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No. 08-674

In the Supreme Court of the United States

NRG POWER MARKETING, LLC, ET AL., PETITIONERS

v.

MAINE PUBLIC UTILITIES COMMISSION, ET AL.

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

BRIEF FOR THE
FEDERAL ENERGY REGULATORY COMMISSION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission had authority to approve a settlement containing a provision specifying that the review of certain aspects of the rates, terms, and conditions for the sale of electric capacity should be governed by the principles set out in this Court's decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 520 F.3d 464. The orders of the Federal Energy Regulatory Commission (Pet. App. 28a-101a, 102a-223a) are reported at 115 F.E.R.C. ¶ 61,340 and 117 F.E.R.C. ¶ 61,133.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2008. Petitions for rehearing were denied on October 6, 2008 (Pet. App. 241a-242a, 243a-244a, 245a-246a, 247a-248a). The petition for a writ of certiorari was filed on November 21, 2008, and was granted on April 27, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

1. a. The Federal Power Act (FPA or Act), 16 U.S.C. 791a *et seq*., grants the Federal Energy Regulatory Commission (FERC or Commission) exclusive jurisdiction over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce" by public utilities. 16 U.S.C. 824(b)(1). Under the FPA, proposed rates for the sale or transmission of power within FERC's jurisdiction must be "just and reasonable" and not unduly discriminatory or preferential. 16 U.S.C. 824d(a) and (b). To facilitate the Commission's exercise of its regulatory responsibilities, the FPA provides for rates and related matters to be filed with the Commission:

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

16 U.S.C. 824d(c).

The Act also provides for the Commission to review rates after they have been accepted for filing and gone into effect. If, after a hearing—either on its own motion or based on a complaint—the Commission determines

that any existing rate or charge is "unjust, unreasonable, unduly discriminatory or preferential," it must determine and fix by order "the just and reasonable rate * * * to be thereafter observed and in force." 16 U.S.C. 824e(a).

b. The parties to a proceeding before the Commission, including a proceeding under Section 824e, may agree to a settlement. If a proposed settlement is "uncontested"—that is, if it is agreed to by all of the parties to the proceeding—the Commission may approve it "upon a finding that the settlement appears to be fair and reasonable and in the public interest." 18 C.F.R. 385.602(g)(3). If a proposed settlement is contested by one or more parties, "the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact." 18 C.F.R. 385.602(h)(1)(i). The Commission may review and approve a contested settlement "as a package" so long as it determines that "the overall result * * * is just and reasonable." *Trailblazer Pipeline Co.*, 85 F.E.R.C. ¶ 61,345, at 62,342 (1998), order on denial of reh'g, 87 F.E.R.C. ¶ 61,110 (1999) (*Trailblazer*). Such a determination does not require a finding "that the settlement rate is exactly the rate the Commission would establish on the merits after litigation," but only that it is "within a broad ambit of various rates which may be just and reasonable." *Id.* at 62,343.

c. In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*), this Court interpreted provisions of the Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, that parallel the FPA. The Court held that, "by requiring contracts to be filed with the

Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts." *Mobile*, 350 U.S. at 338. The Court further concluded that the NGA does not empower a natural-gas company unilaterally to modify its contracts with customers by filing a new rate schedule with the Commission. *Id.* at 343. "By preserving the integrity of contracts," the Court observed, the statute promotes "the stability of supply arrangements which all agree is essential to the health of the natural gas industry." *Id.* at 344. "On the other hand, denying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest." *Ibid.*

On the same day that it issued its decision in *Mobile*, the Court held in *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*), that the FPA, like the NGA, does not authorize unilateral contract changes by a contracting party through the filing of a new rate schedule. *Id.* at 353. The Court in *Sierra* also addressed the scope of the Commission's authority under 16 U.S.C. 824e(a) to determine and fix a new rate if it finds the existing rate to be "unjust, unreasonable, unduly discriminatory or preferential." In the underlying orders, the Commission had found a rate set by contract to be unreasonable because it failed to yield the seller a reasonable rate of return. 350 U.S. at 354. The Court held that the Commission had applied the wrong standard in reviewing the contract: "[W]hile it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return," a utility nevertheless may agree by contract to accept such a rate, and

if it does so, it is not "entitled to be relieved of its improvident bargain." *Id.* at 355.

Instead, the *Sierra* Court explained, "the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other customers an excessive burden, or be unduly discriminatory." 350 U.S. at 355. The Court found this focus on the "public interest," as distinguished from the private interests of the utilities, to be "evidenced by the recital in [16 U.S.C. 824(a)] that the scheme of regulation" established by the Act "is necessary in the public interest." 350 U.S. at 355 (quoting 16 U.S.C. 824(a)). The Court therefore directed that the matter be remanded to the Commission for further proceedings, noting that "[w]hether under the facts of this case the contract rate is so low as to have an adverse effect on the public interest is of course a question to be determined in the first instance by the Commission." *Ibid.*

2. a. This case involves the "capacity" market for electricity in New England. In a capacity market, unlike a wholesale energy market, an electricity provider purchases from a generator an option to buy a specific quantity of energy, rather than purchasing the energy itself. Pet. App. 2a. The option mechanism is designed to enable providers to respond adequately to fluctuations in demand and thereby to maintain the reliability of the electric grid. *Ibid.*

Until 1998, the New England electricity market was highly regulated, and generators sold electric energy at wholesale at a price that was based on the cost of production. See *Blumenthal* v. *FERC*, 552 F.3d 875, 878 (D.C. Cir. 2009). In 1998, FERC approved a proposal to

move the New England market toward greater competition. *Ibid.* That action transferred control of the transmission network to an independent system operator (ISO), the ISO New England, and created markets for several different services, including capacity. *Ibid.* Under the new regime, electricity rates—including rates for capacity—generally were set by the market. *Ibid.*

After 1998, the New England capacity market encountered several problems, including an insufficient supply to meet increasing demand. Pet. App. 2a; see *Blumenthal*, 552 F.3d at 878. High-cost generating units were needed to maintain reliability during times of high demand, but the owners of those units found it difficult to earn a profit because their costs usually exceeded the market price during times of normal or low demand. *Ibid.*

b. The Commission instituted proceedings under 16 U.S.C. 824e to revise the New England market rules to address those problems. *Devon Power LLC*, 103 F.E.R.C. ¶ 61,082, at 61,271 (2003), petition for review dismissed, 419 F.3d 1194 (D.C. Cir. 2005). In the proceedings, ISO New England filed a proposal to redesign the wholesale capacity market. Pet. App. 106a. The proposal would have established four separate sub-regions within New England, each of which would have had monthly auctions to establish the price and amount of capacity to be procured for the following month. *Devon Power LLC*, 107 F.E.R.C. ¶ 61,240, at 62,021-62,023 (2004), petition for review dismissed, No. 04-2549 (1st Cir. May 5, 2005). After a hearing, a FERC administrative law judge issued an initial decision that adopted key elements of the proposal. Pet. App. 107a-108a; *Devon Power LLC*, 111 F.E.R.C. ¶ 63,063 (2005).

At the request of opponents of the proposal, the Commission then held an oral argument to consider the issues further. That proceeding showed that New England's generation capacity was "barely adequate," that "deficits [were] predicted in the very near future," that existing generators were losing money, and that new infrastructure was needed soon to avoid reliability problems. Pet. App. 136a-137a. The overwhelming consensus of the parties was that "the status quo presents significant problems that the Commission must address." *Ibid.*

To that end, the Commission established settlement procedures to enable the parties to pursue agreement on an alternative market structure. *Devon Power LLC*, 113 F.E.R.C. ¶ 61,075 (2005). From October 2005 until March 2006, formal settlement negotiations were conducted by representatives of all of the state public-utility regulatory agencies in New England, as well as representatives of transmission owners, generators, power traders and marketers, demand-response and intermittent-resource owners, consumer-owned utility systems, and end users. Pet. App. 139a. Ultimately, a proposed settlement agreement resolving all issues in the proceeding was presented to FERC. *Id.* at 110a. Of the 115 parties participating in the settlement proceedings, only eight parties formally opposed the agreement. *Ibid.* And only one of those eight objectors—NSTAR Electric and Gas Corporation—actually participates (as a purchaser) in the wholesale capacity market. *Id.* at 121a n.32.

c. The proposed settlement provided for a new long-term structure for the New England capacity market, termed the "forward capacity market." The new market would use annual auctions to establish the price of ca-

pacity for one-year periods beginning three years after each auction. Pet. App. 110a-116a. Instead of establishing pre-defined sub-regions, as the original proposal did, the settlement provided for the creation of separate sub-regions each year based on identifiable transmission constraints that were expected to restrict the delivery of energy. *Id*. at 113a-114a.

Under the settlement, the ISO would conduct the auctions, and the ISO's tariff would document both the obligations of suppliers to deliver capacity and the obligations of load-serving purchasers to pay. J.A. 97-98, 117-118. The auctions would not result in payments directly from purchasers to generators. Instead, the ISO would buy the amount of capacity required to maintain the "installed-capacity requirement" (the capacity necessary to maintain reliability on the grid), and each load-serving entity would then pay for a share of the installed-capacity requirement proportionate to its share of peak load. J.A. 70-71. Utilities would not be required to purchase capacity at the auction price, but could instead choose to "self-supply" by using resources that they owned or for which they separately contracted to meet their capacity obligations. Pet. App. 112a-113a; see J.A. 84-85.

The one-year period beginning June 1, 2010, was the first period for which the forward capacity market auction would procure capacity. Pet. App. 116a. To address the period before that date, the settlement included a transition mechanism, involving a set of fixed transition payments to generators supplying capacity. *Id.* at 116a-117a. As with the annual auctions, obligations of individual load-serving purchasers to cover the cost of the transition payments were calculated based on their share of the peak load. *Id.* at 117a.

3. The Commission approved the proposed settlement. Pet. App. 102a-223a. It concluded that "as a package," the settlement "presents a just and reasonable outcome for this proceeding consistent with the public interest." *Id.* at 103a, 135a-144a. The Commission concluded that the settlement would address "the deficiencies in New England's existing capacity market"—specifically, "the compensation problems faced by generating resources that are needed for reliability but could not obtain sufficient revenue in the markets to continue operation." *Id.* at 135a-136a. And the settlement would "resolve[] all of the outstanding issues in a difficult, contentious and lengthy matter," which had necessitated "difficult compromises among the diverse parties to this proceeding." *Id.* at 139a. The Commission found that the parties objecting to the settlement "would 'be in no worse position under the terms of the settlement than if the case were litigated.'" *Id.* at 141a-142a (quoting *Trailblazer Pipeline Co.*, 87 F.E.R.C. ¶ 61,110, at 61,439 (1999)).

The Commission responded in detail to the issues raised by the parties who opposed the proposed settlement. Pet. App. 144a-218a. For example, while noting that the transition payments were not "ideal as a single market design element," the Commission concluded that, as a component of the larger package embodied in the settlement, the payments were just and reasonable. *Id.* at 151a. In reaching that conclusion, the Commission analyzed record evidence regarding the cost of capacity, finding that the transition payments fell within the "zone of reasonableness" and that those objecting to the payments would not likely achieve a better result through continued litigation. *Id.* at 141a-142a, 152a-158a. The Commission also addressed various issues

relating to the design of the forward capacity market and its auction mechanism. *Id.* at 161a-188a.

Finally, and of particular relevance here, the Commission approved Section 4.C of the proposed settlement. Under the settlement, the rules for conducting the auction would be subject to review by the Commission under the just-and-reasonable standard. Pet. App. 200a. In addition, the results of the auction would be filed with FERC by the New England ISO and would be subject to challenge for a period of 45 days under the just-and-reasonable standard. J.A. 119; Pet. App. 78a, 120a. Under Section 4.C, however, any subsequent challenge to the auction results would be subject to review only under the public-interest standard. *Id.* at 193a-194a. Similarly, any future challenges to the transition payments, which the Commission found in the first instance to be just and reasonable, would be reviewed under the public-interest standard. *Ibid.*

Specifically, Section 4.C provided:

> From the Effective Date, absent the agreement of all Settling Parties to the proposed change, the standard of review for: (i) challenges to the Capacity Clearing Prices derived through the [Forward Capacity Market] and prices resulting from reconfiguration auctions provided for in the Settlement Agreement and in the Market Rules addressing the terms of the Settlement Agreement that are approved or accepted by the FERC pursuant to section 3, and (ii) proposed changes to section 11, Part VIII below (Agreements Regarding Transition Period) and the Market Rules implementing that part, shall be the "public interest" standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission*

> *v. Sierra Pacific Power Co*., 350 U.S. 348 (1956) (the "Mobile-Sierra" doctrine), whether the change is proposed by a Settling Party, a non-Settling Party, or the FERC acting *sua sponte*. This Settlement Agreement does not impose the Mobile-Sierra standard on any provision of this Settlement Agreement or the Market Rules that address the terms of the Settlement Agreement except as expressly provided in this section 4.C.

Pet. App. 193a-194a; J.A. 94.

The Commission stressed that, "even under the 'public interest' standard of review, the Commission retains significant authority to protect non-parties to the settlement from harm." Pet. App. 202a. And the Commission noted that the proposed settlement itself provided for thorough review of final auction prices. *Ibid*. In particular, the settlement provided that ISO New England would make an informational filing before the auction, as well as a filing after the auction containing the results, which would be subject to challenge within 45 days. *Ibid*. The *Mobile-Sierra* provision of Section 4.C did not apply to those filings, which the Commission would review under the ordinary just-and-reasonable standard. *Ibid*.

The Commission concluded that Section 4.C appropriately balanced the need for rate stability with the interests of the diverse entities who would be subject to the forward capacity market. Pet. App. 202a. "Stability is particularly important in this case, which was initiated in part because of the unstable nature of [installed capacity] revenues and the effect that has on generating units, particularly those who are critical to maintaining reliability." *Ibid*. The Commission added that "[t]he Court's statement in *Mobile* that 'all agree . . . [that]

the stability of supply arrangements . . . is essential to the health of the natural gas industry' is no less true with regard to the health of New England's electricity infrastructure." *Id.* at 203a (quoting *Mobile*, 350 U.S. at 344).

The Commission denied petitions for rehearing. Pet. App. 28a-101a. It stated that the tariffs covered by Section 4.C of the settlement were "analogous to contracts," to which *Mobile-Sierra* would apply. *Id.* at 75a-76a. It further pointed out that "the Commission has on many occasions accepted the application of the 'public interest' standard to settlement agreements and contracts setting forth rates." *Id.* at 75a-76a.

4. The court of appeals, while generally rejecting challenges to the Commission's approval of the settlement, sustained the challenge to the Commission's approval of Section 4.C as applied to non-settling parties. Pet. App. 1a-27a. The court stated that, under *Mobile* and *Sierra*, "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." *Id.* at 20a. But the court held that the Commission may not approve a settlement agreement applying the *Mobile-Sierra* "public interest" standard to future rate challenges brought by non-contracting (or non-settling) third parties. *Ibid.* In the court's view, the *Mobile-Sierra* doctrine carves out an "exception" to the generally applicable just-and-reasonable standard when a challenge to an existing rate is brought by one of the contracting parties. That doctrine, the court stated, is intended to "make it more difficult for either party to shirk its contractual obligations." *Id.* at 20a, 24a. But the court held that, because a contract cannot bind a nonparty, "when a rate challenge is brought by a non-

contracting third party, the *Mobile-Sierra* doctrine simply does not apply; the proper standard of review remains the 'just and reasonable' standard." *Id.* at 22a. The court concluded that the application of the *Mobile-Sierra* doctrine to future rate challenges by non-settling parties would "deprive[]" them "of their statutory right to have rate challenges adjudicated under the 'just and reasonable' standard." *Ibid.*

5. After the court of appeals issued its decision, this Court decided *Morgan Stanley Capital Group, Inc.* v. *Public Utility District No. 1*, 128 S. Ct. 2733 (2008), in which the Court further addressed the *Mobile-Sierra* doctrine. In *Morgan Stanley*, the Court held that "[t]here is only one statutory standard for assessing wholesale electricity rates, whether set by contract or tariff—the just-and-reasonable standard." *Id.* at 2745. The Court explained that, instead of representing a wholly different standard, the *Mobile-Sierra* "'public interest standard' refers to the differing *application* of the just-and-reasonable standard to contract rates," *id.* at 2740: the *Mobile-Sierra* doctrine, that is, simply "provide[s] a definition of what it means for a rate to satisfy the just-and-reasonable standard in the contract context," *id.* at 2746.

6. After *Morgan Stanley* was decided, several parties to this case, including FERC, petitioned for rehearing en banc, contending that the court of appeals' decision was inconsistent with *Morgan Stanley*'s explanation of the *Mobile-Sierra* doctrine. The court of appeals denied the petitions. Pet. App. 245a-248a.

7. On remand, the Commission "approve[d] the settlement conditioned on the settling parties revising the standard of review applicable to non-settling third par-

ties, consistent with the court's decision." *Devon Power, LLC*, 126 F.E.R.C. ¶ 61,027, at ¶ 61,114 (2009).

SUMMARY OF ARGUMENT

The Federal Energy Regulatory Commission acted reasonably and within its statutory authority in approving, as just and reasonable, a comprehensive settlement of disputes concerning the structure of the market for electric capacity in New England. That settlement contained a provision stating that future challenges to certain rates established under the settlement would be governed by the "public interest" standard of review of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). The court of appeals erred in setting aside the Commission's exercise of discretion in approving this aspect of the settlement, as a result of two fundamental misunderstandings of the *Mobile-Sierra* standard.

First, the court of appeals erroneously believed that the public-interest standard of *Mobile* and *Sierra* is applicable only to challenges to contract rates that are brought by contracting parties. According to the court of appeals, when non-contracting parties challenge a rate, *Mobile-Sierra* "simply does not apply." Pet. App. 22a. That line of reasoning treats *Mobile-Sierra* as a kind of estoppel doctrine, an interpretation that this Court expressly rejected in *Morgan Stanley Capital Group, Inc.* v. *Public Utility District No. 1*, 128 S. Ct. 2733, 2746 (2008). In fact, *Mobile-Sierra* rests on a presumption that rates set out in a freely-negotiated wholesale energy contract are just and reasonable. Nothing in the *Mobile-Sierra* doctrine as elaborated in *Morgan Stanley* limits its applicability to contracting parties, as

opposed to non-contracting third parties. Because it is the rate itself that is presumed just and reasonable, the presumption should apply irrespective of the identity of the party challenging the rate.

Second, the court of appeals believed that, in applying the *Mobile-Sierra* public-interest standard to future rate challenges brought by non-settling parties, the Commission had unlawfully deprived those parties of their statutory right to challenge rates under the just-and-reasonable standard. Pet. App. 22a. But *Morgan Stanley* made clear that the *Mobile-Sierra* public-interest standard is not an exception to the statutory just-and-reasonable standard; it is an application of that standard in the context of rates set by contract. 128 S. Ct. at 2740. The Commission here similarly interpreted the just-and-reasonable standard to involve an inquiry into the public interest in the context of future challenges to rates set under this settlement agreement. As in *Morgan Stanley*, this focus on the public interest did not deprive any party of any statutory right.

This Court has repeatedly held that the Federal Power Act's "just and reasonable" standard leaves the Commission with considerable discretion in setting rates. The Commission properly exercised that discretion in determining that the public-interest standard should be applied here. Although the rates covered by the settlement's public-interest review provision are not themselves contract rates to which the Commission was *required* to apply *Mobile-Sierra*, the Commission carefully reviewed the settlement, and it reasonably determined that the transition payments fell within a zone of reasonableness, that the auction process would produce just and reasonable rates, and that the interest in rate

stability made the application of the public-interest test appropriate.

ARGUMENT

THE FEDERAL ENERGY REGULATORY COMMISSION PERMISSIBLY EXERCISED ITS DISCRETION IN APPROVING THE SETTLEMENT PROVISION AT ISSUE HERE

This Court's decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956)—and most recently *Morgan Stanley Capital Group, Inc.* v. *Public Utility District No. 1*, 128 S. Ct. 2733 (2008)—hold that the Federal Power Act (and parallel provisions of the NGA) require the Commission to apply the "public interest" standard to its review of rates set by private contract. As we explain in Point A, the court of appeals erred in concluding that this statutory mandate, if otherwise applicable, is limited to challenges brought by contracting parties, and does not extend to challenges initiated by third parties, such as consumer groups or state officials. The court of appeals' error on that point is sufficient to require reversal of its ruling on the *Mobile-Sierra* issue.

As we explain in Point B, however, this is not a case in which the Act itself, as construed in *Sierra* and *Morgan Stanley*, required application of the public-interest standard. The rates at issue here are set not by private contract, but pursuant to a tariff that was contained in a contested settlement approved by the Commission. The Commission therefore was not required to prescribe the public-interest standard for future challenges to the rates provided for in that settlement. But the Commission acted within its discretion in choosing to do so. The Commission's determination represents a permissible

and appropriate application of the Act's "just and reasonable" standard in the circumstances of this case, because the manner of setting rates under the contested settlement is analogous to the creation of a private bilateral contract, and because the interests in promoting market stability and assuring an adequate supply of energy which underlie the *Mobile-Sierra* requirement are also present here. And once having decided to approve use of the public-interest standard, the Commission acted permissibly and appropriately in approving the application of that standard to future challenges by third parties (including the non-settling parties here), just as the Commission would have done if required to apply the *Mobile-Sierra* standard.

A. The *Mobile-Sierra* Doctrine Is Fully Applicable To Third-Party Challenges To Contract Rates And Terms

The court of appeals erred in holding that the *Mobile-Sierra* "public interest" standard applies only to the contracting parties and not to third parties challenging a transaction. In the court's view, "the *Mobile-Sierra* doctrine is designed to ensure contract stability *as between the contracting parties—i.e.* to make it more difficult for either party to shirk its contractual obligations." Pet. App. 24a. By contrast, the court concluded, "when a rate challenge is brought by a non-contracting third party, the *Mobile-Sierra* doctrine simply does not apply." *Id.* at 22a. That is incorrect. Under *Mobile* and *Sierra*, a contractually negotiated rate is presumed just and reasonable, and no basis exists for limiting the application of that presumption to challenges brought by the contracting parties, as opposed to other persons who might challenge the contract rate.

1. The court of appeals' reasoning echoes the argument embraced by the Ninth Circuit but rejected by this Court in *Morgan Stanley*—that *Mobile-Sierra* is "the equivalent of an estoppel doctrine." 128 S. Ct. at 2746 (quoting David G. Tewksbury & Stephanie S. Lim, *Applying the* Mobile-Sierra *Doctrine to Market-Based Rate Contracts*, 26 Energy L.J. 437, 458 (2005)). *Morgan Stanley* held that *Sierra* does not rest on the premise that the Commission is estopped from disapproving an agreed-upon rate after once approving it as just and reasonable. Neither does *Sierra* rest on the notion that the contracting parties are estopped from challenging a rate to which they have agreed. *Sierra* instead reflects a "presum[ption] that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement imposed by law." *Id*. at 2737. *Sierra* "was grounded in the commonsense notion that 'in wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a "just and reasonable" rate as between the two of them.'" *Id*. at 2746 (quoting *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 479 (2002)). Nothing in *Mobile* and *Sierra*, as interpreted in *Morgan Stanley*, limits the applicability of that presumption to situations in which a challenge is brought by the contracting parties. The negotiation between these parties creates the basis for presuming the contract rate to be just and reasonable. But once the presumption comes into effect, it should apply regardless of the identity of the party challenging the rate. Whether a contracting party or a third party or no one at all files a complaint, the question for FERC, acting under 16 U.S.C. 824e, is

always the same: whether the rate in question continues to be just and reasonable.

The oddity of exempting third-party challenges from the *Mobile-Sierra* "public interest" standard would be particularly great, given that the very point of that standard is to protect third parties. The *Mobile-Sierra* standard permits the Commission to modify a contract rate in precisely those circumstances in which third parties—*i.e.*, members of the "public"—are seriously harmed by a contractually specified rate. Under *Mobile-Sierra*, "only when the mutually agreed-upon contract rate seriously harms the consuming public may the Commission declare it not to be just and reasonable." *Morgan Stanley*, 128 S. Ct. at 2746; see *Verizon Commc'ns*, 535 U.S. at 479 (When a buyer and a seller agree upon a rate, "the principal regulatory responsibility [is] not to relieve a contracting party of an unreasonable rate, * * * but to protect against potential discrimination by favorable contract rates between allied businesses to the detriment of *other* wholesale customers.") (emphasis added). The court of appeals' decision thus divorced the standard's application from its most essential purpose.

2. In addition, the court of appeals established prerequisites to applying *Sierra* similar to the ones that this Court rejected in *Morgan Stanley*. In that case, the Court rejected the contention that *Sierra* was inapplicable to contracts that had not previously been subject to just-and-reasonable rate review by the Commission. The Court explained that the "definition of what it means for a rate to satisfy the just-and-reasonable standard" in the contract context is "a definition that applies regardless of when the contract is reviewed"; accordingly, the application of *Sierra* does not depend on when

a contract rate is challenged. 128 S. Ct. at 2746. For a similar reason—that the definition of what it means for a contract rate to be just and reasonable remains the same—neither does the applicability of *Sierra* depend on who might initiate such a challenge.

The Court in *Morgan Stanley* also rejected the suggestion that the *Mobile-Sierra* presumption applies differently depending upon whether a challenge is brought by a buyer or a seller. Instead, the Court held that the public-interest standards of "unequivocal public necessity" and "extraordinary circumstances" that apply when sellers complain that rates are too low have equal application when consumers complain that rates are too high. 128 S. Ct. at 2748 (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968), and *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 582 (1981)). In either situation, the Court explained, "[t]he contract rate must seriously harm the public interest" before it may be set aside. *Id.* at 2747; see *id.* at 2750 (rate may be set aside only in case of "unequivocal public necessity"); *ibid.* (relief available only where "increase is so great" that rates "impose an excessive burden on consumers or otherwise seriously harm the public interest"); see also *Potomac Elec. Power Co.* v. *FERC*, 210 F.3d 403, 411 (D.C. Cir. 2000) (*PEPCO*). Just as there is no basis for treating challenges brought by buyers more favorably under *Mobile-Sierra*'s "public interest" standard than challenges brought by sellers, so too there is no basis for treating challenges brought by non-parties more favorably still by exempting them from the application of the *Mobile-Sierra* framework altogether.

3. Under the court of appeals' reasoning, the Commission would use a different standard when it investigates a rate on its own initiative under 16 U.S.C. 824e

than when it acts on a complaint filed by a non-contracting party. The court of appeals has recognized that contracting parties can bind the Commission, acting under 16 U.S.C. 824e, to the *Mobile-Sierra* public-interest standard. See *Papago Tribal Util. Auth.* v. *FERC*, 723 F.2d 950, 953 (D.C. Cir. 1983) (Scalia, J.) ("[B]y broad waiver, the parties may eliminate both the utility's right to make immediately effective rate changes under [Section 824d] and the Commission's power to impose changes under [Section 824e], except the indefeasible right of the Commission under [Section 824e] to replace rates that are contrary to the public interest."), cert. denied, 467 U.S. 1241 (1984); see *Maine Public Utils. Comm'n* v. *FERC*, 454 F.3d 278, 283 (D.C. Cir. 2006). Commission-initated investigations of contract rates are uncommon, but not unprecedented. See*, e.g., Wisconsin Pub. Power Inc.* v. *FERC*, 493 F.3d 239, 253-254, 272-273 (D.C. Cir. 2007); *Boston Edison Co.* v. *FERC*, 233 F.3d 60, 63 (1st Cir. 2000); *Northeast Utils. Serv. Co.* v. *FERC*, 993 F.2d 937, 943, 960 (1st Cir. 1993); *Borough of Chambersburg* v. *FERC*, 580 F.2d 573, 574 (D.C. Cir. 1978); *Public Serv. Co. of Ind., Inc.* v. *FERC*, 575 F.2d 1204, 1209 (7th Cir. 1978). Under the court of appeals' decision, the rates at issue in such cases would be subject to a different standard of review if they were challenged in complaints by a third party—such as a consumer group or state regulatory agency—rather than in a proceeding initiated by the Commission itself. That result makes little sense, and it finds no support in the FPA or this Court's cases.

4. Finally, the third-party exception created by the court of appeals would seriously undermine the purposes of the *Mobile-Sierra* rule. The FPA, as interpreted in *Sierra*, "recognizes that contract stability ulti-

mately benefits consumers" by encouraging investment, "which is why [the Act] permits rates to be set by contract and not just by tariff." *Morgan Stanley*, 128 S. Ct. at 2749; see *Mobile*, 350 U.S. at 344 ("By preserving the integrity of contracts, [the NGA] promotes the stability of supply arrangements which all agree is essential to the health of the natural gas industry."). That is especially so here: as the Commission explained, "[s]tability is particularly important in this case, which was initiated in part because of the unstable nature of [installed capacity] revenues and the effect that has on generating units, particularly those who are critical to maintaining reliability." Pet. App. 202a. If contract rates could readily be set aside at the behest of any non-contracting party, suppliers and customers would not have the assurance of stability that the *Mobile-Sierra* rule is intended to provide.

B. Although Not Required By The Act To Do So, The Commission Permissibly Chose To Approve A "Public Interest" Standard Of Review For Future Challenges Under The Contested Settlement

The court of appeals' error in creating a third-party exception to the *Mobile-Sierra* presumption is a sufficient basis for reversing its judgment. Respondents have contended, however, that the court of appeals reached the right result because the rates at issue in this case are not set by contract, and the *Mobile-Sierra* presumption therefore does not apply at all. Connecticut Att'y Gen. Br. in Opp. 10-12. Respondents are correct that the Commission's approval of Section 4.C of the proposed settlement in this case did not rest on a direct application of *Sierra* and the public-interest standard it construed the Act to require in the context of rates set

by private contract. But respondents are wrong to think that this fact resolves the case in their favor. The Commission exercised its discretion in this case to approve the proposed settlement—including Section 4.C—under the FPA's general requirement that rates be just and reasonable. The Commission effectively determined that applying the just-and-reasonable standard in the context of future challenges to rates set under this settlement meant inquiring into the public interest, much as *Sierra* had determined that it did in the context of a bilateral private contract. And because the public-interest test provided for in the Commission's action simply implements the statutory just-and-reasonable standard, its application does not deprive any party—settling or non-settling, contracting or non-contracting—of the statutory right to a just and reasonable rate.

In approving the comprehensive settlement of the disputes concerning the structure of the New England capacity market, the Commission specified the standard of review that it will apply to two kinds of future complaints: complaints about the prices set by the capacity auctions and complaints about the transition payments specified in the settlement. Pet. App. 193a-194a. Section 4.C of the settlement provides that those complaints will be reviewed under "the 'public interest' standard of review set forth in" *Mobile* and *Sierra*, "whether the change is proposed by a Settling Party, a non-Settling Party, or the FERC acting *sua sponte*." *Id.* at 193a. Because such complaints would invoke the Commission's authority under 16 U.S.C. 824e(a) to set aside rates that are "unjust, unreasonable, unduly discriminatory or preferential," as well as its authority under 16 U.S.C. 824d(a) to ensure that "[a]ll rates and charges * * * shall be just and reasonable," FERC's approval of Sec-

tion 4.C represents an interpretation and application of Sections 824d and 824e. That interpretation was reached in a formal adjudication, and it is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001).

1. Congress has not specified the precise standard of review that FERC must apply to complaints under Sections 824d and 824e

Neither Section 824d nor Section 824e speaks directly "to the precise question at issue" in this case, which concerns the standard of review that FERC must apply to future complaints about the capacity-auction results or transition payments established by the settlement. *Chevron*, 467 U.S. at 842. The FPA requires that rates be just and reasonable, but it does not specify the manner in which that general formulation will be implemented in any particular context. Under the "just and reasonable" standard, the Commission is not "bound to any one ratemaking formula." *Morgan Stanley*, 128 S. Ct. at 2738; accord *Permian Basin Area Rate Cases*, 390 U.S. at 767; *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). Instead, because "[t]he statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition," the Court "afford[s] great deference to the Commission in its rate decisions." *Morgan Stanley*, 128 S. Ct. at 2738; see *Global Crossing Telecomms., Inc.* v. *Metrophones Telecomms., Inc.*, 550 U.S. 45, 58 (2007) (applying *Chevron* to the Federal Communications Commission's interpretation of 47 U.S.C. 201(b), which prohibits "unjust or unreasonable" practices); *Capital Net-*

work Sys., Inc. v. *FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) (noting that "'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms"). FERC's interpretation must therefore be upheld so long as it represents "a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

2. The "public interest" standard approved by FERC in the circumstances of this case is consistent with the statutory "just and reasonable" standard

Section 4.C of the settlement provides that the Commission shall review certain kinds of future complaints under "the 'public interest' standard of review set forth in" *Mobile* and *Sierra*. Pet. App. 193a-194a. Under that standard, a rate may be set aside only if it "adversely affect[s] the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other customers an excessive burden, or be unduly discriminatory." *Sierra*, 350 U.S. at 355. The court of appeals held that, in approving that provision, the Commission had deprived the non-settling parties "of their statutory right to challenge rates under the 'just and reasonable' standard." Pet. App. 19a; see *id.* at 2a. In the court's view, the public-interest standard is an "exception" to just-and-reasonable rate review that is applicable only to relations between the contracting parties. *Id.* at 20a. Thus, the court reasoned, "when a rate challenge is brought by a non-contracting third party," that standard "simply does not apply; the proper standard of review remains the 'just and reasonable' standard" of Section 824e. *Id.* at 22a. The reasoning of the court of appeals rests on a misunderstanding of the relationship between the *Mobile-Sierra* "public interest"

standard and the ordinary "just and reasonable" standard.

In *Morgan Stanley*, this Court emphatically rejected, as "obviously indefensible," the "proposition that a standard different from the statutory just-and-reasonable standard applies to contract rates." 128 S. Ct. at 2740. Instead, "[t]here is only one statutory standard for assessing wholesale electricity rates, whether set by contract or tariff—the just-and-reasonable standard." *Id.* at 2745. The "public interest" test applied under *Mobile* and *Sierra* is not a different standard; rather, "the term * * * refers to the differing *application* of the just-and-reasonable standard to contract rates." *Id.* at 2740; see also *id.* at 2746 (observing that "*Sierra* thus provided a definition of what it means for a rate to satisfy the just-and-reasonable standard in the contract context.").

As this understanding of the relationship between the just-and-reasonable standard and the public-interest test suggests, no impermeable wall separates the two formulations or the Commission's actions under them. For one thing, application of the public-interest standard itself calls for the exercise of judgment and discretion by the Commission. The Court recognized as much in *Sierra* when, upon concluding that the Act required application of the "public interest" standard to determine whether contract rates were just and reasonable, the Court held that the question whether the rates at issue were contrary to the public interest "is of course a question to be determined in the first instance by the Commission." 350 U.S. at 355; see *FCC* v. *RCA Commc'ns, Inc.*, 346 U.S. 86, 90 (1953) (describing the "public interest, convenience, or necessity" standard of the Radio Act of 1927, ch. 169, § 4, 44 Stat. 1163, as

"[n]ot a standard that lends itself to application with exactitude," but one that "leaves wide discretion and calls for imaginative interpretation"); *Mistretta* v. *United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (pointing to the "public interest" standard as an example of the breadth of scope for permissible delegation). The Commission's actions under *Mobile* and *Sierra* thus can run a gamut, rather than striking in each case the identical note.

At the same time, the Commission may act under even the ordinary just-and-reasonable standard in ways that reflect the premises of the *Mobile-Sierra* approach. In determining just and reasonable rates, FERC may recognize, for example, that "stability ultimately benefits consumers, even if short-term rates for a subset of the public might be high by historical standards." *Morgan Stanley*, 128 S. Ct. at 2749. Similarly, Commission precedent requires most rate challengers to show changed circumstances in order to obtain a rate change, even under the general just-and-reasonable standard. See, *e.g., Dynegy Moss Landing, LLC*, 123 F.E.R.C. ¶ 61,280, at 62,724 (2008); *Northern Va. Elec. Coop., Inc.*, 116 F.E.R.C. ¶ 61,173, at 61,741. In other words, although the public-interest test imposes a more demanding burden on those challenging rates than does the ordinary just-and-reasonable standard, see *Morgan Stanley*, 128 S. Ct. at 2746, the precise degree of difference between the two is committed to the Commission's discretion and may vary depending on the context.

Under *Morgan Stanley*, then, the public-interest test is simply a rigorous application of the statutory "just and reasonable" standard. Rather than being an extra-statutory test, separate and apart from the "just and reasonable" standard, the public-interest test repre-

sents a set of points on a still broader continuum of approaches to the requirement that rates be just and reasonable. In cases such as *Sierra* and *Morgan Stanley*, where rates are set by private contract, the Court has construed the Act to require application of the public-interest standard. But those rulings do not bar the Commission from applying a similar standard in other circumstances as a matter of administrative discretion, in cases in which the Commission determines that considerations relevant to what is "just and reasonable" support that approach. The court of appeals therefore erred in holding that the Act's "just and reasonable" standard itself precluded FERC from applying the public-interest standard to third parties by approving Section 4.C of the settlement.

3. *Although FERC was not required to adopt the "public interest" standard of review in this case, it had discretion to do so*

In *Morgan Stanley*, this Court held that the Commission is "*required* * * * to apply the *Mobile-Sierra* presumption" when it evaluates "a contract rate." 128 S. Ct. at 2745. Section 4.C of the settlement is not itself part of a contract governed by the *Mobile-Sierra* presumption, nor does the section concern the review of rates that are set by such contracts. The Commission therefore was not required to approve that provision's adoption of the public-interest standard of review. But the Commission had discretion to do so.

a. Under *Mobile* and *Sierra*, the Commission is required to apply the public-interest standard in its review of rates set by contracts that are freely negotiated between the contracting parties. See *Morgan Stanley*, 128 S. Ct. at 2737 (*Mobile-Sierra* presumption applies to

"a freely negotiated wholesale-energy contract"); *id.* at 2746 (*Mobile-Sierra* applies to a "mutually agreed-upon contract rate"). As previously noted, the *Mobile-Sierra* doctrine rests on the premise that "the contract rates are the product of fair, arms-length negotiations." *Id*. at 2750. When that condition is satisfied, the deferential public-interest standard is justified by "the commonsense notion that '[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a "just and reasonable" rate as between the two of them.'" *Id.* at 2746 (quoting *Verizon Commcn's*, 535 U.S. at 479) (brackets in original).

Accordingly, in *Morgan Stanley*, as in other cases in which this Court has applied the *Mobile-Sierra* doctrine, the contracts at issue were freely negotiated wholesale energy contracts. See, *e.g.*, 128 S. Ct. at 2743; *Mobile*, 350 U.S. at 333-334 (long-term bilateral contract for the sale of natural gas between a natural gas utility and a distribution company); *Sierra*, 350 U.S. at 351-352 (long-term bilateral power-purchase contract between a distribution company and an electric utility); see also *Boston Edison Co.*, 233 F.3d at 61 (contracts between utilities allocating the output of a nuclear power station); *PEPCO*, 210 F.3d at 404 (long-term power supply agreement between utilities); *Northeast Utils. Serv. Co.*, 993 F.2d at 960 (power contract between utilities). That context creates a presumption that the negotiated rate is just and reasonable, and therefore the Commission must apply the deferential public-interest standard.

b. By contrast, the statutory *Mobile-Sierra* presumption does not apply, of its own force, when the parties have not agreed to set rates wholly by private con-

tract. See *Morgan Stanley*, 128 S. Ct. at 2750. For that reason, neither of the two types of rates to which Section 4.C of the settlement applies—the rates resulting from the capacity auctions and the transition payments established by the settlement—is subject to the statutory *Mobile-Sierra* presumption, and the Commission was not *required* to apply the public-interest standard to its review of those rates.

The results of the capacity auctions, although possessing certain characteristics of contracts, do not constitute contracts between buyers and sellers. Under the auction rules as established in the settlement agreement, the obligations of suppliers to deliver capacity and the obligations of purchasers of capacity to make payments are documented in the ISO's tariff. J.A. 117. The auctions result in binding obligations by sellers to offer capacity during the relevant commitment period. J.A. 143. The auctions also result in a commitment by the ISO to buy the amount of capacity required to maintain the installed-capacity requirement—and, by extension, by each load-serving entity participating in the auction to pay for a share of the installed-capacity requirement proportionate to its share of peak load. J.A. 71.[1] But the auction results are not recorded in separate agreements between a particular generator and a particular purchasing entity—or even separate agreements between any of those participants and the ISO, the facilitating entity at the middle of the market. Likewise, the consequences of default are specified not in an agreement between participants in the auction but in a tariff filed

[1] Load-serving utilities are not required to participate in the capacity auctions. They may instead "self-supply," obtaining the requisite capacity by using resources that they own or for which they have separately contracted. Pet. App. 112a-113a; see J.A. 84-85.

by the ISO. J.A. 117. Thus, the prices to be set by the auction will not reflect the kind of negotiated agreement between buyer and seller to which *Sierra* and *Morgan Stanley* require the Commission to apply the public-interest standard.

The transition payments are also not the product of a contract for which the Act requires *Mobile-Sierra* public-interest review. The payments are specified in the settlement. J.A. 163-170. Although the settlement represented an agreement among the signators, it was not a private contract of the sort at issue in *Mobile*, *Sierra*, and *Morgan Stanley*. It was, rather, the resolution of a disputed proceeding before the Commission, and it was submitted to the Commission for its approval under longstanding regulations governing settlements of such disputes. Moreover, the proposed settlement was contested by certain parties to the proceeding—a distribution company, several state entities, and representatives of large end-users. Pet. App. 121a & n.32. The transition payments apply to all suppliers and purchasers of capacity—including the contesting parties and all future entrants into the market—not just to the settling parties. As to these other participants, the transition payments do not resemble contractually negotiated rates at all.

c. In its order approving the settlement, FERC correctly recognized that it was not compelled by the *Mobile-Sierra* doctrine to apply the public-interest standard of review to the rates specified in Section 4.C. Instead, the Commission stated that it had "broad authority and discretion * * * to address contested settlements," Pet. App. 133a, and explained that it was approving the settlement after finding that the proposal was "consistent with the public interest," *id.* at 135a, and

that it "achieve[d] an overall just and reasonable result," *id.* at 141a-142a. With respect to Section 4.C in particular, the Commission stated that application of the public-interest standard of review to future challenges to rates would be "fully consistent with current Commission policy." *Id.* at 201a; see *ibid.* ("[W]e find this *Mobile-Sierra* provision reasonable."). In the Commission's view, Section 4.C "appropriately balances the need for rate stability and the interests of the diverse entities who will be subject to" the settlement. *Id.* at 202a.

The public-interest standard of review is simply one application of the more general just-and-reasonable standard in the Act, and the Commission's exercise of its discretion to approve the application of the public-interest standard, based on the totality of the circumstances of the proceeding, was permitted by 16 U.S.C. 824d and 824e. As explained below, that choice was also a reasonable one.

C. The Commission Acted Reasonably In Approving The Settlement

Because "Congress has not directly addressed the precise question at issue in this case," FERC's decision must be upheld as long as it "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The Commission's approval of Section 4.C of the settlement represents a reasonable implementation of the FPA's requirement that rates be just and reasonable.

1. FERC found the settlement as a whole to be just and reasonable

a. The Commission recognized in its order that it may approve a contested settlement only upon making an independent determination that the settlement will establish just and reasonable rates. Pet. App. 133a

("Courts have confirmed the Commission's authority to approve contested settlements, so long as the proposal will establish just and reasonable rates."). That observation was consistent with this Court's decision in *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 (1974), which held that the Commission has the authority "to adopt as a rate order a settlement proposal that lacks unanimous agreement of the parties to the proceeding," *id.* at 312, but that such a proposal may only be "adopted as a resolution *on the merits* if the [Commission] makes an independent finding supported by 'substantial evidence on the record as a whole' that the proposal will establish 'just and reasonable' rates," *id.* at 314 (quoting *Placid Oil Co.* v. *FPC*, 483 F.2d 880, 893 (5th Cir. 1973), aff'd *sub nom. Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 (1974)). See *Tejas Power Corp.* v. *FERC*, 908 F.2d 998, 1003 (D.C. Cir. 1990); *New Orleans Pub. Serv., Inc.* v. *FERC*, 659 F.2d 509, 511-512 (5th Cir. 1981); *Pennsylvania Gas & Water Co.* v. *FPC*, 463 F.2d 1242, 1249-1250 (D.C. Cir. 1972). The Commission's regulation on contested settlements, 18 C.F.R. 385.602(h)—which the Commission applied in this case, Pet. App. 133a—"effectively codifies the principles articulated in *Mobil Oil.*" *Laclede Gas Co.* v. *FERC*, 997 F.2d 936, 944 (D.C. Cir. 1993). Under that regulation, "that the proposal is a settlement does not 'establish without more the justness and reasonableness of its terms.'" *Tejas Power Corp.*, 908 F.2d at 1003 (quoting *Mobil Oil*, 417 U.S. at 312-313). Instead, "a settlement proposal in a [contested] proceeding like the instant one is in the nature of a motion for summary judgment, and the agency may reach such a judgment on such terms as it deems fair from the evidence before it." *Consolidated Gas Supply Corp.* v. *FERC*, 606 F.2d 323, 330 (D.C. Cir. 1979), cert. denied, 444 U.S. 1073

(1980); see *Pennsylvania Gas & Water Co.*, 463 F.2d at 1246.

The Commission's review of contested settlements is guided by its decision in *Trailblazer Pipeline Co.*, 85 F.E.R.C. ¶ 61,345 (1998), order on denial of reh'g, 87 F.E.R.C. ¶ 61,110 (1999). In *Trailblazer*, the Commission reviewed the case law regarding contested settlements, and it set out a framework to guide its discretion in addressing such settlements. *Id.* at 62,339-62,345. Under that framework, the Commission first determines "whether the settlement presents an acceptable outcome for the case that is consistent with the public interest." *Id.* at 62,341; see Pet. App. 134a. If the Commission answers that question affirmatively, it will then choose an approach to address the contested issues. *Trailblazer*, 85 F.E.R.C. at 62,342; Pet. App. 134a. Under one such approach—the approach employed here, *Id.* at 140a-141a—the Commission "approve[s] a contested settlement as a package" if it finds that it "provides an overall just and reasonable result," 85 F.E.R.C. at 62,342.

b. The Commission correctly applied the *Trailblazer* approach in this case when it approved the proposed settlement after concluding that it was "consistent with the public interest," Pet. App. 135a, and that, "as a package, [it] achieve[d] an overall just and reasonable result," *id.* at 141a-142a. In deciding to consider the settlement as a package, the Commission noted its "several complex and interrelated features" and concluded that "altering any of those features will have consequences for other portions of the settlement." *Id.* at 141a; see *id.* at 140a (noting that the settling parties had requested that the agreement be considered as a package). Indeed, the proposed settlement itself provided that it

would be effective only if it was approved "in its entirety without modifications or conditions." J.A. 92.

The Commission found that the settlement would "resolve the deficiencies in New England's capacity market"—specifically, "the compensation problems faced by generating resources that are needed for reliability but could not obtain sufficient revenue in the markets to continue operation." Pet. App. 135a-136a. The settlement would, moreover, "resolve[] all of the outstanding issues in a difficult, contentious and lengthy matter," involving "difficult compromises among the diverse parties to this proceeding." *Id.* at 139a.

The Commission also took into account "the level of support for the Settlement Agreement"—namely, that the agreement "was either supported or not opposed by 107 of the 115 parties in the proceeding," a level of support that the Commission regarded as "'quite extraordinary.'" Pet. App. 143a-144a (quoting *Devon Power LLC*, 115 F.E.R.C. ¶ 63,013, at 65,075 (2006)). Although acknowledging that this factor "is not dispositive," the Commission reasonably determined that it is entitled to some weight. *Id.* at 143a; see *NorAm Gas Transmission Co.* v. *FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) ("[T]he Commission is clearly entitled to give weight to the support of customers when deciding whether to approve a settlement offer."). Similarly, the Commission noted that the settlement included many of the market-design features that the States in the region had advocated. Pet. App. 137a.

Finally, to ensure the justness and reasonableness of the settlement as a package, the Commission responded in detail to the issues raised by the objectors. Pet. App. 144a-218a. In particular, the Commission addressed issues regarding the transition mechanism, *id.* at 151a-

160a, and design elements of the forward capacity market, *id*. at 161a-188a. Additionally, the Commission considered the proposed "public interest" review provision in Section 4.C. *Id.* at 200a-203a. It emphasized that the provision "will only apply to (1) the final clearing prices in the [forward capacity auction] and any reconfiguration auctions permitted under the market rules, and (2) the transition mechanism." *Id.* at 200a; see *id.* at 75a. As explained below, the Commission reasonably evaluated both components of that provision and determined that it was just and reasonable.

2. Application of the public-interest standard to challenges to the auction results is reasonable

The Commission reasonably approved Section 4.C's application of the public-interest standard to any challenges brought after an initial 45-day period to the prices set by forward capacity auctions. Although these auctions will not result in contracts between buyers and sellers, see pp. 30-31, *supra*, they share with freely negotiated contracts certain market-based features that render use of the public-interest standard appropriate. The Commission carefully reviewed the design of the proposed auctions and found that it would produce prices that are just and reasonable. Pet. App. 161a-193a; see *id.* at 142a ("[T]he key price-determining parameters of the [forward capacity market] descending clock auction * * * are appropriate and adequately supported in the record."). In other contexts, courts of appeals have recognized that rates set by a market are consistent with the requirements of the FPA and cognate statutes. "[W]hen there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a 'just and

reasonable' result." *Elizabethtown Gas Co.* v. *FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993); see *Louisiana Energy & Power Auth.* v. *FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); *Cajun Elec. Power Coop., Inc.* v. *FERC*, 28 F.3d 173, 176, 179, 180 (D.C. Cir. 1994); *Tejas Power Corp.*, 908 F.2d at 1004. "[I]n a competitive market, where neither buyer nor seller has significant market power," courts have held that "it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment." *California ex rel. Lockyer* v. *FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004) (quoting *Tejas Power Corp.*, 908 F.2d at 1004), cert. denied, 127 S. Ct. 2972 (2007). Accordingly, the Commission reasonably could presume that the parties to the New England capacity auctions would arrive at just and reasonable rates. See *Morgan Stanley*, 128 S. Ct. at 2746.

The appropriateness of this presumption is enhanced by terms of the settlement that provide for ongoing monitoring of the auction process by the Commission. The settlement agreement requires that ISO New England make an informational filing with the Commission before each auction. Pet. App. 202a. In addition, the results will be filed with the Commission after the auction, and these will be subject to challenge for a period of 45 days. *Ibid.*; J.A. 119. The public-interest provision of Section 4.C does not apply to either of those filings, and the Commission can review them under the ordinary just-and-reasonable standard.

Section 4.C also "does not apply to the market rules that will be developed and filed with the Commission under the Settlement Agreement." *Id.* at 200a. Accordingly, should any party develop reason to believe that

the auction rules are not just and reasonable, the Commission can alter the rules as appropriate, entirely unrestricted by Section 4.C. See *id.* at 78a ("These provisions also address concerns that the [forward capacity market] design is untested; these regular filings will reveal any unanticipated problems with that design, giving the parties an opportunity to address them under the just and reasonable standard.").

In addition, the Commission determined that application of the public-interest standard to auction results would promote an important interest in rate stability. As the Commission explained, "[s]tability is particularly important in this case, which was initiated in part because of the unstable nature of [capacity] revenues and the effect that has on generating units, particularly those who are critical to maintaining reliability." Pet. App. 202a; see *id.* at 78a ("[P]rice certainty is important to ensure that the [forward capacity market] achieves its goals of attracting and retaining generators needed for reliability."). Quoting this Court's observation in *Mobile* that "the stability of supply arrangements . . . is essential to the health of the natural gas industry," the Commission found that that statement "is no less true with regard to the health of New England's electricity infrastructure." *Id.* at 204a (quoting *Mobile*, 350 U.S. at 344); see *Morgan Stanley*, 128 S. Ct. at 2749 (describing the *Mobile-Sierra* public-interest standard as "a key source of stability"). That finding, coupled with the presumptively just and reasonable nature of the auction prices, amply supports the Commission's exercise of discretion to assess challenges to rates set by auction under the public-interest standard, after an initial 45-day period during which those rates may be challenged under ordinary just-and-reasonable principles.

3. Application of the public-interest standard to challenges to the transition payments is reasonable

The Commission also acted reasonably in approving application of the public-interest standard to any future challenges to the transition payments, which were set forth in the settlement agreement. In approving the settlement, FERC reviewed the transition payments specified and found them to be just and reasonable, Pet. App. 144a-161a, a finding that the court of appeals upheld, *id.* at 8a-19a. The Commission could reasonably determine that, given the interest in the stability of the settlement and its provision for prompt transition to capacity auctions, *id.* at 202a-203a, a party seeking to alter the transition payments should have to show that they were impairing the public interest. Cf. *Horne* v. *Flores*, No. 08-289 (June 25, 2009), slip op. 10 (explaining that modification of an order entered by a court is appropriate under Federal Rule of Civil Procedure 60(b)(5) "if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest' ") (quoting *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)).

Significantly, the transition payments last only for a limited time, with the final payment to be made in May 2010. J.A. 163. The short duration of the payment regime makes it unlikely that the transition payments will become unjust or unreasonable. Indeed, the parties challenging the settlement have not indicated that they are likely to bring a renewed challenge to the transition payments. And they surely have not shown that circumstances in the New England capacity market are likely to change in a way that would undermine FERC's initial determination that the transition payments are just and reasonable.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it granted the petitions for review.

Respectfully submitted.

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APPENDIX

1. 16 U.S.C. 824 provides:

Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric en-

ergy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),[1] 824i, 824j, 824j-1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 *et seq.*) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

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[1] So in original. Section 824e of this title does not contain a subsec. (f).

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt

wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

2. 16 U.S.C. 824d provides:

Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in con-

venient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

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

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with

such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

3. 16 U.S.C. 824e provides:

Power of Commission to fix rates and charges; determination of cost of production or transmission

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

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Com-

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

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

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the

same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided,* That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

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

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

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of

[1] See References in Text note below.

its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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