

137 FERC ¶ 61,073
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Devon Power LLC

Docket No. ER03-563-067

ORDER DENYING REHEARING

(Issued October 20, 2011)

1. On remand from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit),¹ the Commission issued an order in this proceeding in which it determined that the auction results and transition payments arising from a contested settlement approved by the Commission were tariff rates, not contract rates and that, nevertheless, the Commission had discretion to approve a settlement provision imposing a more stringent application of the statutory just and reasonable standard of review, commonly known as the *Mobile Sierra* “public interest” standard of review.² The New England Power Generators Association, Inc. (NEPGA) and several other entities, collectively referred to as the Joint Applicants,³ filed requests for rehearing of the Remand Order. In this order, the Commission denies rehearing, as discussed below.

I. Background

2. Under section 205 of the Federal Power Act (FPA), all rates associated with the transmission, sale or resale of electric energy in interstate commerce must be just and

¹ *Me. Pub. Utils. Comm’n v. FERC*, 625 F.3d 754 (D.C. Cir. 2010).

² *Devon Power LLC*, 134 FERC ¶ 61,208, at P 9 (2011) (Remand Order).

³ The Joint Applicants include: George Jepsen, Attorney General for the State of Connecticut; the Maine Public Utilities Commission; Martha Coakley, the Massachusetts Attorney General; NSTAR Electric & Gas Corp.; the NEPOOL Industrial Customer Coalition and the Industrial Energy Consumer Group.

reasonable.⁴ The result of two Supreme Court cases, the *Mobile-Sierra* doctrine prescribes a more rigorous application of the statutory “just and reasonable” standard of review under certain circumstances.⁵ Under the *Mobile-Sierra* doctrine, the Commission “must presume that the rate set out in a freely negotiated wholesale energy contract meets the [statutory] ‘just and reasonable’ requirement.”⁶ This presumption may be overcome only if the Commission concludes that the contract seriously harms the public interest.⁷

3. In 2006, the Commission approved a contested settlement agreement redesigning the New England market for installed electric generation capacity (Settlement).⁸ The Settlement established a forward capacity market, which would use annual auctions to set the price of capacity. In these auctions, capacity is procured three years in advance of its use, with the first auction procuring capacity for the one-year period beginning June 1, 2010. To address the period between the effective date of the Settlement and June 1, 2010, the Settlement included a transition mechanism, which provided fixed payments to capacity assignments.

4. Of the 115 parties to the Settlement proceedings, eight opposed the Settlement. Notwithstanding the opposition, the Commission approved the Settlement because, as a package, it presented a just and reasonable outcome for this proceeding consistent with the public interest.⁹ The Commission found that the Settlement provided a necessary

⁴ 16 U.S.C. § 824d (2006).

⁵ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*). As the Supreme Court has found, the Federal Power Act’s (FPA) “just and reasonable” standard is the only statutory standard of review. *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Washington*, 554 U.S. 527, 545 (2008) (*Morgan Stanley*); see also 16 U.S.C. §§ 824d, 824e (2006).

⁶ *Morgan Stanley*, 554 U.S. at 530.

⁷ *Id.*

⁸ *Devon Power LLC*, 115 FERC ¶ 61,340, at P 2 (2006) (Settlement Order), *order on reh’g*, 117 FERC ¶ 61,133 (2006) (Rehearing Order), *remanded in part sub nom. Me. Pub. Utils. Comm’n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008), *order on remand*, 126 FERC ¶ 61,027 (2009).

⁹ *Id.*

solution to serious deficiencies in the New England market that were impairing critical infrastructure development and threatening reliability.¹⁰ Of particular interest here, section 4.C of the Settlement imposed the *Mobile-Sierra* “public interest” standard on certain future challenges to the auction results and transition payments. The Commission found that this provision balanced the need for rate stability with the statutory requirement that rates be just and reasonable.¹¹

5. On appeal, the D.C. Circuit rejected most of the petitioners’ challenges to the Commission’s orders. However, the court agreed with petitioners that applying the *Mobile-Sierra* “public interest” standard to challenges by non-settling parties “unlawfully deprived non-settling parties of their rights under the [Federal Power Act].”¹²

6. The Supreme Court reversed that determination, finding that “the public interest standard is not, as the D.C. Circuit presented it, a standard independent of, and sometimes at odds with, the ‘just and reasonable standard’ ...; rather, the public interest standard defines ‘what it means for a rate to satisfy the just and reasonable standard in the contract context.’”¹³ The Supreme Court reasoned that *Mobile-Sierra* “is not limited to challenges to contract rates brought by contracting parties. It applies, as well, to challenges initiated by third parties.”¹⁴ Thus, the Commission must presume “that contract rates freely negotiated between sophisticated parties meet the just and reasonable standard.”¹⁵

7. The Supreme Court remanded to the D.C. Circuit for further consideration, however, the question of whether the auction results and transition payments subject to the *Mobile-Sierra* clause in the Settlement are “contract rates” to which the Commission is required to apply the *Mobile-Sierra* “public interest” presumption.¹⁶ If not, the D.C.

¹⁰ *Id.* P 62-65.

¹¹ *Id.* P 182-186.

¹² *Me. Pub. Utils. Comm’n v. FERC*, 520 F.3d at 467.

¹³ *NRG Power Mktg. v. Me. Pub. Utils. Comm’n*, 130 S. Ct. 693, 700 (2010) (*NRG*) (quoting *Morgan Stanley*, 554 U.S. at 546).

¹⁴ *Id.*

¹⁵ *Id.* at 699.

¹⁶ *Id.* at 701.

Circuit was to consider whether the Commission has discretion, under the circumstances, to approve the Settlement provision imposing the *Mobile-Sierra* “public interest” standard on future challenges to those results and payments.¹⁷

8. On remand, the D.C. Circuit stated that the Commission had not articulated a rationale “for its discretion to approve a *Mobile-Sierra* clause outside the contract context, or an explanation for exercising that discretion here.”¹⁸ Accordingly, the court asked the Commission to explain “why, if the auction rates are not contract rates, they are entitled to *Mobile-Sierra* treatment.” The court also asked the Commission to answer “[j]ust how do the auction rates reflect market conditions similar to freely-negotiated contract rates? Or does the Commission base its asserted discretion on some other ground?”¹⁹

9. In response to the D.C. Circuit’s Order, the Commission found that the settlement rates at issue here are not “contract rates” that, under *Mobile-Sierra*, require a presumption that the rates are statutorily just and reasonable.²⁰ Nonetheless, the Commission concluded that it has the discretion to consider and decide whether future challenges to the settlement rates must overcome a more rigorous application of the statutory “just and reasonable” standard of review. The Commission found that, based on the circumstances of this proceeding, it was appropriate for the Commission to exercise that discretion in accepting the *Mobile-Sierra* provision in the underlying Settlement.

II. Requests for Rehearing

10. As noted above, the Commission received two requests for rehearing of the Remand Order.

11. NEPGA contends that the Commission erred in finding that rates set in ISO-NE’s Forward Capacity Market are not contract rates; NEPGA argues that the rates are, indeed, contract rates. NEPGA states that the Uniform Commercial Code (UCC) and leading treatises on contracts make clear that a sale by auction is a type of sales contract. NEPGA explains that New England’s forward capacity auctions are “reverse auctions” in

¹⁷ *Id.*

¹⁸ *Me. Pub. Utils. Comm’n v. FERC*, 625 F.3d at 759.

¹⁹ *Id.*

²⁰ Remand Order, 134 FERC ¶ 61,208 at P 9.

which sellers react to the “descending clock” auctioneer’s prices, but the results are still prices. NEPGA further explains that these capacity auctions produce binding mutual obligations to provide and pay for a specific quantity of capacity at a specific time.

12. NEPGA also contends, that the competitive nature of auctions creates a multilateral process of suppliers and bidders that is more akin to bilateral arrangements in contracts than rates set unilaterally by tariff. NEPGA explains that, unlike a unilateral tariff rate, capacity auction prices are not dictated by a single seller who is free to propose new rules or results. NEPGA further contends that, unlike unilateral rates filed by sellers, auctions impose an obligation on suppliers to deliver a specific product at a specific price, place, and time. NEPGA also points out that the Commission’s regulations provide that contracts can create tariffs and that tariffs can contain contracts in the form of rate schedules and service agreements.²¹

13. NEPGA further contends, in support of its claim that the rates are contract rates, that the forward capacity auctions represent contract rates regardless of the opposition to the underlying Settlement. NEPGA states that the Commission approved the Settlement and so imposed an auction mechanism. NEPGA likens Commission approval of the Settlement to other changes the Commission has made to its rules despite significant opposition and, in doing so, requires rates previously set by contract to be abrogated or modified.²² NEPGA also points out that the rehearing requests filed in response to the Commission’s approval of the Settlement did not challenge the auction mechanism as a rate methodology, but rather the standard of review that would be applied to auction results. NEPGA further contends that, if opposition to the Settlement was dispositive of the question of whether Forward Capacity Auction results are contract rates, then the Supreme Court would not have remanded that question.

14. NEPGA also argues that the contractual nature of capacity auction obligations is not undermined by the fact that the auctions are mandatory and conducted according to rules set forth in ISO-NE’s tariff. NEPGA explains that all auctions run according to some system of rules just as all contracts are struck within a system of rules (such as the UCC). NEPGA also contends that the auction results are not mandatory because, as the

²¹ Citing 18 C.F.R. §§ 35.2(b), (c)(1)-(2).

²² Citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968) (adopting area natural gas rates); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 710 (D.C. Cir. 2000) (adopting *pro forma* open access transmission tariff).

D.C. Circuit has observed, load has various options for meeting its forward capacity market obligations.²³

15. NEPGA also disputes the Commission's finding that the Forward Capacity Auction does not produce contract rates because utilities buying capacity in the forward capacity market cannot be said to be contracting with the capacity sellers. NEPGA contends that when ISO-NE purchases capacity from sellers it is either for itself or acting as an agent for entities that must fulfill capacity obligations. NEPGA further contends that the Commission's holding is contrary to statements made by the Commission in Order No. 741²⁴ and other orders regarding the role of Independent System Operators and Regional Transmission Organizations as contracting counterparties in market transactions, including capacity auctions.²⁵ NEPGA also points out that in a rehearing order in this proceeding, the Commission rejected an argument that market rules and tariffs are not contracts to which *Mobile-Sierra* can apply.²⁶ NEPGA contends that the Commission has failed to reconcile its findings in the Remand Order with its previous findings in this proceeding.

16. Finally, NEPGA argues that the Commission's discussion of transition rates is outside the scope of the remand. NEPGA states that, although the Supreme Court remanded the questions whether the auction results and the transition payments are contract rates,²⁷ the D.C. Circuit held that remand was moot with regard to the transmission payments.²⁸

²³ Citing *Conn. Dep't. of Pub. Util. Control v. FERC*, 569 F.3d 477, 481-82 (D.C. Cir. 2009).

²⁴ Citing *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, FERC Stats. & Regs. ¶ 31,317 (2010), *order on reh'g*, Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 (2011), *reh'g denied*, Order No. 741-B, 135 FERC ¶ 61,242 (2011).

²⁵ Citing *PJM Interconnection, LLC*, 132 FERC ¶ 61,207, at P 2, 4, 7, 45 (2010).

²⁶ Citing *Devon Power LLC*, 117 FERC ¶ 61,133, at P 90 (2006).

²⁷ Citing *NRG Power Mktg. v. Me. Pub. Utils. Comm'n*, 130 S. Ct. at 701.

²⁸ Citing *Me. Pub. Utils. Comm'n v. FERC*, 625 F.3d at 757.

17. By contrast, the Joint Applicants support the Commission's determination that the auction results and transition payments were tariff, not contract rates. The Joint Applicants contend, though, that the Commission erred in concluding that it has the discretion and authority to apply a *Mobile-Sierra* "public interest" standard of review to future challenges to those tariff rates as if they were, in fact, contract rates. They state that the Supreme Court has rejected arguments that sought to ground *Mobile-Sierra* in the Commission's approval of public utility rates. Specifically, the Joint Applicants point out that, in *Morgan Stanley*, the Court dismissed contentions that *Mobile-Sierra* could not apply because the Commission had never reviewed the market-based rate agreements at issue in that case.²⁹

18. The Joint Applicants also contend that the Remand Order wrongly suggests that the Commission has discretion to estop future Commissions from modifying the rates absent serious future harm to the public interest. The Joint Applicants explain that *Morgan Stanley* rejected such an estoppel view of *Mobile-Sierra*. They state that the Supreme Court reaffirmed in both *NRG* and *Morgan Stanley* that the *Mobile-Sierra* "public interest" standard operates only in a contract context. The Joint Applicants contend that, because the auction rates are not contract rates, there is no contractual agreement that imbues the rates with reasonableness, and there is no contract-stability interest to protect.

19. The Joint Applicants disagree with the Commission's assertion that because the *Mobile-Sierra* "public interest" test is one application of the statute's "just and reasonable" language, the Commission has the discretion to choose to apply that more rigorous standard outside the contract context. The Joint Applicants explain that the Supreme Court has made clear that the *Mobile-Sierra* "public interest" test for contract-rate changes only provides "the definition of what it means for a rate to satisfy the just-and-reasonable standard in the contract context."³⁰ In addition, the Joint Applicants contend that the Commission's confidence in the ability of the market-based features of the forward capacity auction to produce just and reasonable results derives not from the consent of the buyers and sellers, as it would in a contract context, but instead in the Commission's faith in the tariff rules creating those rates. Using this logic, the Joint Applicants argue that the Commission could apply the more stringent *Mobile-Sierra* "public interest" standard of review in every non-contract case without any legal basis to distinguish between market-based capacity prices as compared to all other market-based rate mechanisms currently setting rates in New England and throughout the nation.

²⁹ Citing *Morgan Stanley*, 554 U.S. 527.

³⁰ Citing *id.* at 546.

Finally, the Joint Applicants argue that the Commission is wrong to limit a future Commission's discretion to review tariff rates absent a showing of serious harm to the public interest.

III. Discussion

20. For the reasons discussed below, the Commission denies rehearing. NEPGA argues that the Commission erred in considering the rates at issue as anything other than contract rates, which would be subject to a *Mobile-Sierra* "public interest" presumption of reasonableness, while the Joint Applicants argue that the Commission erred in suggesting that the rates at issue here, while they are tariff rates, can nevertheless be made subject to the more stringent application of the statutory just and reasonable standard of review, commonly known as the *Mobile Sierra* "public interest" standard of review. We reject both arguments.

A. Contract vs. Tariff Rates

21. The Commission reaffirms its findings that the rates set by the forward capacity auctions represent tariff, not contract, rates and that, therefore, they are not entitled to a presumption that they are just and reasonable. The Commission does not dispute, as NEPGA point out, that conventional auctions can result in a contract between a buyer and a seller.³¹ However, the rates produced by these capacity auctions nevertheless are tariff, not contract, rates; the rates produced by the forward capacity auction are, in fact, determined unilaterally by the ISO-NE tariff.³²

22. The results of the capacity auctions, although possessing certain contractual characteristics, do not constitute contracts between buyers and sellers. The "demand" or "load" side of each auction is set not by the load-serving entities that ultimately pay for the capacity, but by ISO New England, Inc. (ISO-NE), which determines the estimated amount of capacity – known as the installed capacity requirement – that the system as a whole will require for reliability three years in the future.³³ ISO-NE then announces the

³¹ See, e.g., *In re GWI PCS I Inc.*, 230 F.3d 788, 807 (5th Cir. 2000) (holding that the close of the auction creates a binding contract between the seller and the highest bidder).

³² Remand Order, 134 FERC ¶ 61,208 at P 13.

³³ See *Conn. Dep't. of Pub. Util. Control v. FERC*, 569 F.3d 477, 480 (D.C. Cir. 2009) (describing the auction mechanism), *cert. denied*, 130 S. Ct. 1051 (2009).

auction starting price, which is initially twice the estimated cost of new entry, and capacity providers state how much capacity they would offer at that price. If more capacity is offered than required to meet the installed capacity requirement, ISO-NE employs a “descending clock” process, lowering the offering price until the quantity of capacity offered equals the installed capacity requirement. ISO-NE then assesses each utility a capacity charge equal to the utility’s share of the installed capacity requirement multiplied by the market clearing price.

23. Thus, although a conventional auction can result in a contract between the buyer and seller,³⁴ the forward capacity auctions bear little resemblance to a conventional auction. The utilities “buying” capacity in the forward capacity market have no role in the auction at all, and cannot be said to be “contracting” with the capacity sellers; indeed, it can be said that they themselves are not “buying” capacity but rather are merely paying the rate that ISO-NE charges to recover ISO-NE’s costs of buying capacity. That is, rather than agreeing to pay a specific seller an amount set by a voluntary bid for a particular property – as in a conventional auction – the “buyers” in the forward capacity auction are assessed a standard rate, based upon the intersection of the installed capacity requirement set by ISO-NE and the offers made by the capacity sellers. While the bids of the capacity sellers commit them to supply the amount they offer at the clearing price, there is nothing that can be reasonably viewed as voluntary agreements of any sort between the sellers of the capacity and the “buyers” in the auction. Thus, the standard capacity charge paid by each “buying” utility in the system for its share of the installed capacity requirement more closely resembles a tariff rate paid to ISO-NE to compensate ISO-NE for costs that ISO-NE has incurred.

24. Moreover, it cannot be said that ISO-NE is acting as an agent for capacity buyers. Although the Forward Capacity Auction creates a multilateral process of suppliers and bidders, the ultimate purchases are made unilaterally via ISO-NE’s tariff. ISO-NE is at the center of this capacity market. Through its forward auctions it procures capacity to meet its installed capacity requirement. Under ISO-NE’s tariff, load-serving entities then pay ISO-NE for that capacity. Moreover, as NEPGA points out, the auction results are not per se mandatory because load has options for meeting its forward capacity obligations, including the ability to self-supply capacity. Thus, there is no contractual obligation for load to fulfill its capacity obligations directly through the auctions. Under the Commission’s regulations, a rate schedule may take the form of a contract but, in this instance, ISO-NE’s tariff does not create a contractual obligation by buyers to purchase capacity from sellers of that capacity. To the contrary, the standard capacity charge paid

³⁴ See *supra* note 31.

by each utility in the ISO-NE system for its share of the installed capacity requirement more closely resembles a tariff rate.

25. Non-settling parties are equally obligated to pay the rates derived from the rate methodology resulting from the Settlement. These obligations arise because the Commission found that the Settlement and the resulting market rules were just and reasonable, not because the non-settling parties are subject to any contractual obligations under the Settlement. By choosing to purchase capacity through the forward capacity auctions, these non-settling parties are obligated to make payments under ISO-NE's tariff.

26. We find NEPGA's arguments with regard to the consistency of the Remand Order with Order No. 741 and other orders to be similarly unpersuasive. In Order No. 741, the Commission addressed credit reforms in organized wholesale electric markets by, *inter alia*, requiring each independent system operator (ISO) or regional transmission organization (RTO) to file tariff revisions to protect against the bankruptcy of a market participant.³⁵ The Commission offered several options for ISOs and RTOs to comply with this requirement, including the development of tariff revisions that would establish the ISO or RTO to act as the central counterparty to transactions with market participants.³⁶ That does not mean that there is a direct contractual relationship between sellers of capacity and buyers of capacity. More recently, the Commission conditionally accepted tariff revisions filed by PJM Interconnection, L.L.C. (PJM) designating PJM as a counterparty to transactions with market participants.³⁷ In those revisions, PJM defines counterparty as establishing PJM "as the contracting party, *in its name and own right and not as an agent*, to an agreement or transaction with Market Participants or other entities, including the agreements and transactions with customers regarding transmission service and other transactions under the PJM Tariff..."³⁸

27. In any event, any discussion of whether ISO-NE will choose to act as counterparty in market transactions is speculative because the Commission has extended the filing deadline for the tariff revisions until January 31, 2012. Nevertheless, even if ISO-NE chooses to designate itself as the official counterparty, that does not necessarily create a

³⁵ Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 117.

³⁶ *Id.*

³⁷ *PJM Interconnection, L.L.C.*, 132 FERC ¶ 61,207 (2010).

³⁸ *Id.* P 7 (citing PJM Operating Agreement, Eleventh Revised Sheet No. 19).

contractual relationship between sellers and buyers. As discussed above, the terms of purchase through the forward capacity auction are set unilaterally by tariff.³⁹ ISO-NE may purchase capacity to meet its installed capacity requirement, and ISO-NE establishes rates for this capacity in its tariff, but that does not create a contractual relationship between generators and load-serving entities.

28. Finally, although the D.C. Circuit found that any controversy related to the transition payments paid to generators was moot, the Commission included the transition payments in its analysis of the auction rates because they both were derived from the Settlement. We recognize here, however, as we did in the Remand Order,⁴⁰ that 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.

B. Commission Discretion to Accept “Public Interest” Standard

29. The Commission also denies rehearing regarding its discretion to accept application of a *Mobile-Sierra* “public interest” standard of review. Under *Mobile-Sierra*, as interpreted by the Supreme Court in *Morgan Stanley*, the Commission must 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.⁴¹ This presumption may be overcome only if the Commission concludes that the underlying rate “adversely affect[s] the public interest.”⁴² Thus, this “public interest” presumption demands a more stringent application of the statutory “just and reasonable” standard when the Commission reviews rates, terms and conditions of freely negotiated power sales contracts, both on initial review and if and when those rates, terms and conditions are later challenged. Nevertheless, the “public interest” presumption is not a different standard of review; rather, “the term ... refers to the differing *application* of [the statutory] just-and-reasonable standard,” which is the only statutory standard of review

³⁹ As NEPGA notes, the non-settling parties objected only to the use of the *Mobile-Sierra* public interest standard.

⁴⁰ Remand Order, 134 FERC ¶ 61,208 at P 22.

⁴¹ *Morgan Stanley*, 554 U.S. at 530.

⁴² *Sierra*, 350 U.S. at 355; *see also Morgan Stanley*, 554 U.S. at 530.

under the FPA.⁴³ Thus, rather than being an extra-statutory test, separate and apart from the “just and reasonable” standard, the “public interest” presumption represents a point on a broad continuum of approaches employed to meet the statute’s requirement that rates, terms and conditions be just and reasonable.

30. *Morgan Stanley* makes clear that the *Mobile-Sierra* “public interest” presumption applies only to contract rates, and *Morgan Stanley* does not address the Commission’s discretion to accept different applications of the statutory “just and reasonable” standard for non-contract rates. The Supreme Court has explained that the “just and reasonable” standard is the only statutory standard under the FPA for assessing wholesale rates, whether set by contract or tariff.⁴⁴ Under this statutory “just and reasonable” standard, the Commission is not “bound to any one ratemaking formula;”⁴⁵ rather, the Commission must interpret, and necessarily has the discretion to interpret, how this statutory standard is to be implemented.⁴⁶ Indeed, because “[t]he statutory requirement that rates be ‘just and reasonable’ is obviously incapable of precise judicial definition,” courts have long “afforded great deference to the Commission in its rate decisions.”⁴⁷ That is, the FPA requires only that rates be just and reasonable; it does not specify the manner in which that general formulation must be implemented in any particular context.

31. Given the flexibility inherent in the statutory “just and reasonable” standard, the Commission may require varying types and degrees of justification for challenges to particular rates or practices, depending on the circumstances. When power sales rates are set by contracts resulting from fair, arm’s-length negotiations between willing sellers and buyers, *Sierra* and the more recent *Morgan Stanley* require application of the more rigorous “public interest” presumption when the Commission is faced with a challenge to such contractually agreed-to rates. Nothing in the FPA or in the court opinions related to

⁴³ *Morgan Stanley*, 554 U.S. at 535. The Supreme Court noted that it was “less confusing” to “refe[r] to the two different applications of the just-and-reasonable standard as the ‘ordinary’ ‘just and reasonable standard’ and the ‘public interest standard.’” *Id.* at 534.

⁴⁴ *Id.* at 545.

⁴⁵ *Id.* at 532; *see also* 16 U.S.C. §§ 824d, 824e (2006).

⁴⁶ *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842 (1984).

⁴⁷ *Morgan Stanley*, 554 U.S. at 532.

this proceeding, however, precludes the Commission from applying a similar more rigorous standard when faced with challenges to other rates, as a matter of discretion, if considerations relevant to what is “just and reasonable” make that approach appropriate.

32. Because the Settlement rates at issue in this proceeding are not contract rates, there is no presumption that the *Mobile-Sierra* “public interest” standard of review should apply. Nonetheless, the Commission determined that it would be appropriate to accept the *Mobile-Sierra* “public interest” language in part because of the similarities between the Settlement rates and contract rates. The Commission determined that, although these forward capacity auctions will not result in contracts between buyers and sellers, they share with freely-negotiated contracts certain market-based features that tend to assure just and reasonable rates.⁴⁸ In particular, the Commission found that the auctions provide a market-based mechanism to appropriately value capacity resources based on their location, satisfying cost-causation principles.⁴⁹ The forward-looking nature of the Forward Capacity Market provides appropriate signals to investors when infrastructure resources are necessary, with sufficient lead time to allow that infrastructure to be put into place before reliability is sacrificed.⁵⁰ And the locational component of the Forward Capacity Market ensures that the addition of new infrastructure is targeted to where reliability concerns are most critical.⁵¹

33. In addressing the justness and reasonableness of the Settlement, the Commission determined that acceptance of the Settlement, including its “public interest” standard of review, would promote consumer welfare by balancing the need for rate stability and the interests of the diverse entities who participate in the Forward Capacity Market.⁵² The Commission found that stability is particularly important in this case, which was initiated

⁴⁸ Remand Order, 134 FERC ¶ 61,208 at P 19.

⁴⁹ *Id.* (citing Settlement Order, 115 FERC ¶ 61,340 at P 65 [citing *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112, at P 19-20 (2004); *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079, at P 49-51 (2006)]).

⁵⁰ *See id.* (citing Settlement Order, 115 FERC ¶ 61,340 at P 65 [citing *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 at P 67-72]).

⁵¹ *See id.* (citing Settlement Order, 115 FERC ¶ 61,340 at P 65 [citing *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 at P 49-51]).

⁵² Settlement Order, 115 FERC ¶ 61,340 at P 186.

in part because of the unstable nature of the former installed capacity revenues and the effect that has on generating units, particularly those critical to maintaining reliability.⁵³ In addition, as noted above, the Commission found that the forward-looking nature of the Forward Capacity Market will provide appropriate signals to investors when new infrastructure resources are necessary with sufficient lead time to allow that infrastructure to be put into place before reliability is sacrificed.⁵⁴ The Commission also found that the Settlement comported with expressed intent of Congress regarding this case.⁵⁵

34. The Commission's acceptance of the Settlement, as a package, was consistent with Commission precedent.⁵⁶ In *Trailblazer*, the Commission identified four approaches it could use to address a contested settlement.⁵⁷ The Commission determined that it was appropriate to apply the second *Trailblazer* approach in addressing this Settlement. Accordingly, the Commission found that the parties objecting to the Settlement Agreement would "be in no worse position under the terms of the settlement than if the case were litigated," and that the Settlement, as a package, achieves an overall just and reasonable result within a zone of reasonableness.⁵⁸ In particular, the Commission found

⁵³ *Id.*

⁵⁴ *See supra* note 52.

⁵⁵ Settlement Order, 115 FERC ¶ 61,340 at P 67 ("In section 1236 of the Energy Policy Act of 2005, Congress noted the concerns voiced by the governors of the New England states regarding the LICAP mechanism, and declared that the Commission should carefully consider their objections.").

⁵⁶ *Id.* P 70.

⁵⁷ *Trailblazer Pipeline Company*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110 (1999) (*Trailblazer*). The four approaches laid out in *Trailblazer* are: (1) Commission renders a binding merits decision on each contested issue, (2) Commission approves the settlement based on a finding that the overall settlement as a package is just and reasonable, (3) Commission determines that the benefits of the settlement outweigh the nature of the objections, and the interests of the contesting party are too attenuated, and (4) Commission approves the settlement as uncontested for the consenting parties, and severs the contesting parties to allow them to litigate the issues raised.

⁵⁸ Settlement Order, 115 FERC ¶ 61,340 at P 70 (citing *Trailblazer*, 87 FERC ¶ 61,110 at 61,339).

that the Settlement resolved the issues raised in this proceeding concerning the under-compensation of capacity resources in New England, and provided the appropriate market structure to: (1) ensure that generating resources are appropriately compensated based on their location and contribution to system reliability; and (2) provide incentives to attract new infrastructure when and where needed.⁵⁹ Thus, the Commission appropriately exercised its discretion under the FPA to accept the Settlement, including its more stringent application of the statutory “just and reasonable” standard because the Settlement presented an overall just and reasonable result consistent with the requirements of section 205 of the FPA.

35. Moreover, the Commission found that the Settlement might not have been reached without the inclusion of the “public interest” standard of review provided in section 4.C.⁶⁰ The Commission initiated these proceedings in response to the compensation problems faced by generating resources that are needed for reliability but could not obtain sufficient revenues in the markets to continue operation. If the Settlement had not been reached, many of the deficiencies within the ISO-NE market would have persisted and ISO-NE might not have been able to retain the resources needed for reliability. In addition, an already protracted litigation involving over 175 representatives would have continued and would have caused further instability in the ISO-NE market thereby thwarting other market enhancements.⁶¹

36. Accepting the application of the *Mobile-Sierra* “public interest” standard of review to the Settlement, we recognize, will make it more difficult to challenge in future cases the justness and reasonableness of the Settlement; i.e., the Commission will not act absent a showing of serious public harm. This is not an action that the Commission took, or takes, lightly. In a recent order approving an uncontested settlement, the Commission directed the settling parties to modify their settlement so as not to impose the “public interest” standard of review on future changes proposed by the Commission and non-settling parties.⁶² The Commission found that the circumstances of the *HIOS* settlement

⁵⁹ Settlement Order, 115 FERC ¶ 61,340 at P 71.

⁶⁰ See ISO-NE April 5, 2006 Reply Comments at 8 (contending that “every detail” of the Settlement “was critical to one or more of the negotiating parties” and that “changing one aspect of the Settlement package will likely cause a chain reaction that could easily lead to the demise of the Settlement, leaving New England without a solution for what most if not all agree is a serious problem”).

⁶¹ Settlement Order, 115 FERC ¶ 61,340 at P 66.

⁶² *High Island Offshore System, LLC*, 135 FERC ¶ 61,105 (2011) (*HIOS*).

did not rise to the compelling level of those present in *Devon Power* so as to warrant binding the Commission and non-settling third parties to a more rigorous application of the statutory “just and reasonable” standard of review.⁶³ Since *HIOS*, the Commission has issued other orders accepting uncontested settlements in which it has directed the settling parties to remove *Mobile-Sierra* provisions because we found that the circumstances of those settlements did not rise to the compelling level as those present in this proceeding.⁶⁴

37. Thus, the Commission has judged, and intends to judge, various proposed applications of the statutory “just and reasonable” standard, including the *Mobile-Sierra* “public interest” standard of review, on a case-by-case basis. The Commission will accept a more stringent application of the statutory “just and reasonable” standard only when the applicant can demonstrate compelling circumstances, such as those found in this proceeding, that merit such protection from challenges.⁶⁵ We will not use our discretion to accept a more rigorous application of the statutory “just and reasonable” standard unless we find, based on the facts presented, that the package offers sufficient benefits to consumers to warrant taking such action. The Commission’s assessment, as in any statutory just and reasonable analysis, must be responsive to the arguments presented and based on the administrative record compiled.

38. Moreover, even when, as in the particular circumstances presented here, the Commission does decide to exercise its discretion and apply a more stringent standard of review to govern future challenges, that action also does not mean that, in response to future challenges to a rate, the Commission will be unable to review the rate.⁶⁶ We will respond as necessary to the threat of serious harm to the public interest.⁶⁷ The

⁶³ *Id.* P 5.

⁶⁴ See, e.g., *Petal Gas Storage, LLC*, 135 FERC ¶ 61,152, at P 17 (2011); *Southern LNG Company, LLC*, 135 FERC ¶ 61,153, at P 24 (2011) (*Southern*); *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014, at P 18 (2011).

⁶⁵ See *Southern*, 135 FERC ¶ 61,153 at P 24.

⁶⁶ Remand Order, 134 FERC ¶ 61,208 at P 25.

⁶⁷ *Morgan Stanley*, 128 S. Ct. at 2747-48 & n.4 (Commission may look at the “totality of the circumstances,” not just the three factors – continuing ability of utility to provide service, excessive burden on consumers, undue discrimination – once identified in *Sierra*).

Commission has taken such action in the past,⁶⁸ and retains the ability to do so in the future.

The Commission orders:

The requests for rehearing are hereby denied.

By the Commission. Commissioner Spitzer is not participating. Commissioner Norris is dissenting in part with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶⁸ See *Arizona Corporation Commission, et al. v. FERC*, 397 F.3d 952 (D.C. Cir. 2005) (modifying the terms of earlier settlements, despite presence of *Mobile-Sierra* public interest standard, not to protect one party from an “improvident bargain,” but rather to prevent “the imposition of an excessive burden” on third parties) (quoting *Northeast Utils. Serv. Co. v. FERC*, 55 F.3d 686, 691 (1st Cir. 1995)).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Devon Power LLC

Docket No. ER03-563-067

(Issued October 20, 2011)

NORRIS, Commissioner, *dissenting in part*:

For the reasons I expressed in my partial dissent in the Remand Order, I continue to disagree with the majority's conclusion here that the Commission can or should exercise its discretion to extend the public interest standard of review to non-contract rates, terms, and conditions.¹ Therefore, I respectfully dissent in part from the portions of this order that affirm that conclusion on rehearing.

John R. Norris, Commissioner

¹ *Devon Power LLC*, 134 FERC ¶ 61,208 (2011) (Remand Order), *Norris, dissenting in part*.