘rate-making’ nor a ‘rate-changing’ procedure. It is simply the power to review rates and contracts made in the first instance by [public utilities] and, if they are determined to be unlawful, to remedy them.” Section 205(e) only adds to this basic power the “further powers (1) to

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39. See *Mobile*, 350 U.S. at 338-39; *Verizon*, 535 U.S. at 479. When compared to the ICA, relatively few wholesale transactions were regulated under the NGA, and they typically required substantial investments in capacity and facilities for the service of a particular gas distributor. *Mobile*, 350 U.S. at 339. Such circumstances demanded individual arrangements between jurisdictional natural gas companies and their customers, natural gas distributors. *Id.*


41. *Id.* at 339, 343 (construing the analogous provisions of the NGA).


43. *Id.* at § 824d(d). FERC may, for good cause shown, allow changes to take effect without requiring the sixty days’ notice. *Id.*

44. *Id.* at § 824d(e). FERC may convene a hearing concerning the reasonableness of a new rate upon complaint or on its own initiative. *Id.*

45. *Id.*

46. *Id.* at § 824e(a).

47. 350 U.S. 332, 341 (1956) (construing section 4(d) of the NGA).

48. *Id.*

49. *Id.* at 341-42.

50. *Id.* at 341.

51. *Id.*
preserve the status quo pending review of [a] new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the change became effective."  

The limitations on public utilities are set forth in section 205(c) and 205(d). Section 205(c) requires rate schedules and contracts in force to be filed with the Commission. Section 205(d) requires all changes in such schedules and contracts to be filed with FERC at least sixty days before they go into effect. The Mobile Court explained that section 205(d) was a prohibition, not a grant of power. Otherwise valid changes to a contract cannot be put into effect without giving the required notice to FERC. However, the FPA does not say under what circumstances a public utility can make such a change.

In Mobile, the Court concluded that FPA sections 205 and 206 do not establish a rate-changing procedure or constitute a mechanism for initiating rate "proceedings." Section 205 does not provide for the filing of rate "proposals"; it provides only for notice to FERC of the rates established by the public utility and for review by FERC of those rates. If a public utility has the power to make a change to a rate schedule or contract, then the change is effectuated upon compliance with section 205(d)’s notice requirement.

B. The Mobile-Sierra Doctrine

1. Mobile, Sierra, and Memphis

In twin cases decided on February 27, 1956, Mobile (discussed above) and Federal Power Commission v. Sierra Pacific Power Co. ("Sierra"), the Supreme Court addressed the authority of FERC to modify rates that had been negotiated bilaterally and set forth in contracts. In Mobile, the Court rejected a natural gas pipeline’s argument that NGA section 4’s requirement that all new rates must be filed with FERC authorized such pipelines to unilaterally change existing contracts. As explained above, the NGA did not grant extra-contractual power to jurisdictional pipelines. If a contract does not grant either party the unilateral right to make changes to the contract, no such right exists.

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52. Id.
54. Id. at § 824d(d).
56. Id. at 339-40, 341-42.
57. See id.
58. Id. at 342.
59. Id. at 342-43.
60. See id. at 342.
61. Id. at 332.
63. Mobile, 350 U.S. at 337-38.
64. See id at 339-40.
65. See id. at 339-42 (noting that under section 4 of the NGA, otherwise valid changes cannot be put into effect without giving the required notice to FERC). As the D.C. Circuit has explained, “[t]he contract between the parties governs the legality of the filing. Rate filings consistent with contractual
However, the Court in *Mobile* noted that NGA section 5 authorizes FERC to investigate rates “upon complaint,” as well as on its own initiative. The Court reasoned that although the jurisdictional natural gas pipelines were not enumerated among the list of entities that might file a complaint with FERC seeking the commencement of an investigation, “there is nothing to prevent them from furnishing to [FERC] any relevant information and requesting it to initiate an investigation on its own motions.” If FERC concludes after an investigation and hearing that the rate in a natural gas pipeline’s contract is “so low as to conflict with the public interest,” [FERC] may under [NGA] § 5(a) authorize the natural gas company to file a schedule increasing the rate.

In *Sierra*, the Supreme Court applied the holding from *Mobile* to the analogous provision of the FPA—section 205. The Court concluded that a public utility could not unilaterally file a new rate under FPA section 205(d) that was contrary to the terms of an effective contract. However, *Sierra* involved an issue not present in *Mobile*—when FERC, under FPA section 206(a), was authorized to find that an existing contract rate was unlawful and to fix a new lawful rate. The Court explained that FERC could not find that an existing contract rate was “unreasonable solely because it yields the public utility less than a fair return on net invested capital.” Faced with the question of how FERC must evaluate whether an existing contract rate is just and reasonable, the Court explained:

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

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66. *Mobile*, 350 U.S. at 344 (quoting 15 U.S.C. § 717d(a) (1938)). NGA section 5(a) states that a complaint may be brought by “any State, municipality, State commission, or gas distributing company.” 15 U.S.C. § 717d(a) (1938). The Court described these entities as “those who represent the public interest” and “those who might be discriminated against.” *Mobile*, 350 U.S. at 345. FPA section 206(a) does not enumerate or limit entities that may file a complaint. See 16 U.S.C. § 824e(a) (1938).


68. *Id*. (emphasis added).

69. *Id*. (emphasis added).

70. *Id*.

71. *Id*. at 353-55. FPA section 206(a) grants FERC the authority to prescribe a change in contract rates whenever it determines such rates to be unlawful, i.e., “unjust, unreasonable, unduly discriminatory or preferential.” 16 U.S.C.A. § 824e(a) (2010 & Supp. 2012); *Sierra*, 350 U.S. at 353.


73. *Id*. (emphasis added, citation omitted). The Court noted that the purpose of the power given to FERC by FPA section 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities. *Id*. at 355 (citing 16 U.S.C.A. § 824e(a)). Therefore, a contract is not “unjust” or “unreasonable” simply because it is not profitable to the public utility. *Id*.
From these two cases, the eponymous “Mobile-Sierra doctrine” was born. The doctrine acts as a presumption when such rates are investigated pursuant to FPA section 206(a). As the Court has subsequently explained, under the Mobile-Sierra doctrine, FERC “must presume that the rate set out in a freely negotiated wholesale-energy contract meets the ‘just and reasonable’ requirement imposed” by the FPA. The presumption is only overcome if the contract seriously harms the public interest; that is, where the contract might (1) impair the financial ability of the public utility to continue its service, (2) cast upon other consumers an excessive burden, or (3) be unduly discriminatory. Indeed, “[t]he regulatory system created by the [FPA] is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity.” In neither case did the Court find that the public interest required the existing rates to be reformed.

Both Mobile and Sierra involved attempts by sellers to change rates set forth in existing bilateral contracts negotiated by the parties, and where the contracts did not otherwise permit such changes. In subsequent cases, the Supreme Court addressed whether the Mobile-Sierra presumption applies where rates are set forth in instruments other than individually-negotiated bilateral contracts, or contracts

74. The Supreme Court did not use the term “Mobile-Sierra doctrine” until 2008. Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 551 n.6 (2008). Responding to Justice Stevens’s dissent, see id. at 555 (Stevens, J., dissenting), the Court explained that it likely had never before used the phrase “Mobile-Sierra doctrine” because the understanding of the holdings in Mobile and Sierra was uniform and no circuit split arose concerning its meaning until the Ninth Circuit’s erroneous decision in the cases on review, Pub. Util. Dist. No. 1 of Snohomish Cnty. v. Fed. Energy Regulatory Comm’n, 471 F.3d 1053 (9th Cir. 2006). Id. at 551 n.6.
75. 16 U.S.C.A. § 824e(a).
76. Morgan Stanley, 554 U.S. at 530.
77. Sierra, 350 U.S. at 355; see Morgan Stanley, 554 U.S. at 533.
78. Morgan Stanley, 554 U.S. at 534 (quoting In re Permian Basin Area Rate Cases, 390 U.S. 747, 822 (1968)). The Mobile-Sierra doctrine “recognizes the superior efficiency of private bargaining, and its purpose is ‘to subordinate the statutory filing mechanism to the broad and familiar dictates of contract law.’” Maine PUC I, supra note 19, at 476 (D.C. Cir. 2008) (quoting Borough of Lansdale v. Fed. Power Comm’n, 494 F.2d 1104, 1113 (D.C. Cir. 1974)); see also Atlantic City Elec. Co. v. Fed. Energy Regulatory Comm’n, 295 F.3d 1, 14 (D.C. Cir. 2002) (“[T]he purpose of the Mobile-Sierra doctrine is to preserve the benefit of the parties’ bargain as reflected in the contract, assuming that there was no reason to question what transpired at the contract formation stage.”) (citation omitted). Mobile and Sierra “recognize that the FPA and the NGA provide that conventional regulation must give way to contracts that are the product of negotiation and market forces.” Carmen L. Gentile, The Mobile-Sierra Rule: Its Illustrious Past and Uncertain Future, 21 ENERGY L. J. 353, 358 (2000).
79. United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 347 (1956); Sierra, 350 U.S. at 353. Courts have observed that the public interest presumption is “practically insurmountable” and that attempts to change rates when the presumption applies hold only a “dim prospect, hardly worthy of recognition.” Papago Tribal Util. Auth. v. Fed. Energy Regulatory Comm’n, 723 F.2d 950, 954 (D.C. Cir. 1983). One commenter has stated that “it could be said that it would be easier for a camel to pass through the eye of a needle than for a utility to increase a rate protected by the Mobile-Sierra rule.” Gentile, supra note 78, at 356. It has been observed that it is more difficult to overcome the public interest presumption than to meet the business judgment standard used in bankruptcy cases. See Kendall Hollrah, Comment, Learning to Live Together: Exploring Interactions Between Bankruptcy Law and Energy Law, 42 Hous. L. Rev. 529 (2005).
80. Mobile, 350 U.S. at 336-37; Sierra, 350 U.S. at 351-52.
that specifically permit rate changes.

In United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division (“Memphis”), the Court held that parties could include in contracts the right to unilaterally change rates at will.81 The Court distinguished the case from Mobile, noting that in Mobile, the natural gas pipeline had contractually bound itself to furnish gas throughout the contract term at a particular price and had “bargained away by contract the right to change its rates unilaterally.”82 However, the agreement at issue in Memphis did not state a single fixed rate, but included a rate provision that amounted to the pipeline’s “‘going’ rate,” reserving to the pipeline the power to make rate changes subject to the procedures and limitations of the NGA.83 The Court found that the pipeline, when filing a new rate with FERC, simply sought to assert, in accordance with the notice procedures in the NGA, its rights expressly reserved to it by contract.84 In a subsequent case, the Supreme Court referred to the rule from Memphis as permitting parties to “contract out of the Mobile-Sierra presumption” by including in their contracts a provision that would permit one or both parties to unilaterally establish a new rate that would supersede the existing contract rate.85 The Supreme Court has stated that Memphis is consistent with the lead role of contracts in the FPA’s regulatory scheme.86 However, absent the presence of a “Memphis clause,” the Mobile-Sierra presumption remains the default rule.87

Although the Court in Memphis did not, for purposes of its analysis, draw a distinction between rates set by bilateral contract and rates set forth in a tariff of general applicability, the arrangements at issue in Memphis involved such tariffs.88 The Court noted that FERC had promulgated regulations requiring natural gas

83. Id. at 105, 110, 114 (quoted language at 105). The provision read:
   All gas delivered hereunder shall be paid for by Buyer under Seller’s Rate Schedule (the appropriate rate schedule designation is inserted here), or any effective superseding rate schedules, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof.
84. Id. at 112.
86. NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n, 558 U.S. 165, 130 S. Ct. 693, 699 n.3 (2010). Memphis clarified that contracts regulated under the NGA and FPA command the same respect as any other lawful contract and that the governing statutes do not contemplate the encroachment on the parties’ contracts. Kyle, supra note 81, at 109 (“The integrity of the contract would be defeated if an outsider could place his interpretation on the pricing clause diametrically opposed to the intent and objectives of the parties to the contract.”).
87. Morgan Stanley, 554 U.S. at 534; see also Texaco, Inc. v. Fed. Energy Regulatory Comm’n 148 F.3d 1091, 1096 (D.C. Cir. 1998) (citation omitted) (finding that no language is required to invoke the public interest presumption and that where there is no “contractual language ‘susceptible to the construction that the rate may be altered,’ . . . the Mobile-Sierra doctrine applies”).
pipeline companies to convert from using individual bilateral agreements to a “tariff-and-service-agreement” system. Under the tariff-and-service-agreement system, natural gas pipelines must adopt system-wide “tariffs” that establish terms and conditions of service for their customers and rates for different classes of customers. The tariff is not itself an agreement or contract between the pipeline and any customer. Customers must execute their own agreements with the pipeline. Instead of individually tailored contracts between pipelines and their customers, pipelines and customers execute “service agreements” containing references to rates set forth in the tariff’s rate schedules of general applicability and incorporating the tariff’s general terms and conditions. In Memphis, the Court was satisfied that the parties to such arrangements could permissibly reserve for natural gas pipelines the right to change their rates. The Court believed that it was not unlikely that customers would have agreed to be charged a “going rate” that could be changed consistent with the notice provisions under NGA section 4(d).

The innovation of Memphis clauses and the introduction of the tariff-and-service agreement regime for natural gas pipelines resulted in fewer Mobile-Sierra doctrine issues for the natural gas industry. However, the electric utility industry did not convert to a tariff-and-service agreement system for electric transmission service until FERC issued Order No. 888 in 1996. Until then, electric utilities

89. Id. at 115 n.8 (referring to FPC Order No. 144, 13 Fed. Reg. 6371 (Oct. 30, 1948), codified at 18 C.F.R. pt. 154 (1949)). 18 C.F.R. § 154.38(d)(3) (1949) reads in pertinent part: No Rule, regulation, exception or condition such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which in any way purports to effect a modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: Provided, however, a natural-gas company may state in the service agreement or in rate schedules filed pursuant to § 154.52 that it is or will be its privilege, under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge: Provided further, That no such clause may effectuate a change in an effective rate or charge except in the manner provided in Section 4 of the Natural Gas Act, as amended, and the regulations in this part.
90. 18 C.F.R. § 154.38(d)(3); see McGrew, supra note 25, at 201.
91. Memphis, 358 U.S. at 115 n.8; see McGrew, supra note 25, at 201.
92. Memphis, 358 U.S. at 114-15. Order No. 144 states that natural gas companies’ service agreements and rate schedules could include “adjustment” provisions, and that such adjustments must be accomplished by filing new rate schedules in accordance with the Part 154 regulations. Order No. 144, 13 Fed. Reg. at 6372. The Court noted that “tariff-and-service agreement” arrangements were adopted by Order No. 144, see supra note 89, promulgated in 1948, but that until the case giving rise to Memphis, no party connected to the natural gas industry seemed to have thought that natural gas pipelines were precluded from changing the rates set forth in their tariffs subject to NGA section 4(d) and 4(e) procedures. Memphis, 358 U.S. at 115. In Memphis, the controversy did not involve a conflict between the buyer and seller under the contract at issue; the buyer supported the position of the pipeline. The objection was made by an end-use customer of the buyer. See Kyle, supra note 81, at 102.
93. Memphis, 358 U.S. at 115 n.10.
94. See McGrew, supra note 25, at 201. It would be unlikely for pipeline-sellers to conduct a large portion of their business under long-term contracts at fixed rates that could not be changed to reflect changing costs. See Kyle, supra note 81, at 108.
95. Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Service by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,
had entered into numerous bilateral and multiparty arrangements for the sale of bundled power—that is, power together with transmission. Public utilities continue to enter into bilateral and multiparty arrangements for the sale of electric power and capacity. Thus, Mobile-Sierra issues continue to arise in the electric industry.

2. Morgan Stanley

The next chapter in the story of the Mobile-Sierra doctrine came in the Supreme Court’s 2008 case, Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County (“Morgan Stanley”). The cases on review in Morgan Stanley presented the Court with two issues for review: (1) whether the Mobile-Sierra presumption applies only if FERC has had an initial opportunity to review a contract rate without the presumption; and (2) whether the Mobile-Sierra presumption imposes as high a bar to challenges by purchasers of wholesale electricity as it does to challenges by sellers. The Court answered no to the first question and yes to the second.

Under FERC’s market-based rate regime, a wholesale electricity seller that has demonstrated that it lacks (or has adequately mitigated) market power may enter into freely negotiated contracts with purchasers. Those contracts are not filed


96. See McGrew, supra note 25, at 201-02.


100. See id. at 535-38. Prior to Morgan Stanley, there had been some discussion regarding whether the Mobile-Sierra public interest presumption should apply to electric power agreements entered into under FERC’s market-based rate regime. See David G. Tewksbury & Stephanie S. Lim, Applying the Mobile-Sierra Doctrine to Market-Based Rate Contracts, 26 ENERGY L. J. 437 (2005). Cf. Gentile, supra note 78, at 387 (believing that the prospects for future litigation related to the Mobile-Sierra doctrine were diminished in part because electric power sales are frequently at market-based rates and under standardized short-term contracts).
with FERC before they go into effect; instead, market-based rate sellers must file quarterly reports summarizing each of the contracts into which they have entered.\footnote{101} In 2000 and 2001, prices for electricity in the western United States rose dramatically. As a result, retail utilities entered into long-term contracts with market-based rate sellers that locked in rates that were very high by historical standards.\footnote{102} After prices began to return to normal levels, many retail utility-purchasers asked FERC to modify the contracts, contending that the contracts should be reviewed without Mobile-Sierra’s public interest presumption that the rates are just and reasonable.\footnote{103} FERC disagreed, applied the public interest presumption to its review of the contracts, and determined that the purchasers could not overcome the presumption.\footnote{104} On appeal, the Ninth Circuit reversed, finding that because the market-based rate agreements had not been initially reviewed by FERC, the public interest presumption did not apply to the challenges.\footnote{105} In addition, the Ninth Circuit found that even if the presumption applied, the standard for overcoming the presumption is different when a purchaser challenges a high rate.\footnote{106} The Supreme Court granted certiorari.\footnote{107}

On its way to resolving the questions presented, the Court in Morgan Stanley reiterated and clarified several points about the Mobile-Sierra presumption that are relevant here. First, the Court noted, as it had in Mobile and Memphis,\footnote{108} that the FPA permits public utilities to set jurisdictional rates with electric power customers through individually-negotiated bilateral contracts as well as through tariffs of general applicability.\footnote{109} For tariffs, as opposed to individually-negotiated contracts, FERC traditionally reviewed rates under the “cost of service” method, ensuring that a public utility covers its costs plus a rate of return sufficient to attract investment.\footnote{110} Both individual contracts and tariffs of general applicability are subject to the FPA’s notice and filing requirements.\footnote{111}

The Court next addressed how application of the Mobile-Sierra presumption fits within the FPA’s requirement that jurisdictional rates be “just and reasonable.” The Court noted that since 1956, FERC and the courts of appeals referred to two differing modes of review: one with the Mobile-Sierra presumption, i.e., the

\footnote{101. See Morgan Stanley, 554 U.S. at 537. Sellers must also have on file with FERC a market-based rate “tariff.” These tariffs do not set forth specific rate schedules, but simply state that the seller is permitted to enter into freely negotiated agreements at market-based rates. See id.}

\footnote{102. See id. at 538-40.}

\footnote{103. See id. at 540-42.}

\footnote{104. See id. at 542-43.}


\footnote{106. See id. at 544 (citing Snohomish Cnty., 471 F.3d at 1088-90).}


\footnote{109. Morgan Stanley, 554 U.S. at 531 (comparing the FPA with the ICA, under which regulated carriers could charge rates only pursuant to filed tariffs).}

\footnote{110. Id. at 532 (citation omitted).}

\footnote{111. Id. at 531, 533 (citing 16 U.S.C. § 824d(c) (2006)).}
“public interest standard”; and the other without, i.e., the “just and reasonable standard.”112 The Supreme Court explained that, notwithstanding this nomenclature, the “public interest standard” was not a different standard from the statutory “just and reasonable standard.”113 Instead, the Court concluded, the “public interest standard” refers to the differing application of the just-and-reasonable standard to freely negotiated rates.114

Thus, FERC’s review of rates under the FPA’s just and reasonable standard must begin with a threshold inquiry: whether the rate at issue is the result of bilateral (or multi-party) negotiations and bargaining. If so, FERC must apply the Mobile-Sierra presumption and can only make a finding that the existing rate is unjust or unreasonable—and, thereby, fix a new rate—where the existing rate seriously harms the public interest.115 Application of the presumption is appropriate because, “[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.”116 The Court in Morgan Stanley explained that Sierra provided “a definition of what it means for a rate to satisfy the just-and-reasonable standard in the contract context.”117 However, if the rate under review is not the result of bilateral (or multi-party) negotiations—or if the parties to the arrangement state that the Mobile-Sierra presumption does not apply—FERC would perform its review without applying the presumption and review the rate under cost of service (or other) principles.118

Establishing that the Mobile-Sierra presumption should be applied when rates are set through a negotiated agreement, the Court in Morgan Stanley answered the first question presented for review, holding that the FPA’s just and reasonable standard is not applied differently depending on when a rate is challenged.119 If a rate is one to which the Mobile-Sierra presumption does not apply, the presumption applies each time the rate is reviewed by FERC. The FPA does not require FERC to review the rate under cost of service principles before the rate can be reviewed.

112. Id. at 535 (citations omitted).
113. Id. at 535, 545.
114. Id. at 535.
115. Id. at 545-46; Fed. Power Comm’n v. Sierra Pac. Power Co., 350 U.S. 348, 355 (1956). In Sierra, the Court outlined three instances where a rate might harm the public interest: (1) impair the financial ability of the public utility to continue its service, (2) cast upon other consumers an excessive burden, or (3) be unduly discriminatory. Id.
117. Id. at 546.
118. See id. at 532. For a discussion of the cost-of-service standard of ratemaking as a basic standard of “reasonableness,” see, e.g., BONBRIGHT ET AL., supra note 31, at 108-23.
119. Morgan Stanley, 554 U.S. at 545; see also Tewksbury & Lim, supra note 100, at 461 (explaining that Mobile indicates that the statutory structure of the FPA and NGA does not support distinctions between newly proposed and already existing rates for purposes of determining whether the public interest presumption should apply); Bress, Gergen & Lim, supra note 98, at 301 (“In a regulatory scheme grounded on the ability of ‘sophisticated businesses’ to manage their own affairs and protect their own interests, there is no need for FERC to have an initial opportunity for plenary review before presuming that contract rates are just and reasonable.”).
subject to the Mobile-Sierra presumption. The Court stated that it was proper in a regulatory scheme to review rates set by negotiated contracts by evaluating whether the rates seriously harm the public interest, not whether the rates are unfair to one of the parties that voluntarily entered into the contract. Thus, FERC may abrogate a valid contract only if that contract harms the public interest.

Turning to the second question presented for review, FERC found that the Mobile-Sierra presumption applies equally regardless of whether the rate is challenged by purchasers of wholesale electricity rather than by sellers (as had been the case in Mobile and Sierra). The Court noted that the three factors identified in Sierra—where a rate might (1) impair the financial ability of the public utility to continue its service, (2) cast upon other consumers an excessive burden, or (3) be unduly discriminatory—were not all directly applicable to a challenge brought by a purchaser, and that the three factors from Sierra were not an exclusive list. Where the challenge is brought by a purchaser, the primary concern is likely whether the rate imposes an excessive burden on that customer, not other customers (as in Sierra’s second prong). However, the fact that the customer is the challenger does not transform the “excessive burden” prong into an inquiry as to whether the customer pays a cost above the public utility’s marginal cost, in effect reverting to a form of cost-based analysis. The Court concluded that the FPA intended to reserve FERC’s power to abrogate negotiated contract rates only for those extraordinary circumstances where the public would be

120. Morgan Stanley, 554 U.S. at 545-46.
121. Id. at 546-47 (citations omitted).
122. Id. at 548. The Court noted that FERC possesses the authority to set aside a contract if there is unfair dealing at the contract formation stage, e.g., fraud, duress, or market manipulation. Id. at 547, 552-55. However, the Court cautioned that that was no reason that FERC should be able to abrogate a contract on these grounds without a finding of a causal connection between the unlawful activity and the contract rate. Id. at 554-55. If a causal connection is established, then the Mobile-Sierra presumption should not apply. Id. at 555.
123. Id. at 548. The logic from Mobile establishes that the Mobile-Sierra rule is rate-neutral. See Gentile, supra note 78, at 363-65 (discussing earlier court of appeals cases that found that the Mobile-Sierra doctrine protects high rates as well as low rates). Moreover, FERC’s market-based rate regime eliminates a policy rationale that may be used for differentiating between so-called “low-rate” and “high-rate” cases because neither the buyer nor the seller enjoys the protections of the regulatory compact. See Tewksbury & Lim, supra note 100, at 469-70. But cf. Northeast Utils. Serv. Co. v. Fed. Energy Regulatory Comm’n, 55 F.3d 686 (1st Cir. 1995) (suggesting that the application of the public interest presumption might be more relaxed in non-low-rate cases (such as Mobile) or in order to protect third parties); Northeast Utils. Serv. Co. v. Fed. Energy Regulatory Comm’n, 993 F.2d 937 (1st Cir. 1993). For a discussion of the Northeast cases, see Gentile, supra note 78, at 367-73 (noting, in an article published prior to Morgan Stanley, that the Northeast decisions might be the most significant Mobile-Sierra cases since 1956).
124. Morgan Stanley, 554 U.S. at 548 (citing Fed. Power Comm’n v. Sierra Pac. Power Co., 350 U.S. 348, 355 (1956)). In a market-based rate regime, under which the regulatory compact has been eliminated, the first prong from Sierra—i.e., impairing the financial ability of the public utility to continue its service—would not be applicable. See Tewksbury & Lim, supra note 100, at 470.
125. Morgan Stanley, 554 U.S. at 549.
126. Id. at 548-49 (citing record below).
127. Id. at 550-51.
III. NRG POWER MARKETING, LLC V. MAINE PUBLIC UTILITIES COMMISSION

Two terms after Morgan Stanley, the Supreme Court once again took up the Mobile-Sierra doctrine in NRG. In NRG, the Supreme Court resolved that application of the Mobile-Sierra presumption does not depend upon the identity of the person challenging the rate at issue—i.e., whether the challenger is a party to the contested agreement, or a third-party. The NRG case is discussed below, including the underlying FERC proceedings in Devon Power, review by the D.C. Circuit and Supreme Court, and FERC's orders on remand.

A. Proceedings at FERC: Devon Power LLC

The NRG case arose out of New England’s difficulties in ensuring adequate electric power supplies and maintaining the reliability of the region’s electric transmission grid. For many years, the ISO-New England (“ISO-NE”) imposed on retail utilities an “installed capacity” (“ICAP”) requirement, requiring utilities to maintain specified amounts of ICAP based on their peak loads plus a reserve margin. For years, New England’s capacity market has been “rife with problems” and “the supply of capacity was barely sufficient to meet the region’s demand.”

128. Id. at 551. Although disagreeing with the Ninth Circuit’s analysis of the two questions presented, the Supreme Court nonetheless affirmed the Ninth Circuit’s reversal of FERC’s decision because of defects in FERC’s analysis. Id. at 552-55.
130. Id. at ___, 130 S. Ct. at 696-97, 701.
131. See id. at ___, 130 S. Ct. at 696.
132. “ISO” stands for “independent system operator.” “An ISO is an independent company that has operational control, but not ownership,” over the transmission facilities owned by its member utility companies. See Maine PUC I, supra note 19, at 468 n.2. An ISO “provide[s] open access to the regional transmission system to all electricity generators at rates established in a single, unbundled, grid-wide tariff . . . .” Id. (quoting Midwest ISO Transmission Owners v. Fed. Energy Regulatory Comm’n, 373 F.3d 1361, 1364 (D.C. Cir. 2004)). In 2004, ISO-NE was organized as a “Regional Transmission Organization” or “RTO.” Id. FERC grants greater regulatory flexibility to RTOs, provided that they, among other things, “are regional in scope, have exclusive operational control over all transmission facilities within their control, and have sole authority to approve or deny requests for transmission service” over facilities under their control. Id. (citing Midwest ISO Transmission Owners, 373 F.3d at 1365). RTOs and ISOs may also operate regional markets for electric power and capacity. See Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 73 Fed. Reg. 61,400 (Oct. 28, 2008), order on reh’g, Order No. 719-A, 74 Fed. Reg. 37,776 (July 29, 2009), order on reh’g, Order No. 719-B, 129 FERC ¶ 61,252 (2009).
133. In Maine PUC I, supra note 19, the D.C. Circuit noted that utilities generally purchase more capacity than is necessary to meet their customers’ demand for electricity in order to ensure that the utilities are able to respond adequately to unexpected fluctuations in demand. Id. at 467; NRG, 558 U.S. at ___, 130 S. Ct. at 697.
135. Maine PUC I, 520 F.3d at 467. As FERC has subsequently explained, “existing generators needed for reliability [were] not earning sufficient revenues and [were] in fact losing money, and . . . additional infrastructure [was] needed soon to avoid violations of reliability criteria.” Devon Power LLC, 115 FERC ¶ 61,340 at 62,315.
136. NRG, 558 U.S. at ___, 130 S. Ct. at 697; see also Maine PUC I, 520 F.3d at 467.
utilities made several attempts to solve this problem.\footnote{For example, FERC identified in the early 2000s several flaws in the ISO-NE’s then-existing ICAP market. See ISO New England, Inc., 91 FERC ¶ 61,311, at 62,058 (2000); New England Power Pool & ISO New England, Inc., 100 FERC ¶ 61,287, at 62,259 (2002). Among other things, FERC noted that the then-existing ICAP market lacked a “locational requirement element” and “believe[d] that location is an important aspect of ensuring optimal investment in resources.” New England Power Pool & ISO New England, Inc., 100 FERC ¶ 61,287 at 62,278.} In 2003, FERC directed the ISO-NE to develop a new market mechanism that would separately set prices for capacity in different geographical sub-regions in order to encourage construction of new capacity in the sub-regions with greater capacity shortages.\footnote{Devon Power LLC, 103 FERC ¶ 61,082, at 61,266 (2003); see Maine PUC I, 520 F.3d at 468; NRG, 558 U.S. at ___, 130 S. Ct. at 697.} In March 2004, the ISO-NE proposed a locational ICAP (“LICAP”) mechanism that would set capacity prices for four separate sub-regions.\footnote{Devon Power LLC, 107 FERC ¶ 61,240, at 62,020 (2004); Maine PUC I, 520 F.3d at 468; NRG, 558 U.S. at ___, 130 S. Ct. at 697. Under the ISO-NE proposal, each of the four sub-regions would have a monthly auction for capacity. Devon Power LLC, 107 FERC ¶ 61,240, at 62,022. Among other aspects of the proposal, the ISO-NE would establish a demand curve that set the amount of ICAP that must be procured and the price for that capacity. Id. The D.C. Circuit noted that the term “demand curve” is misleading because, ordinarily, a demand curve is a model of the relationship between prices and consumer preferences in a free market. Maine PUC I, supra note 19, at 468 n.3. However, under the ISO-NE’s proposal, the “demand curve” was an artificial construct that administratively determined the prices that must be paid for various quantities of capacity. Id. (citing Devon Power LLC, 107 FERC ¶ 61,240, at 62,022).} FERC established hearing procedures before an administrative law judge (“ALJ”).\footnote{Devon Power LLC, 107 FERC ¶ 61,240, at 62,020; see Maine PUC I, 520 F.3d at 468-69; see also NRG, 558 U.S. at ___, 130 S. Ct. at 697.} In June 2005, the ALJ issued an Initial Decision largely accepting the ISO-NE’s proposal.\footnote{Devon Power LLC, 111 FERC ¶ 63,063 (2005). The ALJ’s Initial Decision largely adopted the “demand curve” proposed by ISO-NE. Id. at 65,211-63.} Several parties filed exceptions to the ALJ’s Initial Decision; FERC subsequently heard arguments, and thereafter established settlement procedures to allow the parties to develop a revised market proposal.\footnote{See Devon Power LLC, 113 FERC ¶ 61,075, at 61,271 (2005); see also Maine PUC I, 520 F.3d at 469; NRG, 558 U.S. at ___, 130 S. Ct. at 697. The parties requesting oral argument were mostly state entities and retail customers. See Devon Power LLC, 115 FERC ¶ 61,340, at 62,304, 62,306 (2006). Oral argument focused on whether the LICAP mechanism, or some other approach, would result in just and reasonable wholesale power prices in New England that would be adequate to encourage needed generation additions and whether LICAP or another approach would provide assurance that adequate electric generation capacity and reliability would be maintained. See id.} On March 6, 2006, a settlement was reached by 107 of the participants; however, eight participants opposed the settlement.\footnote{See id. at 62,304, 62,306-08; see also Maine PUC I, supra note 19, at 469; NRG, 558 U.S. at ___, 130 S. Ct. at 697. For the three-year gap between the first capacity auction and the time when the capacity procured in that auction would be provided, the Settlement Agreement provided for a series of fixed, transition-period payments to generators supplying capacity. See Devon Power LLC, 115 FERC ¶ 61,340, at 62,308-09; Maine PUC I, supra note 19, at 469; NRG, 558 U.S. at ___, 130 S. Ct. at 697.} The Settlement Agreement established a “Forward Capacity Market” (“FCM”) under which there would be annual price-setting auctions for capacity, held three years in advance of when the capacity would be needed.\footnote{See id. at 62,304, 62,306-08; see also Maine PUC I, supra note 19, at 469; NRG, 558 U.S. at ___, 130 S. Ct. at 697. Although the transition payments were included among the issues presented to the D.C. Circuit and the} Each retail utility would be required to acquire...
enough capacity to meet its share of the total installed capacity requirement—i.e., the minimum level of capacity needed to maintain the reliability of the grid, as determined by the ISO-NE.\textsuperscript{145} The FCM proposal contained a locational component: before each auction, the ISO-NE would determine capacity zones by identifying transmission constraints.\textsuperscript{146}

Of importance here, § 4.C of the Settlement Agreement provided that challenges to both transition-period payments and auction-clearing prices would be reviewed under “the ‘public interest’ standard of review set forth in United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956)[,] and [FPC] v. Sierra Pacific Power Co., 350 U.S. 348, 76 S.Ct. 368, 100 L.Ed. 388 (1956) (the ‘Mobile-Sierra’ doctrine) . . . whether the change is proposed by a Settling Party, a non-Settling Party, or the FERC acting \textit{sua sponte}.”\textsuperscript{147}

FERC approved the Settlement Agreement, finding that it was a “just and reasonable outcome” and “consistent with the public interest.”\textsuperscript{148} Among other things, FERC believed that the Mobile-Sierra provision “appropriately balances the need for rate stability and the interests of the diverse entities who will be subject to the [FCM’s auction mechanism].”\textsuperscript{149}


Several of the parties who objected to the Settlement Agreement sought review in the D.C. Circuit.\textsuperscript{150} Decided prior to the Supreme Court’s decision in Morgan Stanley, the court largely affirmed FERC’s decision.\textsuperscript{151} However, the petitioners prevailed on the Mobile-Sierra issue: The D.C. Circuit held that the Mobile-Sierra doctrine could only apply to contracting parties; therefore, the parties to the Settlement Agreement could not “thrust the ‘public interest’ standard of review upon non-settling third parties who have vociferously objected to the terms of the [S]ettlement [A]greement.”\textsuperscript{152}

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Supreme Court, this article focuses on the FCM auction mechanism because the transition payments lasted only for a limited time, with the final payment made in May 2010. See Devon Power LLC, 134 FERC ¶ 61,208, at P 22 (2011). As FERC explained in 2011, “the last transition payment was made over a year ago and, therefore, the controversy as to whether these payments represent contract or tariff rates is now moot.” Devon Power LLC, 137 FERC ¶ 61,073, at P 28 (2011).
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145. See \textit{Devon Power LLC}, 115 FERC ¶ 61,340, at 62,307; see \textit{Maine PUC I}, 520 F.3d at 469; NRG, 558 U.S. at ___, 130 S. Ct. at 697.
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147. \textit{Devon Power LLC}, 115 FERC ¶ 61,340, at 62,309 & n.29; see \textit{Maine PUC I}, supra note 19, at 469; NRG, 558 U.S. at ___, 130 S. Ct. at 697-98 (citations omitted).
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149. \textit{Devon Power LLC}, 115 FERC ¶ 61,340, at 62,335; NRG, 558 U.S. at ___, 130 S. Ct. at 698; see also \textit{Maine PUC I}, supra note 19, at 470.
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150. \textit{Maine PUC I}, supra note 19, at 467, 470. The court of appeals identified the petitioners as the Maine Public Utilities Commission and the Attorneys General of Connecticut and Massachusetts. \textit{Id.} However, the Supreme Court’s opinion in \textit{NRG} stated that \textit{six} of the eight objecting parties petitioned for review. NRG, 558 U.S. at ___, 130 S. Ct. at 698.
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151. \textit{Maine PUC I}, supra note 19, at 467, 470.
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152. \textit{Id.} at 467, 470, 476-79 (quoted language at 478); see also \textit{NRG}, 558 U.S. at ___, 130 S. Ct. at 698.
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The Supreme Court granted certiorari in \textit{NRG} to determine whether \textit{Mobile-Sierra}'s public interest standard applies to a “contract rate” regardless of the identity of the party challenging the rate.\footnote{NRG, 558 U.S. at ___, 130 S. Ct. at 698.} The Court reversed the D.C. Circuit’s judgment insofar as it rejected application of the \textit{Mobile-Sierra} public interest presumption to non-contracting parties.\footnote{Id. at ___, 130 S. Ct. at 698, 701.} The Court explained that if FERC itself must presume that a rate that results from fair, arms-length negotiations is just and reasonable, so too must non-contracting parties.\footnote{Id. at ___, 130 S. Ct. at 700.} The \textit{Mobile-Sierra} presumption applies “because well-informed wholesale-market participants of approximately equal bargaining power generally can be expected to negotiate just-and-reasonable rates.”\footnote{Id. at ___, 130 S. Ct. at 700 n.4.} The Court also noted that “contract stability ultimately benefits consumers.”\footnote{Id. (quoting Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 551 (2008)).} Third parties could include end users, advocacy groups, state utility commissions, or elected officials.\footnote{Id. at ___, 130 S. Ct. at 700 (citing \textit{Morgan Stanley}, 554 U.S. at 530).} Third parties could include end users, advocacy groups, state utility commissions, or elected officials.\footnote{Id. at ___, 130 S. Ct. at 701. As noted above, see supra note 144, the rates at issue also included the transition payments.}

Although the Court determined that the \textit{Mobile-Sierra} presumption applied to third-party challenges, it pointed out that the doctrine did not overlook third-party interests: rates may be rejected when they would seriously harm the consuming public.\footnote{Id. at ___, 130 S. Ct. at 700-01 (citing United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 344 (1956)).} Moreover, limiting the \textit{Mobile-Sierra} doctrine to challenges by contracting parties would undermine the stability of contractual arrangements that the doctrine sought to ensure.\footnote{Id.}

However, the Supreme Court found that neither the D.C. Circuit nor FERC had previously determined whether the auction clearing prices qualified as “contract rates” to which the \textit{Mobile-Sierra} doctrine must apply.\footnote{Id. at ___, 130 S. Ct. at 701.} Accordingly, the Court remanded that issue to the D.C. Circuit; and, if the rates were not “contract rates,” the D.C. Circuit was directed to resolve the additional issue of whether FERC possessed discretion to treat such rates analogously.\footnote{Id.}

On remand, the D.C. Circuit first recounted the proceedings up to that point, noting that the “case has characteristics of a chameleon; it has changed its colors—and its shape—at each stage of the proceedings.”\footnote{Maine Pub. Utils. Comm’n v. Fed. Energy Regulatory Comm’n, 625 F.3d 754, 755 (D.C. Cir. 2010) [hereinafter \textit{Maine PUC II}].} Turning to the remanded issues, the D.C. Circuit noted FERC’s argument that, even though the auction rates were not “contract rates,” FERC nevertheless possesses discretion to approve § 4.C

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\bibitem{NRG} \textit{NRG}, 558 U.S. at ___, 130 S. Ct. at 698.
\bibitem{Morgan Stanley} Id. at ___, 130 S. Ct. at 698, 701. Perhaps unsurprisingly, following \textit{Morgan Stanley}, commenters opined that the portion of the D.C. Circuit’s decision in \textit{Maine PUC I} holding that FERC cannot approve an agreement that would require application of the \textit{Mobile-Sierra} public interest presumption to rate challenges brought by third parties was wrongly decided. \textit{See} Bress, Gergen & Lim, \textit{supra} note 98, at 308-10; Catherine Ascani, Casenote, \textit{Deal or No Deal: It’s a Deal} in \textit{Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, Washington}, 60 \textit{Mercer L. Rev.} 1025, 1041 (2009). \textit{Cf.} McCaffrey, \textit{supra} note 98, at 76-78 (stating that the applicability of the \textit{Mobile-Sierra} public interest presumption to challenges to rates by third-parties “remains a developing issue”).
\bibitem{Maine PUC I} \textit{Maine PUC I}, 625 F.3d 754, 755 (D.C. Cir. 2010) [hereinafter \textit{Maine PUC II}].
\end{thebibliography}
of the Settlement Agreement. However, the D.C. Circuit found that it could not determine whether FERC’s position was reasonable under the Administrative Procedure Act because “FERC never articulated in its orders a rationale for its discretion to approve a Mobile-Sierra clause outside of the contract context, or an explanation for exercising that discretion here.” The court of appeals explained that “FERC must explain why, if the auction rates are not contract rates, they are entitled to Mobile-Sierra treatment,” suggesting that FERC should clarify how “the auction rates reflect market conditions similar to freely-negotiated contract rates” or on what other ground FERC bases its asserted discretion. The D.C. Circuit remanded FERC’s orders approving the Settlement Agreement for further proceedings.

C. Remand to FERC

In response to the remand from the D.C. Circuit, FERC issued an order on March 17, 2011, to resolve whether the auction results [ . . . ] arising from a contested settlement approved by [FERC] earlier in this proceeding constitute “contract rates” where challenges can only be reviewed by [FERC] under a more rigorous application of the statutory “just and reasonable” standard of review; that more rigorous application is often characterized as the Mobile-Sierra “public interest” standard.

FERC noted that “if the auction results [ . . . ] are not ‘contract rates,’” there was the supplementary issue of “whether [FERC] may act within its discretion in nevertheless approving a settlement provision imposing the Mobile-Sierra ‘public interest’ standard on certain future challenges to the auction results and transition payments.”

As explained by FERC, the Mobile-Sierra presumption requires FERC to “presume that rates set by power sales contracts that are freely negotiated at arm’s length between willing buyers and sellers meet the statutory ‘just and reasonable’ standard of review.” However, where the parties have not agreed to set rates by contract, Mobile-Sierra’s public interest presumption does not automatically apply.

FERC found that the FCM auction rates were not “contract rates” that would

162. Id. at 759.
164. Maine PUC II, supra note 161, at 759-60.
165. Id. at 760.
166. Devon Power LLC, 134 FERC ¶ 61,208, at P 1 (2011), order on reh’g, 137 FERC ¶ 61,073 (2011). Although not the focus of this article, the rates at issue also included the transition payments. See supra note 144.
167. Devon Power LLC, 134 FERC ¶ 61,208, at P 1.
necessarily be subject to the Mobile-Sierra public interest presumption when challenged. In its order, FERC noted that the ICAP requirement is set by ISO-NE, not the purchasing entities. FERC then described the FCM’s auction mechanism and explained that once a price is determined—i.e., the “market clearing price”—the ISO-NE “assesses each utility a capacity charge equal to that utility’s share of the installed capacity requirement multiplied by the market clearing price.” In a subsequent order responding to requests for rehearing, FERC stated that under this mechanism, the rates produced by the FCM auctions are “determined unilaterally by the ISO-NE tariff.” Further, because the auction applies to participants who did not agree to its adoption—that is, non-parties to the Settlement Agreement—FERC believed that the rates should not be considered “contract rates.”

Turning to the second question on remand, FERC began by noting that the FPA does not directly address how the “just and reasonable” standard should be applied or implemented in any particular context. As such, FERC believed that it “has discretion to consider and decide whether future challenges to rates should be evaluated under a more rigorous application of the statutory ‘just and reasonable’ standard of review.” FERC noted that it is not “bound to any one ratemaking formula,” and that nothing in the statute or case law precludes it from applying a standard like the “public interest” presumption when faced with challenges to rates other than contractually agreed-to rates, if relevant considerations make such application appropriate.

In the circumstances of Devon Power, FERC believed that it was proper to exercise its discretion and determined that it would apply a more rigorous application of the “just and reasonable” standard if the FCM auction rates were

170. Id. at P 2, 9, 13-14, 19; Devon Power LLC, 137 FERC ¶ 61,073, at P 21-28.
171. Devon Power LLC, 134 FERC ¶ 61,208, at P 13; Devon Power LLC, 137 FERC ¶ 61,073, at P 22.
172. Devon Power LLC, 134 FERC ¶ 61,208, at P 13; Devon Power LLC, 137 FERC ¶ 61,073, at P 22.
173. Devon Power LLC, 137 FERC ¶ 61,073, at P 21. “[T]he terms of purchase through the [FCM] auction are set unilaterally by tariff.” Id. at P 27.
174. Devon Power LLC, 134 FERC ¶ 61,208, at P 13; Devon Power LLC, 137 FERC ¶ 61,073, at P 25. FERC also noted that because utilities buying capacity in the FCM do not actually participate in the auction that sets the market clearing price, the buyers cannot be considered to be contracting with the sellers of capacity. Devon Power LLC, 134 FERC ¶ 61,208, at P 13; 137 FERC ¶ 61,073, at P 25. Responding to requests for rehearing, FERC stated that nothing in the auction could “be reasonably viewed as voluntary agreements of any sort between the sellers of the capacity and the ‘buyers’ in the auction.” Devon Power LLC, 137 FERC ¶ 61,073, at P 23.
175. Devon Power LLC, 134 FERC ¶ 61,208, at P 15; Devon Power LLC, 137 FERC ¶ 61,073, at P 30.
176. Devon Power LLC, 134 FERC ¶ 61,208, at P 2, 9, 14-17 (quoted language at P 2).
177. Id. at P 15 (citing Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 532 (2008)); Devon Power LLC, 137 FERC ¶ 61,073, at P 30 (citing Morgan Stanley, 554 U.S. at 532). Because “the statutory requirement that rates be ‘just and reasonable’ is obviously incapable of precise judicial definition, courts have long afforded great deference to [FERC] in its rate decisions.” Devon Power LLC, 137 FERC ¶ 61,073, at P 30 (citing Morgan Stanley, 554 U.S. at 532).
178. Devon Power LLC, 134 FERC ¶ 61,208, at P 16; Devon Power LLC, 137 FERC ¶ 61,073, at P 31.
challenged in the future. FERC stated that the application of the “public interest” presumption would provide for rate stability while satisfying the “just and reasonable” standard. Because the rates resulting from the FCM auctions would share certain market-based characteristics with freely-negotiated contracts, FERC could presume that such rates would be just and reasonable. Furthermore, the Settlement Agreement might not have been reached without the inclusion of the “public interest” presumption in § 4.C.

Finally, FERC stated that in other contexts it might be unjust and unreasonable to lock in a more stringent application of the “just and reasonable” standard, where there are not broader goals and purposes at issue (such as in Devon Power). In each inquiry, FERC would focus on the particular facts presented. In orders issued after the remand order in Devon Power, FERC has directed parties that have reached an uncontested settlement to modify their settlement agreements so as not to impose the “public interest” presumption on future challenges or changes proposed by FERC or non-settling parties. In these cases, FERC found that the individual circumstances “did not rise to the compelling level of those present in Devon Power so as to warrant binding [FERC] and non-settling third parties to a more rigorous application of the statutory ‘just and reasonable’ standard of

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179. Devon Power LLC, 134 FERC ¶ 61,208, at P 2, 9, 17-20; Devon Power LLC, 137 FERC ¶ 61,073, at P 32-36. FERC also determined that it would implement the “more rigorous” application of the “just and reasonable” standard to any future challenges to the transition payments. Devon Power LLC, 134 FERC ¶ 61,208, at P 21. FERC noted that the D.C. Circuit had upheld the reasonableness of the transition payments, id. (citing Maine PUC I, supra note 19, at 470-75); that there was a heightened need for the payments because of the swift transition to the FCM auctions, id.; and that the transition payments lasted only for a limited time, with the final payment made in May 2010, making it unlikely that the transition payments would become unjust and unreasonable over time, id. at P 22.

180. Id. at P 17 (citing Devon Power LLC, 115 FERC ¶ 61,340, at 62,335 (2006) (noting that rate stability is particularly important because the case “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”)); Devon Power LLC, 137 FERC ¶ 61,073, at P 33.

181. Id. at P 19; Devon Power LLC, 137 FERC ¶ 61,073, at P 32. FERC stated that the FCM auctions provide a market-based mechanism for valuing capacity and that the forward-looking nature of the FCM provides appropriate price signals to investors. Devon Power LLC, 134 FERC ¶ 61,208, at P 19; Devon Power LLC, 137 FERC ¶ 61,073, at P 32. In addition, the locational component of the FCM ensures that new infrastructure development is properly targeted. Devon Power LLC, 134 FERC ¶ 61,208, at P 19; Devon Power LLC, 137 FERC ¶ 61,073, at P 32-33.

182. Devon Power LLC, 137 FERC ¶ 61,073, at P 35. FERC noted that if the Settlement had not been reached, many of the deficiencies related to capacity shortages in New England might have persisted and litigation would have continued. Id.

183. Devon Power LLC, 134 FERC ¶ 61,208, at P 24; see Devon Power LLC, 137 FERC ¶ 61,073, at P 36-37.

184. Devon Power LLC, 134 FERC ¶ 61,208, at P 24; see also Devon Power LLC, 137 FERC ¶ 61,073, at P 37 (stating that “various proposed applications of the statutory ‘just and reasonable’ standard, including the Mobile-Sierra ‘public interest’ standard of review, [will be] on a case-by-case basis”).

FERC denied requests for rehearing of its Devon Power remand order on October 20, 2011. A petition for review of FERC’s orders was filed with the D.C. Circuit on October 31, 2011.

IV. RESPONDING TO NRG’S REMANDED QUESTIONS

As explained above in Part III, the Supreme Court found that neither the D.C. Circuit nor FERC had previously determined whether the FCM auction market clearing prices qualified as “contract rates” to which the Mobile-Sierra doctrine must apply. The Court remanded that issue to the D.C. Circuit. If the rates were not “contract rates,” the D.C. Circuit was directed to resolve the additional issue of whether FERC possessed the discretion to apply the Mobile-Sierra presumption to such rates. The D.C. Circuit, in turn, remanded these questions to FERC. FERC determined that the FCM auction rates were not “contract rates.” Nonetheless, FERC believed that it “has discretion to consider and decide whether future challenges to rates should be evaluated under a more rigorous application of the statutory ‘just and reasonable’ standard of review.”

FERC erred in its resolution of the first remanded question. FERC should have found that, for the 107 settling parties, the FCM auction rates are “contract rates” (in the Supreme Court’s parlance) because, for those parties, the auction rates are the result of a negotiated settlement. Therefore, the Mobile-Sierra public interest presumption should apply automatically to challenges to the rates paid by any of the 107 settling parties. This article explores below the characteristics of so-called “contract rates,” and suggests that it would be more accurate to describe a rate that is the result of successful negotiations and bargaining between the parties as a “bargained-for rate” (“BFR”). The term “contract rate,” particularly when

186. HIOS, supra note 185, at P 525; Petal Gas, 135 FERC ¶ 61,152 at P 17; So. LNG, 135 FERC ¶ 61,153 at P 24; Carolina Gas, supra note 185, at P 18; SCEG, supra note 185, at P 5; FP&L, supra note 185, at P 11; see also Devon Power LLC, 137 FERC ¶ 61,073, at P 36 (explaining cases).
187. Devon Power LLC, 137 FERC ¶ 61,073.
189. NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n, 558 U.S. 165, ___, 130 S. Ct. 693, 701 (2010). As noted above, see supra note 144, the rates at issue in NRG also included the transition payments.
190. Id.
191. Id.
192. Maine PUC II, supra note 161, at 759-60.
194. Devon Power LLC, 134 FERC ¶ 61,208, at P 2, 9, 14-17 (quoted language at P 2).
195. The term “negotiated rate” may seem more suitable, but that term already has a particular understanding among FERC and NGA-jurisdictional natural gas pipelines. See Natural Gas Pipeline Negotiated Rates Policies and Practices, 104 FERC ¶ 61,134 (2003), order on reh’g, 114 FERC ¶ 61,042, order denying reh’g, 114 FERC ¶ 61,304 (2006) (modifying FERC’s previous policy statement on negotiated rates); Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, 74 FERC ¶ 61,076, order on clarification, 74 FERC ¶ 61,194, order on reh’g, 75 FERC ¶ 61,024 (1996).
distinguished from a “tariff rate,” fails to recognize that parties often negotiate and bargain for rates that are ultimately set forth in tariffs. This article also provides examples of FERC-regulated agreements and explains whether such agreements are BFRs to which the public interest presumption should automatically apply. Finally, this article answers the question remanded by the Supreme Court in NRG, explaining that for the 107 settling parties, the FCM auction produces BFRs to which the Mobile-Sierra public interest presumption should automatically apply.

With respect to the second remanded question—whether FERC possesses discretion to apply a “more rigorous” application of the just and reasonable standard—this article suggests that FERC should not have determined in advance that it would apply a more rigorous application of the just and reasonable standard to future challenges of the auction rates paid by the eight non-settling participants.

A. Determining Whether the Mobile-Sierra Public Interest Presumption Should Apply Automatically

Public utilities under the FPA may either (1) “fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer”; or (2) unilaterally establish, and change at will, rates offered to prospective customers. The Mobile-Sierra public interest presumption automatically applies to challenges to the first set of agreements—which the Supreme Court in recent cases has referred to as “contract rates.” However, the public interest presumption does not (automatically) apply to the second set of agreements, which the Court has referred to as “tariff rates.”

Under the Mobile-Sierra doctrine, FERC “must presume that the rate set out in a freely negotiated wholesale-energy contract meets the ‘just and reasonable’ requirement” imposed by the FPA. The principal rationale for applying the presumption is that the parties who negotiated the rate are generally “sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a ‘just and reasonable’ rate as between the two of them.” The hallmark of these agreements—which this article shall refer to as “BFRs”—is that the agreement contains a rate which was the result of successful negotiation and bargaining between the parties. Thus, the Mobile-Sierra doctrine recognizes the importance of individual agreements containing BFRs and that the FPA’s regulatory scheme “contemplates abrogation of these agreements only in circumstances of unequivocal public necessity.”

198. Id.
199. See NRG, 558 U.S. at 698, Morgan Stanley, 554 U.S. at 531-33. Because the Court appears to have distinguished only between “contract rates” and “tariff rates,” presumably all agreements to which the public interest presumption does not automatically apply are “tariff rates.”
201. Id. at 479 (quoting Verizon Commc’ns Inc. v. FCC, 535 U.S. 467, 479 (2002)).
202. Id. at 534 (citing In re Permian Basin Area Rate Cases, 390 U.S. 747, 822 (1968)).
However, the other category of rates under the FPA’s regulatory scheme are subject to a public utility’s right to unilaterally establish, and change at will, its rates offered to prospective customers;\(^{203}\) in other words, unilateral rates. The Mobile-Sierra presumption does not (automatically) apply to such agreements. The Court described unilateral rate setting in a telecommunications case, \(\text{Verizon Communications, Inc. v. FCC}\), stating that under “the classic scheme of administrative rate setting at the federal level,” the “regulated utility companies [would set out their rates] in proposed tariff schedules,”\(^{204}\) such as those employed under the ICA.\(^{204}\) Interested parties would have an opportunity to comment, and the tariffs would be accepted by the regulatory agency so long as the rates contained therein were reasonable and not unduly discriminatory.\(^{205}\) The Court recognized the use of such tariffs of general applicability for the natural gas industry in \(\text{Memphis}\)\(^{206}\) and for the electric power industry (with respect to the transmission of electric power) in \(\text{New York v. FERC}\).\(^{207}\) Under the tariff-and-service agreement system, public utilities and natural gas pipelines adopt, subject to FERC approval, system-wide tariffs that establish the rates, terms, and conditions pursuant to which the utility company offers service to its customers, as those rates, terms, and conditions may be changed by the public utility or pipeline from time to time.\(^{208}\) Customers execute “service agreements” with public utilities or natural gas pipelines containing (or incorporating by reference) standardized language for terms and conditions of service and references to FERC-approved rates set forth in the tariff’s rate schedules of general applicability.\(^{209}\) When such agreements are challenged at FERC, or when a party proposes to change a rate unilaterally, FERC must perform its review without applying the Mobile-Sierra public interest presumption.\(^{210}\)

Thus, there are two types of regulated electric power agreements: (1) agreements that contain BFRs, established by mutual agreement of the parties, and therefore, to which the Mobile-Sierra public interest presumption automatically applies; and (2) agreements that contain rates established unilaterally by a public


\(^{204}\) \(\text{Verizon}\), 535 U.S. at 478. In \(\text{Mobile}\), the Court noted that the ICA required all rates to be the same for all shippers (customers) and that there was no provision under the ICA for the filing of individual contracts. \(\text{Mobile}\), 350 U.S. at 345. However, the NGA and FPA recognize the need for private contracts that contain various rates, terms, and conditions, and provide for the filing of such contracts. \(\text{Id.}\)

\(^{205}\) \(\text{Verizon}\), 535 U.S. at 478.


\(^{207}\) New York v. \(\text{Fed. Energy Regulatory Comm’}n\), 535 U.S. 1, 10 (2002) (noting that FERC had proposed and adopted the requirement “that public utilities owning and/or controlling facilities used for the transmission of electric energy in interstate commerce have on file tariffs providing for nondiscriminatory open-access transmission services”).

\(^{208}\) \(\text{Memphis}\), 358 U.S. at 115 n.8 (referring to the FPC’s Order No. 144, see supra note 89); \(\text{McGrew}, supra\) note 25, at 201. \(\text{See supra Part II.B.1 for a discussion of the tariff-and-service agreement system.}\)

\(^{209}\) \(\text{Memphis}\), 358 U.S. at 115 n.8. \(\text{See 18 C.F.R. § 35.10a(a) (2012)}\) (setting forth requirements for the inclusion of service agreements with public utility tariffs); \(\text{McGrew, supra}\) note 25, at 201.

\(^{210}\) \(\text{See Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.}, 554 U.S. 527, 532, 534 (2008); \(\text{Memphis}\), 358 U.S. at 114-15. FERC would review the rate under cost of service (or other) principles.
utility, often arising under the tariff-and-service-agreement method. The public interest presumption does not (automatically) apply to such agreements.

The Supreme Court has classified these two types of agreements as (1) “contract rates,” and (2) “tariff rates.” At first blush, this appears to be convenient shorthand; however, the Court’s terminology fails to recognize that the distinction between “contracts” and “tariffs” is not as clear as it once may have been. The term “tariff rate”—as distinguished from a “contract rate”—implies that any agreement that results from the tariff-and-service-agreement system cannot be the result of negotiation and bargaining and, therefore, cannot be automatically subject to the Mobile-Sierra presumption. Similarly, the use of the term “contract rate” suggests that the public interest presumption cannot automatically apply to agreements other than traditional bilateral agreements.

This article explains below that the Mobile-Sierra public interest presumption should automatically apply to many agreements that include rates contained in tariffs. Rates set forth in tariffs may, in fact, be the result of bargaining and negotiation between a public utility and its customers, particularly in the case of settlement agreements. Therefore, the public interest presumption should apply when these rates are challenged. Instead of “contract rates” and “tariff rates,” this article refers to BFRs and unilateral rates. These terms more accurately describe the characteristics of the rates, and recognize that the rates set forth in tariffs frequently are BFRs to which the public interest presumption should automatically apply.

B. BFRs vs. Unilateral Rates: Examples and Explanations

The Mobile-Sierra public interest presumption applies to FERC-jurisdictional agreements and rates that are the result of negotiation and bargaining between the parties, but the presumption does not apply to rates that are set unilaterally. This section provides examples that illustrate the difference between the two. The first examples discussed below are the most straight-forward: bilateral fixed-rate contracts and tariffs, classic examples of BFRs and unilateral rates, respectively. The next example is that of unilateral rates set forth in bilateral agreements. Finally, this section discusses unilateral rates that result in negotiated settlements.

1. Classic Bargained-For Rates (BFRs): Bilateral Fixed-Rate Contracts

The classic example of an agreement containing a BFR is a bilateral fixed-rate agreement between a utility company (seller) and its customer (buyer). Both Mobile and Sierra involved bilateral fixed-rate agreements containing BFRs. In each case, the seller attempted to change the BFR set forth in its existing bilateral contract. In Mobile, United Gas Pipe Line Company (“United”) entered into an
agreement to supply gas to Mobile Gas Service Corporation (“Mobile”) for a duration of ten years at a rate that was the equivalent of 10.7 cents per MCF (thousand cubic feet).214 However, prior to the expiration of that agreement, “United, without the consent of Mobile, filed new schedules with [FERC], which purported to increase the rate on gas to . . . 14.5 cents per MCF.”215 Similarly, in Sierra, Sierra Pacific Power Company (“Sierra”) had entered into an agreement to purchase electric power from Pacific Gas and Electric Company (“PG&E”) for a duration of fifteen years.216 However, prior to the expiration of the agreement, “PG&E, without the consent of Sierra, filed with [FERC] . . . a schedule purporting to increase its rate to Sierra by approximately 28%.”217

In both cases, the agreements at issue contained BFRs. United and Mobile, and PG&E and Sierra, respectively,218 negotiated and entered into agreements where the rate was the result of arms-length bargaining. These agreements were traditional bilateral contracts and could not be changed without the consent of both parties.219 Because the agreements contained BFRs, the public interest presumption applied, and neither United nor PG&E was permitted to unilaterally change the BFRs in the agreements.220 In neither case did the Court find that the public interest required the rates to be reformed.221

2. Classic Unilateral Rates: Tariffs

Other agreements contain unilateral rates. As the Supreme Court’s terminology suggests, the classic example of a unilateral rate is set forth in a tariff of general applicability. As discussed above, the use of tariffs for federally-regulated rates originated under the ICA.222 In Memphis, the Supreme Court recognized that FERC had directed natural gas pipelines to adopt tariffs for natural gas transmission.223 As part of the Order No. 888 series, initially issued in 1996, FERC required electric utilities to provide open access transmission service pursuant to a standardized, or “pro forma,” tariff, which was set forth in Appendix

215. Id. at 336.
216. Sierra, 350 U.S. at 352.
217. Id.
218. As the Supreme Court suggested in Morgan Stanley and Verizon, these four parties—United, Mobile, PG&E, and Sierra—were each “sophisticated businesses enjoying presumptively equal bargaining power,” and therefore should “be expected to negotiate a just and reasonable rate as between . . . them.” Morgan Stanley, 554 U.S. at 545 (citing Verizon Commc’ns, Inc. v. FCC, 535 U.S. 467, 479 (2002)).
219. See Mobile, 350 U.S. at 343 (stating that rates fixed by contract may only be changed by mutual agreement).
220. Mobile, 350 U.S. at 347 (finding that United’s unilateral filing of a new rate “was a nullity insofar as it purported to change the rate set by its contract with Mobile and that the contract rate remained the only lawful rate”); Sierra, 350 U.S. at 353 (concluding that PG&E’s unilateral filing of a new rate was not effective to change PG&E’s agreement with Sierra).
221. See Mobile, 350 U.S. at 347; Sierra, 350 U.S. at 353.
A tariff does not, on its own, constitute an agreement between the service provider and any customer. Customers must execute "service agreements" containing references to rates set forth in the tariff’s rate schedules and incorporating the tariff’s general terms and conditions. Under a classic tariff scheme, customers do not negotiate with the utility the rates for service. Instead, the customer must accept the rates set forth in the tariff. The customer is protected because the regulatory agency, such as FERC, has found that the rates listed in the tariff are just and reasonable and not unduly discriminatory. Tariff rates generally constitute a utility’s “going rates.” When the utility determines that the rates in the tariff no longer provide it with a sufficient return, the utility may unilaterally seek an increase by proposing a new rate to FERC. The rate goes into effect automatically so long as FERC does not find that the rate is not just and reasonable.

Because the tariffs apply to all of the utility’s customers and tariffs are not limited to a specific duration, a utility must retain the right to change its rates when it requires a greater return. FERC has recognized as much. In Order No. 888, FERC’s pro forma tariff for electric transmission service provides that the electric transmission provider retains the right to unilaterally propose rate changes and file those proposed rate changes with FERC pursuant to FPA section 205.

3. Unilateral Rates in Bilateral Agreements

Tariffs are not the only contractual instruments through which a unilateral rate may be established. Changes to a bilateral agreement ordinarily must be agreed to by both parties, but the FPA’s regulatory scheme permits parties to include in

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224. Order No. 888, supra note 95, 61 Fed. Reg. at 21,706-24. As opposed to natural gas pipelines, which were permitted to propose their own individual tariffs, FERC-regulated public utilities providing transmission service were required to adopt the pro forma tariff. Utilities were permitted to propose deviations from the pro forma tariff if those individual changes could be shown to be consistent with, or superior to, the pro forma tariff. Id. at 21,619.

225. Memphis, 358 U.S. at 115 n.8; see McGrew, supra note 25, at 188-89, 201.

226. See Memphis, 358 U.S. at 105, 110, 114.

227. Memphis, 358 U.S. at 115 n.8 (noting that FERC expressly contemplated that a seller would reserve for itself the right to change rates under section 4 of the NGAs).


229. Order No. 888, supra note 95, 61 Fed. Reg. at 21,710. The provision, section 9 of the pro forma tariff, provides, in relevant part:

Nothing contained in the Tariff or any Service Agreement shall be construed as affecting in any way the right of the Transmission Provider to unilaterally make application to the Commission for a change in rates, terms and conditions, charges, classification of service, Service Agreement, rule or regulation under Section 205 of the Federal Power Act and pursuant to the Commission’s rules and regulations promulgated thereunder.

The provision also provides that customers retain their rights to seek redress under FPA section 206:

Nothing contained in the Tariff or any Service Agreement shall be construed as affecting in any way the ability of any Party receiving service under the Tariff to exercise its rights under the Federal Power Act and pursuant to the Commission’s rules and regulations promulgated thereunder.

230. See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 343 (1956) (stating that rates fixed by contract may only be changed by mutual agreement).
their bilateral agreements a provision that would permit one or both parties to unilaterally establish a new rate that would supersede the existing contract rate—i.e., a Memphis clause, in essence permitting the parties to “contract out of the Mobile-Sierra presumption.” The new rate would be subject to FPA section 205(d)’s requirement that it be filed with FERC but can take effect without FERC action.

Two courts of appeals have identified another route by which two parties to a bilateral agreement can effectuate a rate change. Parties may include in their contracts a provision that would permit FERC to act pursuant to FPA section 206(a) and set aside the existing rate if the rate is found not to be just and reasonable and replace it with a new rate. Such a provision is different from a Memphis clause, which permits the seller to take unilateral action to increase rates, subject only to FPA section 205’s filing requirements. Such rate changes are effected solely by virtue of the utility’s action and do not require a FERC order.

Unlike a Memphis clause, a provision permitting rate changes pursuant to FPA section 206 requires FERC action to permit any proposed rate changes. When the contract requires a FERC order, the parties “have bargained for and obtained a contractual authorization for a section 206(a) proceeding with its just and reasonable standard of proof.” The Mobile-Sierra public interest presumption would not apply in this context because the parties contemplated that they would be permitted to seek rate changes. Because the rate change would be implemented

231. Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 534 (2008); Memphis, 358 U.S. at 110, 114-15; see also Papago Tribal Util. Auth. v. Fed. Energy Regulatory Comm’n, 723 F.2d 950, 953 (D.C. Cir. 1983) (noting that one of the ways that rates may be revised under FPA sections 205 and 206 is for the parties to “agree that new rates can be unilaterally and immediately imposed by the utility, subject, under § 205, to [FERC] suspension for no longer than five months, and to ultimate [FERC] disallowance if they are not just and reasonable”).


233. See Papago, 723 F.2d at 953; Louisiana Power & Light Co. v. Fed. Energy Regulatory Comm’n, 587 F.2d 671, 675-76 (5th Cir. 1979). One commenter has referred to Papago as one of a series of cases that belong to the “Middle Age of the Mobile-Sierra Doctrine.” Gentile, supra note 78, at 358-363.

234. Papago, 723 F.2d at 953; see Louisiana Power, 587 F.2d at 675-76. The Supreme Court in Mobile similarly observed that there was nothing in section 206 to prevent a utility “from furnishing to [FERC] any relevant information and requesting it to initiate an investigation on its own motion.”


237. See Louisiana Power, 587 F.2d at 676 (citing Mobile, 350 U.S. at 342).

238. Papago, 723 F.2d at 955 (citing Papago Tribal Util. Auth. v. Fed. Energy Regulatory Comm’n, 610 F.2d 914, 928 (D.C. Cir. 1979)); Louisiana Power, 587 F.2d at 675. The contract provision at issue in the Papago cases stated that after a specified period of time, the rates would remain in effect “unless and until changed by [FERC], with either party hereto to be free unilaterally to take appropriate action before [FERC] in connection with changes which may be desired by such party.” Papago, 723 F.2d at 953. In Louisiana Power, the provision stated that the agreements were “subject to amendment or alteration as a result of and in accordance with a valid applicable order of any governmental authority having jurisdiction hereof.” Louisiana Power, 587 F.2d at 675.

239. Louisiana Power, 587 F.2d at 676.
pursuant to FPA section 206(a), the rate would only apply prospectively from the date of the FERC order.\textsuperscript{240}

Thus, the courts recognize that the entities regulated by FERC have established several options through which to contractually provide for changes to rates in existing bilateral agreements. “The rule of \textit{Sierra}, \textit{Mobile} and \textit{Memphis} is refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid.”\textsuperscript{241}

\section*{4. Unilateral Rate Setting that Results in a Settlement: A Mixed Case}

Utilities’ tariffs generally include \textit{Memphis} clauses, permitting the utilities to unilaterally change rates set forth in the tariffs. Similarly, if a bilateral agreement contains a \textit{Memphis} clause, the utility may make a unilateral change to a rate set forth in that contract. In both cases, the utility must comply with the notice provisions of FPA section 205(d).\textsuperscript{242}

The prevalence of unilateral rate setting has caused FERC and utility practice with respect to FPA section 205 to evolve over time. The Supreme Court in \textit{Mobile} characterized the FPA as \textit{not} establishing a rate-changing procedure or a mechanism for initiating rate “proceedings.”\textsuperscript{243} FPA section 205 provides only for \textit{notice} to FERC of the rates established by the public utility and for \textit{review} by FERC of those rates.\textsuperscript{244} Notwithstanding \textit{Mobile}’s straightforward analysis of FPA section 205, that section’s notice requirement and opportunity for review by FERC have become similar to the “traditional” unilateral rate-setting model, where public utilities “seek approval” from FERC in order to implement a proposed rate.\textsuperscript{245} FPA section 205 has been described as “the key pattern for much of
[FERC’s] regulation: a public utility makes a proposed filing and [FERC] then acts to accept, reject, or modify the filing as necessary.\(^{247}\)

When a utility’s unilateral rate filing is contested by interested parties, FERC will frequently give the utility and the parties the opportunity to come to an agreement, or settlement, resolving differences in their positions. This article explains that when the utility and interested parties reach a settlement, through negotiation and bargaining, the rate they establish is a BFR. FERC’s rate filing procedures and settlement practice are summarized below. This article argues that because settlements are the result of negotiation and bargaining, the public interest presumption should automatically apply when a settlement is challenged. An example of a unilateral rate filing resulting in a settlement is provided below, including an explanation of when and how the Mobile-Sierra public interest presumption would apply.

\[a. \text{FERC’s Rate Filing Procedures}\]

FERC’s regulations implementing FPA section 205(c)\(^{248}\) and 205(d)\(^{249}\) are set forth at 18 C.F.R. Part 35.\(^{250}\) When a utility unilaterally submits a proposed rate increase to FERC, the utility initiates what is commonly referred to as a “rate case.”\(^{251}\) Consistent with FPA section 205(d), FERC’s regulations require proposed changes to be submitted to FERC not less than sixty days or more than 120 days prior to the proposed effective date of the change.\(^{252}\) FERC may waive the notice requirement if the proponent has shown good cause.\(^{253}\) FERC’s regulations require that the utility include the rationale and support for the increase, and to enable FERC and its staff to evaluate the merits of the “proposed” rate.\(^{254}\) A utility may need to file up to thirty-eight different cost-of-service statements.\(^{255}\)

After the utility makes its initial rate case filing, FERC will assign a new

\[\text{295} \text{ F.3d 1, 9 (D.C. Cir. 2002). In Atlantic City Elec. Co., the court characterized FPA section 205’s filing requirement as a statutory right to file changes to rates given to public utilities by Congress. Id.}\]

This characterization stands in stark contrast to Mobile’s pronouncement that section 205 bestowed no rights on utilities, but merely required utilities to provide notice of any rate change that they are permitted under their agreements to make. See Mobile, 350 U.S. at 339-40, 341-42.

\[247. \text{McGrew, supra note 25, at 21.}\]

\[248. \text{Section 205(c) requires effective rate schedules and contracts to be filed with FERC. 16 U.S.C.A. § 824d(c) (2010 & Supp. 2012).}\]

\[249. \text{Section 205(d) requires all changes in such schedules and contracts to be filed at least sixty days before the changes go into effect. 16 U.S.C.A. § 824d(d).}\]

\[250. \text{18 C.F.R. § 35.1-35.47. These regulations apply both to proposed changes to rates on file at FERC as well as to proposed revisions to non-rate terms and conditions of contracts and tariff provisions.}\]

\[251. \text{Part 35’s requirements also apply to the submission of BFRs to FERC pursuant to FPA section 205(d).}\]

\[252. \text{18 C.F.R. § 35.3(a).}\]

\[253. \text{Id.}\]

\[254. \text{See 18 C.F.R. § 35.13.}\]

\[255. \text{Id. at § 35.13(h) (setting forth Statements AA through BM) (note that there is no Statement AZ). These Statements seek information relating to, among other things, earnings, labor, materials, operation and maintenance expenses, taxes, fuel, depreciation on plant, construction, interest costs for debt, and other costs. Not all thirty-eight Statements will be appropriate for each rate case.}\]
docket number to that filing and issue a “notice of filing.” In the notice of filing, FERC will establish a deadline—usually twenty-one days after the date of filing—for interested parties to submit protests and motions to intervene in the docketed proceeding. Through protests, interested parties, such as customers or state commissions, may set forth their objections to the rate change proposed by the utility. If no party protests a proposed rate change, FERC is more likely to permit the proposed change to become effective on the proposed effective date. This practice is consistent with the traditional understanding of FPA section 205 expressed in Mobile, that section 205 is not a rate-change mechanism, but that otherwise valid rate changes can go into effect so long as the proponent provides the required notice to FERC and FERC has the opportunity to review the changed rate.

Although FERC may reject a filing “which patently fails to substantially comply” with FERC’s Part 35 requirements, FERC generally will issue an order permitting the proposed rate to become effective on the date requested, or suspending the filing (for up to five months) and permitting it to become effective subject to refund. The purpose of a suspension is to allow FERC to resolve issues of fact and to determine whether the proposed rate is just and reasonable, or what a just and reasonable rate would be. If the proposed rate is suspended, it is generally set for hearing—a trial-type proceeding—before an ALJ.

b. Settlement Practice at FERC

The settlement practice has been used by FERC to assist in managing its...
voluminous case load. Because FERC hearings can be time consuming and expensive, parties often resolve the issues set for hearing by settlement. FERC and the courts have determined that settlements are in the public interest because they provide for “voluntary, self-imposed resolutions” of issues that have been set for hearing. In dockets where FERC has set issues for hearing, it is common practice for FERC to hold the hearing in abeyance and direct the parties to engage in settlement discussions aided by the appointment of a settlement judge.

Parties may submit an offer of settlement at any time, but settlements must be submitted to and approved by FERC in order to take effect. After an offer of settlement is submitted to FERC, all participants in the docketed proceeding have the opportunity to file comments and reply comments on the settlement offer. Given the inherent nature of compromise involved in a settlement, a settlement offer may be considered a “black box” in which the settling parties agree to settle the case without specifying a rate of return. If the offer of settlement is uncontested, FERC will approve the settlement if it is fair and reasonable and in the public interest. Generally, if the settlement is uncontested, there are few procedural obstacles in the path to FERC approval.

Settlements are reached through negotiation and bargaining, and the customers who join the settlement have agreed to the rate set forth in the settlement agreement. As such, the Mobile-Sierra public interest presumption applies to

264. See Tex. E. Transmission Corp. v. Fed. Power Comm’n, 306 F.2d 345, 347 (5th Cir. 1962). FERC relies on its informal settlement procedure to resolve most of its rate cases. See e.g., Littlechild, supra note 9, at 2, 32. Professor Littlechild provides a detailed account of how the settlement process at FERC operates in practice with respect to natural gas pipeline rate cases. Another article has used a theoretical model and empirical data from natural gas cases to examine three issues: (1) how the settlement process is different from the formal adjudicatory process; (2) how settlement outcomes are different from outcomes in litigation; and (3) why participants settle rate cases. Zhongmin Wang, Settling Utility Rate Cases: An Alternative Ratemaking Procedure, 26 J. OF REG. ECON. 141 (2004).

265. See Pa. Gas & Water Co. v. Fed. Power Comm’n, 463 F.2d 1242, 1247 (D.C. Cir. 1972) (noting that the purpose of the Administrative Procedure Act’s informal settlement provision, 5 U.S.C. § 554(c), “is to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest”); McGrew, supra note 25, at 35.

266. See McGrew, supra note 25, at 36.


268. Id. § 385.602(f).

269. See McGrew, supra note 25, at 104; Littlechild, supra note 9, at 17; Wang, supra note 264, at 150.

270. 18 C.F.R. § 385.602(g).

271. See McGrew, supra note 25, at 36.

272. See United Mun. Distribs. Grp. v. Fed. Energy Regulatory Comm’n, 732 F.2d 202, 205 (D.C. Cir. 1984) (characterizing approval of a settlement “allowing [the settling parties] to have the benefit of their bargain”); see also Littlechild, supra note 9, at 17-19 (describing the settlement procedure as a negotiation process), 32 (stating that FERC’s “regulatory aim is to bring the parties into agreement, not to impose a preconceived settlement upon them” and “to facilitate the market process, not to replace it”); Wang, supra note 264, at 156, 161 (explaining that “[t]he settlement process is clearly a bargaining game” and that consenting parties to a settlement may “reap the benefits of their bargain”). Cf. McCaffrey, supra note 98, at 78-80 (noting that it can be argued that FERC should not “reject a settlement agreement negotiated by sophisticated parties to govern jurisdictional rates, terms and conditions”).
issues that are resolved through settlement. As discussed above in Part II, bargaining between parties is the hallmark of rates to which the public interest presumption must apply. Although proceedings to change rates may have commenced through a unilateral filing by a utility, the resolution through settlement transforms the unilateral rate “proposal” into a BFR. Settlements need not be unanimous and may be contested by participants of the proceeding. If the offer of settlement is contested, FERC may decide the merits of the contested issues if it determines that the record is adequately developed to do so. If the record is not adequate to make a determination on the

274. See Dominion Transmission, Inc. v. Fed. Energy Regulatory Comm’n, 533 F.3d 845, 853-56 (D.C. Cir. 2008) (finding that FERC was not permitted to modify the terms of a settlement agreement because the Mobile-Sierra public interest presumption was not overcome); Maine PUC I, supra note 19, at 476 (stating that “when the parties to a rate dispute reach a contractual settlement, FERC must enforce the terms of the bargain unless the public interest requires otherwise”); Union Elec. Co. v. Fed. Energy Regulatory Comm’n, 890 F.2d 1193, 1194-95 (D.C. Cir. 1989) (finding that the Mobile-Sierra doctrine’s pro-contract policy “encompasses settlement agreements”); Cities of Newark v. Fed. Energy Regulatory Comm’n 763 F.2d 533, 546-47 (3d Cir. 1985) (noting that the “policies underlying the Mobile-Sierra doctrine apply with equal force to settlement agreements”); Cities of Bethany v. Fed. Energy Regulatory Comm’n, 727 F.2d 1131, 1139 (D.C. Cir. 1984) (“[T]he policies . . . in Mobile and Sierra support treating a settlement agreement” as permissible under FPA section 205(b)’s anti-discrimination requirement, even when other participants do not agree to the settlement and pay different rates). Cf. Tewksbury, Lim & Su, supra note 98, at 444 (“If a settlement package includes a fixed-rate contract or provides that the settling parties will execute a fixed-rate contract upon approval of the settlement, then the contract rate results directly from the provisions of the settlement.”). 275. It has been suggested that “negotiated settlements have generally led to better information flows and understanding in the industry, and to better relationships between the company and customers.” Littlechild, supra note 9, at 24. 276. See 18 C.F.R. § 385.602(h). A key difference between settlements in administrative proceedings and those in civil litigation is that a settlement “do[es] not have to be consented to by all parties to the [administrative] proceeding, and if settlements are found to be ‘equitable by the regulatory agency, then the terms of the settlement form the substance of an order binding on all parties, even though not all are in accord as to the result.’” Mary Ann Walker, Settlement Practice at the FERC: Boom or Bane, 7 ENERGY L. J. 343, 344 (1986) (quoting Pa. Gas & Water Co. v. Fed. Power Comm’n, 463 F.2d 1242, 1247 (D.C. Cir. 1972). Some commenters have argued that regulatory commissions should not accept contested or non-unanimous settlements. See, e.g., Stefan H. Krieger, Problems for Captive Ratepayers in Nonunanimous Settlements of Public Utility Rate Cases, 12 YALE J. ON REG. 257 (1995). But see Alan P. Buchmann & Robert S. Tongren, Nonunanimous Settlements of Public Utility Rate Cases: A Response, 13 YALE J. ON REG. 337 (1996) (arguing that requiring unanimous settlements is neither necessary nor conducive to reasonable regulation). Other observers suggest that contested, or non-unanimous, settlements are abnormal, and that the uncertainty about the outcome and the cost and burden of carrying a case alone may make contested settlements unattractive to objecting parties. See Littlechild, supra note 9, at 19. 277. 18 C.F.R. § 385.602(h); see Pa. Gas & Water Co., 463 F.2d at 1247-52 (finding that FERC may approve a non-unanimous rate settlement proposal and terminate proceedings over the objection of a participant in the proceeding). In Trailblazer Pipeline Co., 85 FERC ¶ 61,345 (1998), order on r e h g, 87 FERC ¶ 61,110 (1999), FERC explained the standards it would use to rule on contested offers of settlement. If FERC concludes that a contested settlement provides an acceptable outcome for a case, it must next determine which of four approaches it will employ to address each of the contested issues on the merits: (1) FERC shall render a binding merits decision on each contested issue; (2) FERC shall approve the settlement based on a finding that the overall settlement as a package is just and reasonable; (3) FERC shall determine that the benefits of the settlement outweigh the nature of the objections, and the interests of the contesting party are too attenuated; or (4) FERC shall approve the settlement as
merits of a contested issue, FERC may provide for a limited hearing to supplement the record so that FERC may make such findings on the merits.\footnote{278} FERC may choose to sever contested issues or contesting parties, approving the uncontested portion of the settlement or approving the settlement as between consenting parties, if it finds it appropriate to do so.\footnote{279} However, most offers of settlement contain “non-severability” clauses, which require that the offer of settlement be approved as a package and that issues may not be severed.\footnote{280}

A settlement may be reached among all or some of the participants to the proceeding and may resolve all or some of the issues between the parties. FERC may impose aspects of a non-unanimous settlement on participants that contested the settlement.\footnote{281} The Mobile-Sierra public interest presumption should apply when an issue resolved by the settlement is challenged,\footnote{282} but not when an aspect of the settlement that was imposed on a contesting participant is challenged. This may be administratively inconvenient—where the public interest presumption would apply to a challenge to rates paid by settlement parties, but would not apply to a challenge to identical rates paid by a contesting participant. However, it recognizes that the parties to a settlement successfully negotiated and agreed to the rates and issues set forth in the settlement agreement, but that a participant contesting part (or all) of a settlement did not. It is also consistent with FERC’s practice of severing contesting parties in order to effectuate a settlement among the consenting parties.\footnote{283} Courts of appeals have approved this practice, even though it results in participants to the same proceeding paying different rates.\footnote{284} Where a rate proceeding may result in participants paying different rates (because FERC may approve a settlement for parties consenting to the settlement agreement, but contesting participants would pay an administratively determined rate), it follows uncontested for the consenting parties, and sever the contesting parties to allow them to litigate the issues raised. \textit{Id.}

that there may be differing applications of the just and reasonable standard when rates established through a settlement are challenged. This is because the Mobile-Sierra public interest presumption would apply when rates paid by settling parties are challenged, but not when the rates paid by participants on whom the settlement rates were imposed by FERC are challenged.

c. Examples

Some examples may help to illustrate these principles. Suppose that Utility Co. has an electric tariff on file with FERC. The tariff contains three rate schedules for different electric services: Rates Schedules A, B, and C. Utility Co.’s tariff includes a Memphis clause, permitting Utility Co. to make unilateral rate changes to the rates set forth in Rate Schedules A, B, and C. Utility Co. does so, and submits the proposed rates to FERC on January 2, 2011, requesting an effective date of March 3, 2011—sixty days later. After FERC issues a notice of filing, wholesale customers of Utility Co.—W, X, and Y—file motions to intervene and protest to the proposed rate increases. Z, a retail customer of W, also files a motion to intervene and protest. State Utility Commission intervenes and protests as well. FERC issues an order accepting the rates subject to refund, but suspending the effectiveness of the proposed rates for five months—until August 3, 2011—and instituting hearing procedures to investigate the justness and reasonableness of the proposed changes to the rates. However, FERC holds the hearing in abeyance and directs the parties to engage in settlement discussions.

After months of negotiations and bargaining, Utility Co. submits an offer of settlement to FERC with respect to Rate Schedules A and B. For Rate Schedule A, all parties—Utility Co., W, X, Y, Z, and State Utility Commission—have compromised and agreed to a smaller increase in the rate than proposed by Utility Co. For Rate Schedule B, Utility Co. has reached an agreement with W, X, and Z for a smaller rate increase than that originally proposed; however, Y and State Utility Commission object to the amount of the increase and do not join the settlement agreement with respect to Rate Schedule B. The settlement agreement stipulates that Utility Co. will not seek a rate increase with respect to Rate Schedules A and B for a period of five years after the effectiveness of the settlement rates—that is, August 3, 2016. However, Utility Co. will be permitted to unilaterally seek a rate increase that may take effect no earlier than August 3, 2016. In addition, the settlement agreement states that the Mobile-Sierra presumption shall apply to any challenges to, or attempts to change, the rates for Rate Schedules A and B during the five year rate moratorium. Finally, no agreement is reached with respect to Rate Schedule C.

After the offer of settlement is presented to FERC, FERC issues an order...
finding that the rates for Rate Schedules A and B are fair and reasonable and in the public interest, notwithstanding the objections by Y and State Utility Commission with respect to Rate Schedule B.288 Therefore, the rates set forth in the settlement agreement for Rate Schedules A and B take effect on the date contemplated by the five-month suspension—that is, August 3, 2011. FERC sets Rate Schedule C for hearing, and the parties proceed with trial-type hearing procedures before an ALJ to determine a just and reasonable rate. At the conclusion of the hearing, the ALJ determines that a rate increase is appropriate, but that the increase should be smaller than that proposed by Utility Co.289 In a subsequent order, FERC approves of the ALJ’s findings, and the new rate for Rate Schedule C goes into effect on August 3, 2011.

Suppose further that in July 2013, Utility Co. decides to seek a higher rate for services provided under Rate Schedule A and submits a proposed rate increase to FERC on July 15, 2013. FERC issues an order finding that Utility Co.’s rate filing is a legal nullity.290 The rate for Rate Schedule A constitutes a BFR, agreed to in the settlement by Utility Co. and all interested parties.291 Therefore, Utility Co. and the parties only possess the rights that are enumerated in the settlement agreement with respect to Rate Schedule A.292 Utility Co.’s July 15 filing is similar to the proposed rate increase in Mobile, because Utility Co. does not have authority under the settlement agreement to unilaterally change the rate until August 3, 2016.293 Because the Mobile-Sierra public interest presumption applies to Utility Co.’s proposed rate change, FERC may only permit the rate to be changed (prior to settlement, the ALJ determines that the settlement is uncontested, the ALJ shall certify to FERC that the offer of settlement is uncontested. See 18 C.F.R. § 385.602(g)(1). An uncontested offer of settlement may be approved by FERC upon a finding that the settlement appears to be fair and reasonable and in the public interest. See id. § 385.602(g)(3). If the ALJ determines that the offer of settlement is contested, either in whole or in part, the ALJ may certify all or part of the offer to FERC. See id. § 385.602(h)(2). If any part of the settlement is contested, it may be certified to FERC only if: (1) there are no genuine issues of material fact; or (2) the parties concur that the ALJ may omit preparation of an initial decision, and the record contains substantial evidence from which FERC may reach a reasoned decision on the merits of the contested issue. See id.

288. See Pennsylvania. Gas & Water Co. v. Fed. Power Comm’n, 463 F.2d 1242, 1247-52 (D.C. Cir. 1972) (finding that FERC may approve a rate settlement proposal and terminate proceedings over the objection of a participant in the proceeding, so long as there are no questions of material fact). In this situation, the ALJ could have certified as uncontested the offer of settlement as it relates to the rates in Rate Schedule A, severed from the contested offer of settlement with respect to Rate Schedule B. See 18 C.F.R. § 385.602(b)(2)(iv).

289. Subject to certain exceptions, at the conclusion of a hearing the ALJ who presides over the hearing shall prepare a written initial decision, which shall be certified to FERC with a copy of the record from the hearing. Id. at § 385.708.


292. See Mobile, 350 U.S. at 343-44, 347.

293. See id. at 347.
If the change is required by the public interest. FERC rejects the proposed change to the rate.

Suppose that the following year, X and Y file complaints at FERC against Utility Co., alleging that the rates in Rate Schedule B are excessive. State Utility Commission believes that the rates paid by W under Rate Schedule B, some of which are passed on in retail rates to W’s retail customer Z, are too high, resulting in excessive retail rates collected by W from Z. State Utility Commission also files a complaint with FERC against Utility Co., arguing that W is paying too much under Rate Schedule B. FERC consolidates all of these complaint proceedings because all complainants are challenging the rates in Rate Schedule B. In the consolidated proceedings, FERC must first determine whether the Mobile-Sierra public interest presumption automatically applies.

The public interest presumption must apply to the challenge made by X because X’s rate is a BFR. The rate paid by X to Utility Co. is a BFR because Utility Co. and X agreed to that rate in the settlement agreement; therefore, FERC must apply the Mobile-Sierra public interest presumption to the challenge by X.

Although the public interest presumption must apply to the challenge made by X, that is not the case with respect to the challenge made by Y. Y did not agree to the rate set forth in the settlement agreement for Rate Schedule B. Therefore, the rate paid by Y cannot be considered a BFR (even though it is the same rate paid by X). Because Y’s rate is not a BFR, FERC would not automatically apply the public interest presumption to the challenge made by Y.

There may appear to be a conundrum: both X and Y pay the same rate under Rate Schedule B, yet X’s rate is a BFR and Y’s rate is not. However, this outcome is consistent with the principles underlying the Mobile-Sierra presumption—namely, that parties who have negotiated and agreed to a rate are bound to it. A BFR is established when both parties mutually agree to the rate, as when X and Utility Co. joined the settlement agreement, and X bargained away the right to challenge its rate under Rate Schedule B prior to August 3, 2016. However, Y struck no such bargain and should not be bound by a contract term to which it did not agree. This may be administratively inconvenient for FERC, but it recognizes that each of a utility company’s customers, including customers taking service pursuant to a tariff, have separate contractual agreements with the utility.

In the case of the complaint filed by State Utility Commission, FERC must apply the Mobile-Sierra presumption to that challenge. Although State Utility


295. The rate set forth in the settlement agreement remained the only lawful rate. See Mobile, 350 U.S. at 347.

296. See Dominion Transmission, 533 F.3d at 853-56; Maine PUC I, supra note 19, at 476; Union Elec. Co., 890 F.2d at 1194-95; Cities of Newark, 763 F.2d at 546-47; Cities of Bethany, 727 F.2d at 1139.

297. See Dominion Transmission, 533 F.3d at 853-56.

Commission did not join the settlement with respect to Rate Schedule B, State Utility Commission is not a customer of Utility Co. under Rate Schedule B. Therefore, State Utility Commission cannot argue that it is paying excessive rates under Rate Schedule B. Instead, State Utility Commission’s complaint argues that the rates paid by W for service under Rate Schedule B are too high, in turn, resulting in excessive retail rates paid by Z to W. In NRG, the Supreme Court determined that the application of the public interest presumption does not depend on the identity of the challenger.299 In this example, the Mobile-Sierra presumption would apply to State Utility Commission’s challenge of W’s rate because W was a party to the settlement agreement.300 Therefore, under NRG, FERC and State Utility Commission must presume that W’s rate is just and reasonable because W’s rate is the result of negotiations that ended in settlement.301

C. Addressing NRG’s Issues on Remand

On remand, FERC was directed to determine whether the FCM auction market clearing prices should be considered “contract rates” (or BFRs) to which the Mobile-Sierra public interest presumption must apply.302 And, if not, FERC was also directed to answer whether it possesses the discretion to apply the Mobile-Sierra presumption to such rates.303 FERC determined that the rates were not BFRs.304 Nonetheless, FERC believed that it “has discretion to consider and decide whether future challenges to rates should be evaluated under a more rigorous application of the statutory ‘just and reasonable’ standard of review.”305

FERC’s finding as to the first question was in error. The FCM auction produces BFRs. A BFR results from freely negotiated contracts,306 including settlement agreements.307 The ISO-NE’s FCM is a unique creation that does not fit squarely within the traditional seller-purchaser contractual rubric. However, the

300. See Dominion Transmission, 533 F.3d at 853-56; Maine PUC I, supra note 19, at 476; Union Elec. Co., 890 F.2d at 1194-95; Cities of Newark, 763 F.2d at 546-47; Cities of Bethany, 727 F.2d at 1139.
301. See NRG, 558 U.S. at ___, 130 S. Ct. 701; Maine PUC II, supra note 161, at 759-60. As noted above, see supra note 144, the rates at issue in NRG also included the transition payments.
302. NRG, 558 U.S. at ___, 130 S. Ct. 701; Maine PUC II, supra note 161, at 759-60. As noted above, see supra note 144, the rates at issue in NRG also included the transition payments.
303. Devon Power LLC, 134 FERC ¶ 61,208, at P 2, 9, 14-17 (2011); Devon Power LLC, 137 FERC ¶ 61,073, at P 21-28 (2011). Cf. Tewksbury, Lim & Su, supra note 98, at 445 n.89 (noting that there was “considerable disagreement about whether the [FCM] auctions at issue in NRG resulted in contract rates”).
304. Devon Power LLC, 134 FERC ¶ 61,208, at P 2, 9, 14-17 (quoted language at P 2).
principles outlined above can be used to determine the appropriate resolution to the Supreme Court’s questions in NRG.

The FCM auction mechanism was set forth in the Settlement Agreement, which was agreed to by 107 of 115 participants in the Devon Power proceeding. The Settlement Agreement was reached through painstaking negotiation and bargaining, and the settling parties agreed to the use of the auction mechanism to determine the price for capacity. The results of the annual auctions are akin to the prices produced through the application of “formula rates.” With a formula rate, “the formula itself is the rate.” As a utility’s costs fluctuate over time, the costs can be plugged in to the formula to derive the resulting rate charged to customers. When FERC approves a formula rate, it is approving the formula, not the utility’s inputs into the formula or the charges resulting from the application of the inputs into the formula. One court of appeals has stated that a formula rate in a bilateral contract functions in many respects as a cost-of-service tariff. Rather than specifying a rate, it elucidates a formula for calculating a rate. The formula uses cost variables, or categories of costs, to measure most components. As the utility’s costs in each of these categories fluctuate, its charges vary proportionately, without the need for a rate change filing [pursuant to FPA section 205].

As with a traditional formula rate, the Settlement Agreement in Devon Power and the ISO-NE tariff did not state what the auction clearing prices would be; rather, the Settlement Agreement established the FCM, under which the ISO-NE holds annual price-setting auctions for capacity. The individual auction processes provide the inputs to the “formula” that result in the market clearing prices, i.e., the rates. Just as with formula rates, approval by FERC of the Settlement Agreement permitted the auction mechanism to go into effect.

The auction mechanism was established through a settlement that was reached by 107 parties in Devon Power. As such, the FCM’s auction process and the prices it produces constitute BFRs for those 107 parties. The Mobile-Sierra public interest presumption should apply to challenges to capacity prices derived from FCM auctions paid by the 107 settling parties.

With respect to the rates paid by the eight parties that did not join the settlement in Devon Power (if they are electric utilities that need to acquire

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309. Id.
310. See McGrew, supra note 25, at 185.
311. See id. at 186.
313. See Devon Power LLC, 115 FERC ¶ 61,340, at 62,304, 62,306-08.
314. Id. at 62,306.
315. See Dominion Transmission, 533 F.3d at 853-56; Maine PUC I, supra note 19, at 476; Union Elec. Co., 890 F.2d at 1194-95; Cities of Newark, 763 F.2d at 546-47; Cities of Bethany, 727 F.2d at 1139. But cf. Tewksbury, Lim & Su, supra note 98, at 447 (suggesting that the FCM auction rates are not BFRs because they are not traditional fixed-rate contracts).
316. See Dominion Transmission, 533 F.3d at 853-56; Maine PUC I, supra note 19, at 476; Union Elec. Co., 890 F.2d at 1194-95; Cities of Newark, 763 F.2d at 546-47; Cities of Bethany, 727 F.2d at 1139.
capacity), the Mobile-Sierra public interest presumption would not (automatically) apply to challenges to their rates. Purchasers that did not join the Settlement Agreement must pay a price for capacity that was not the result of those purchasers’ negotiations and assent. Therefore, the FCM auction mechanism and the resulting prices are not BFRs with respect to those purchasers.

It should be noted that if the challenger is not a capacity purchaser—for example, a state utility commission—the challenge is, inherently, to the price paid by some purchaser for capacity. As NRG made clear, application of the presumption does not depend on the identity of the challenger.317 Rather, the inquiry turns on the nature of the agreement challenged. If a state utility commission challenges the price for capacity paid by a purchaser who was a party to the Settlement Agreement, then FERC should presume that the purchaser’s rate was just and reasonable because the rate and the auction mechanism that led to the rate were the result of fair negotiations and voluntary agreement.318 If the challenge is to a price paid by a purchaser that was not a party to the Settlement Agreement, the public interest presumption would not automatically apply.

FERC’s orders on remand did not consider that the Settlement Agreement imbues the auction rates with the characteristics of BFRs. Instead, FERC focused on the FCM auction itself, finding that it produced rates that are “determined unilaterally by the ISO-NE tariff” because the ISO-NE assesses the purchasing utilities their respective capacity charges based on the FCM auction’s market clearing prices.319 FERC ignored the role of the settling parties in establishing the FCM. Although the ISO-NE’s role in assessing capacity charges is set forth in the ISO-NE’s tariff, it does not necessarily follow that the capacity charges constitute unilateral rates. When a utility offers services under a traditional tariff, the utility assesses charges to its customers. However, as explained above, not every rate set forth in a tariff is a unilateral rate. When a rate is the result of a successful settlement—that is, negotiation, bargaining, and mutual agreement—the rate is a BFR.320 In Devon Power, 107 parties agreed to the FCM and its auction mechanism.321 Therefore, the capacity charges that result from the FCM’s auction paid by those 107 parties are BFRs.322

In the order addressing requests for rehearing, FERC noted that “ISO-NE’s tariff does not create a contractual obligation by buyers to purchase capacity from...
sellers of that capacity.” This does not mean that the capacity charges are unilateral rates. With an ordinary tariff, the existence of the tariff does not obligate any entity to become a customer of the utility or to take particular services or purchase particular quantities. However, if a customer purchases a product or service offered through a tariff, the customer is obligated to pay the price set forth in the tariff. Here, utilities in New England must procure certain quantities of capacity. If the utilities do not self-supply the capacity or procure it from another source, they must purchase capacity through the FCM. Although the auctions do not create an obligation for the utilities to purchase, the auctions set the prices for utilities purchasing capacity through the FCM. If the utilities purchase capacity through the FCM, they are obligated to pay the price set through the auction process, just as a customer under a traditional tariff is obligated to pay the rate set forth in the tariff or the rate derived through a formula set forth in the tariff. Whether the rates are BFRs turns on whether the rate was the result of purely unilateral rate setting or through negotiations and bargaining.

Turning to the second question on remand, FERC was directed to answer, if the FCM auction rates were not BFRs, whether FERC “ha[s] discretion to treat them analogously” to BFRs. FERC stated that it “has discretion to consider and decide whether future challenges to rates should be evaluated under a more rigorous application of the statutory ‘just and reasonable’ standard of review” and that future challenges to the FCM’s auction prices would be subject to a “more rigorous application.” In reaching this decision, FERC relied on the fact that the rates resulting from the FCM auctions would have certain market-based characteristics, similar to freely-negotiated contracts to which the Mobile-Sierra public interest presumption must apply. FERC also noted that a more rigorous application of the just and reasonable standard would promote rate stability, an important issue because of the variable nature of capacity revenues and the effect of that instability on generating units in New England.

It should first be noted that, had FERC answered the first remanded question properly, it would not have needed to address the second remanded question with respect to the rates paid by the 107 parties to the Settlement Agreement because challenges to those rates should be automatically subject to the Mobile-Sierra public interest presumption. However, the question remains whether a more stringent application of the just and reasonable standard—such as the public interest presumption—can and should be applied to challenges to the rates paid by non-settling parties.

FERC’s affirmative answer may be considered both incorrect and premature.

323. Devon Power LLC, 137 FERC ¶ 61,073, at P 24.
324. See Devon Power LLC, 115 FERC ¶ 61,340, at 62,304.
326. NRG, 558 U.S. at ___, 130 S. Ct. at 701; Maine PUC II, supra note 161, at 759-60 (directing FERC to answer “why, if the auction rates are not [BFRs], they are entitled to Mobile-Sierra treatment”).
327. Devon Power LLC, 134 FERC ¶ 61,208, at P 2, 9, 14-17 (quoted language at P 2).
328. Id. at P 19; Devon Power LLC, 137 FERC ¶ 61,073, at P 32.
FERC was incorrect insofar as it purported to determine that a more rigorous application of the just and reasonable standard will automatically apply to future challenges to the rates paid by non-settling parties. The automatic application of the Mobile-Sierra public interest standard to BFRs is appropriate because it respects the intent of the parties that negotiated the agreement. However, where the challenged rate is not a BFR, as would be the case for rates paid by the non-settling parties in Devon Power, the rationale underlying the application of the Mobile-Sierra public interest presumption does not apply. In Devon Power, the non-settling participants did not agree to the FCM auction, and did not agree to the application of the public interest presumption to challenges to their rates. In essence, FERC is attempting to bind the non-settling participants to the terms of the Settlement Agreement. In this way, FERC’s response to the Supreme Court’s second remand question may be considered to be incorrect.

FERC’s response is also premature because FERC should determine whether a “more rigorous” application of the just and reasonable standard should apply to a challenge of an FCM auction rate paid by a non-settling participant at the time such a challenge is brought. Although FERC is correct that the FPA does not directly address how the “just and reasonable” standard should be applied or implemented in any particular context, FERC can better determine at the time the challenge is made whether a more rigorous application of the just and reasonable standard is appropriate. In the orders on remand, FERC has offered reasons why it believes that challenges to the FCM auction results should be subject to application of the public interest presumption, including challenges to rates paid by non-settling parties. There may be situations in which it is appropriate for FERC to apply a presumption to challenges of rates that are not BFRs; however, an examination of the possible application of the public interest presumption outside of the BFR context is beyond the scope of this article. Because the auction rates paid by non-settling participants are not BFRs and application of a presumption would not

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330. See id. at P 17-25. It is not clear whether FERC considers the more rigorous application of the just and reasonable standard that would be applied in FERC’s discretion to be Mobile-Sierra’s “public interest” presumption, or a different (yet similar) application. One set of commenters believes that FERC has drawn distinctions between the public interest presumption and the new discretionary application. Cf. Tewksbury, Lim & Su, supra note 98, at 451-52.

331. FERC believed that the Settlement Agreement might not have been reached without the inclusion of the public interest presumption in section 4.C. Devon Power LLC, 137 FERC ¶ 61,073, at P 35. This purported rationale should be inapposite because the FCM auction produces BFRs for the parties to the Settlement Agreement; as such, the Mobile-Sierra public interest presumption would apply automatically to challenges, regardless of whether a Mobile-Sierra clause was included in the Settlement Agreement.

332. See Devon Power LLC, 134 FERC ¶ 61,208, at 62,048 (Norris, dissenting in part) (“[I]t is not reasonable to . . . apply the more stringent public interest form of the just and reasonable standard dictated by the [public interest] presumption to situations where a contract [or BFR] is not present.”).

333. Devon Power LLC, 134 FERC ¶ 61,208, at P 15; Devon Power LLC, 137 FERC ¶ 61,073, at P 30.

334. FERC stated that the FCM auction rates would be presumed to be just and reasonable because the rates would share certain market-based characteristics with freely-negotiated contracts. Devon Power LLC, 134 FERC ¶ 61,208, at P 19; Devon Power LLC, 137 FERC ¶ 61,073, at P 32.

335. For a more expansive discussion of FERC’s authority to apply a more rigorous application of the just and reasonable standard, see Tewksbury, Lim & Su, supra note 98, at 446-58.
be based on the negotiations and bargaining of the parties, FERC should not have determined in advance whether a presumption shall apply to future challenges of those rates. In this regard, FERC’s answer to the second remanded question may be considered premature.

V. PRACTICAL CONSEQUENCES OF FERC’S ORDERS ON REMAND IN DEVON POWER LLC

It may at first appear that there is little practical difference between FERC’s resolution of the issues remanded by the Supreme Court and the proposed resolution of those issues put forth by this article. In Devon Power, FERC found that even though the FCM auction rates were not BFRs (or “contract rates”), FERC could exercise its discretion to approve a settlement provision that would impose the Mobile-Sierra public interest presumption on future challenges to the auction results. On the other hand, this article has explained that, for the parties to the Settlement Agreement, the auction results are BFRs and the Mobile-Sierra public interest presumption should apply to challenges to the rates paid by the 107 settling parties; however, the public interest presumption would not automatically apply to challenges to the rates paid by the eight participants that objected to the Settlement Agreement. Thus, with respect to the participants in the Devon Power proceeding, FERC and this article agree that the Mobile-Sierra presumption should apply to future challenges to the rates paid by the 107 parties to the Settlement Agreement. FERC has also determined in advance that it will apply the public interest presumption to future challenges to auction prices paid by the eight non-settling parties, while this article suggests that any such determination should be made if and when such a challenge arises.

Notwithstanding the practical similarity between the outcome for the participants in Devon Power and the outcome that would arise following the analysis in this article, FERC’s Devon Power precedent will have significant consequences on regulated utilities. The impact of FERC’s determination will be felt most significantly in proceedings that are resolved through settlement. The Settlement Agreement in Devon Power resolved a unique situation. Routine changes to rates set forth in tariffs and bilateral agreements will arise more frequently than issues associated with the New England capacity market that was the subject of the controversy in Devon Power.

Since issuing its order on remand in Devon Power, FERC has addressed the inclusion of so-called “Mobile-Sierra clauses” in uncontested settlement agreements resolving proceedings to change rates set forth in tariffs several times. In the post-Devon Power cases, FERC found that because the rates at

336. Devon Power LLC, 134 FERC ¶ 61,208, at P 2, 9, 14-17.
338. See HIOS, supra note 185; Petal Gas Storage, LLC, 135 FERC ¶ 61,152 (2011); Southern LNG Co., 135 FERC ¶ 61,153 (2011); Carolina Gas, supra note 185; SCEG, supra note 185; FP&L, supra note 185. A Mobile-Sierra clause states that future challenges to the terms of the agreement shall be
issue were set forth in tariffs, the rates were not BFRs, even though the proceedings were resolved through settlement. Although the settling parties could impose the Mobile-Sierra public interest presumption on future challenges to the rates paid by the settlement parties, FERC directed the settlement parties to modify their settlement agreements so as not to impose the “public interest” presumption on future challenges or changes proposed by FERC acting sua sponte or non-settling parties. In these cases, FERC found that the individual circumstances in those cases “did not rise to the compelling level of those present in Devon Power so as to warrant binding [FERC] and non-settling third parties to a more rigorous application of the statutory ‘just and reasonable’ standard of review.”

Based on the analysis set forth above, FERC has erred in these cases by finding that the settlement agreements produced unilateral rates (or “tariff rates”) rather than BFRs (or “contract rates”). A voluntary settlement among the participants of a FERC proceeding is the result of negotiations and bargaining, even though those negotiations did not take place prior to the filing of the proposed rate change. Therefore, rates set forth in settlement agreements are BFRs for the customers that have joined the settlement agreement, and the Mobile-Sierra public interest presumption should apply to challenges to those BFRs. However, the rates would not be BFRs for entities that were not parties to the settlement agreement.

For example, in South Carolina Elec. & Gas Co. (“SCEG”), SCEG submitted to FERC a settlement agreement that was the result of negotiations between SCEG and four customers. As described above, FERC stated that the settlement agreement related to a tariff rate—not a BFR—and that FERC would use its discretion not to impose a more rigorous application of the just and reasonable subject to the Mobile-Sierra public interest presumption. As explained above, the inclusion of such clauses should be unnecessary because a settlement agreement produces a BFR and the public interest presumption automatically applies to a challenge to a BFR. However, the current practice is to include Mobile-Sierra clauses in settlement agreements, indicating the parties’ wish for the public interest presumption to apply to future challenges to the settlement rates.

339. HIOS, supra note 185, at P 1; Petal Gas, 135 FERC ¶ 61,152 at P 1; Southern LNG, 135 FERC ¶ 61,153 at P 1; Carolina Gas, supra note 185, at P 1; SCEG, supra note 185, at P 5-6; FPL, supra note 185, at P 11-12.

340. Devon Power LLC, 137 FERC ¶ 61,073, at P 36 (2011). See HIOS, supra note 185, at P 5 24; Petal Gas, 135 FERC ¶ 61,152 at P 17; S. LNG, 135 FERC ¶ 61,153 at P 24; Carolina Gas, supra note 185, at P 17; SCEG, supra note 185, at P 5; FP&L, supra note 185, at P 11.

341. See HIOS, supra note 185, at P 19; Petal Gas, 135 FERC ¶ 61,152 at P 12; Southern LNG, 135 FERC ¶ 61,153 at P 19; Carolina Gas, supra note 185, at P 17; SCEG, supra note 185, at P 5; FP&L, supra note 185, at P 11.

342. See, e.g., SCEG, supra note 185, at P 1 (stating that the settlement agreement was the result of negotiations between South Carolina Electric & Gas and its customers and resolved all the issues that were set for hearing).


344. SCEG, supra note 185, at P 1. The four customers were Central Electric Power Cooperative, Inc., North Carolina Electric Membership Corporation, the City of Orangeburg, South Carolina, and the Town of Winnsboro, South Carolina. Id.
standard to future challenges to the settlement brought by FERC or non-settling third parties.\textsuperscript{345} This determination was error. The rate set forth in the settlement agreement in \textit{SCEG} constitutes a BFR between SCEG and the four customers that joined the settlement agreement. If any entity challenges the rate paid by one of those four customers pursuant to the settlement agreement, the \textit{Mobile-Sierra} public interest presumption should apply to that challenge, whether the challenge is brought by one of the four customers, FERC, or a non-party to the settlement.\textsuperscript{346}

As the Supreme Court explained in \textit{NRG}, application of the \textit{Mobile-Sierra} presumption does not depend upon the identity of the person challenging the rate at issue—i.e., whether the challenger is a party to contested agreement, or a third-party.\textsuperscript{347}

The situation created by FERC in \textit{SCEG} and other proceedings is likely to be repeated in cases that are resolved through settlement agreements. The effects may be far-reaching because 80 to 90 percent of all rate proceedings set for hearing at FERC are resolved through settlement.\textsuperscript{348} When FERC determines that a rate set forth in a settlement agreement is not a BFR to which the \textit{Mobile-Sierra} public interest presumption automatically applies, FERC will likely further determine that it and non-parties to the settlement are free to challenge the rate paid by settlement parties without presuming that the rates are just and reasonable.\textsuperscript{349} Just as in \textit{SCEG}, these findings will be contrary to the principle that rates set forth in settlement agreements are BFRs and the holding from \textit{NRG}—namely, that application of the \textit{Mobile-Sierra} presumption does not depend upon the identity of the person challenging the rate.\textsuperscript{350} In these cases, the bargain struck by the parties to the settlement agreement will be subject to being overturned by challenges brought by FERC or non-parties to the settlement agreement. Furthermore, FERC may be forced to re-visit issues that should have been finalized by settlement agreements. This compromises the stability that is purported to be undergirded by the FPA’s agreement-based regulatory regime.

It should be noted that if there were another customer under the tariff at issue in \textit{SCEG}—a customer that was not a party to the settlement agreement—that third-party customer could challenge the rate it pays under its own service agreement with SCEG without application of the public interest presumption to that challenge. This inconvenient situation may arise where a rate set forth in a tariff may be subject to differing applications of the just and reasonable standard depending on which customer’s rate is being challenged: a settlement party’s rate, or a third party’s rate. Although this is not the most convenient way for FERC or utilities to

\textsuperscript{345} \textit{SCEG}, supra note 185, at P 5.


\textsuperscript{347} \textit{NRG}, 558 U.S. at ____ , 130 S. Ct. at 696-97.


\textsuperscript{349} \textit{SCEG}, supra note 185, at P 5; see also \textit{Tewksbury, Lim & Su}, supra note 98, at 455 (“FERC may be disinclined to grant settling parties heightened protections for extended periods.”).

\textsuperscript{350} \textit{NRG}, 558 U.S. at ____ , 130 S. Ct. at 696-97, 701.
deal with challenges to rates, it respects the wishes of parties to settlement agreements, adheres to the principle of contract stability, and properly recognizes that settlement agreements should automatically be subject to the Mobile-Sierra presumption because they are the result of negotiation and bargaining.

VI. CONCLUSION

FERC’s orders on remand in Devon Power and its subsequent orders addressing settlements have failed to recognize that settlement agreements are the result of negotiation and bargaining. FERC believed that it does not need to apply the Mobile-Sierra public interest presumption to future challenges to settlement rates. The effects of FERC’s erroneous findings are potentially far-reaching because of the number of rate disputes that are resolved through settlement.

Parties to a settlement negotiate, often painstakingly, to reach a resolution that is agreeable to all parties. And, parties on both sides may “call that a bargain. The best [they] ever had.”351 The public interest presumption is intended to preserve for parties the benefits of their bargains and to provide much-needed stability to electric industry participants. FERC has undermined these goals. If Devon Power is not corrected by the courts, FERC and the electric industry will continuously confront the effects of this decision.

351. T HE WHO, Bargain, o n WHO’S NEXT (Decca 1971).