

104 FERC ¶ 61,213  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell

Richard Blumenthal, Attorney General  
of the State of Connecticut, and  
The Connecticut Department of  
Public Utility Control

v.

Docket No. EL03-123-002

NRG Power Marketing, Inc.

ORDER DENYING REHEARING AND  
LATE INTERVENTION

(Issued August 15, 2003)

1. In this order, we deny rehearing requests of our June 25 Order.<sup>1</sup> In that order, we decided an issue of first impression: whether a bankruptcy court's approval of a public utility seller's request to reject a contract between it and a buyer precludes the Commission from making an independent determination, pursuant to the Federal Power Act (FPA), as to whether that seller must continue to fulfill its contractual obligation to provide service to the buyer. The Commission found that, even if a public utility files for bankruptcy, the utility still must meet its obligations under the FPA.<sup>2</sup> In addition, in the June 25 Order, we

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<sup>1</sup>See Richard Blumenthal, Attorney General of the State of Connecticut, and The Connecticut Department of Public Utility Control v. NRG Power Marketing, Inc., et al., 103 FERC ¶ 61,344 (2003) (June 25 Order). This order only addresses requests for rehearing that pertain to those portions of the June 25 Order that relate to Docket No. EL03-123-001. A future rehearing order will address requests for rehearing related to other matters in the June 25 Order (i.e., Docket Nos. EL03-134-000, EL03-129-000, and EL03-135-000).

<sup>2</sup>Id. at 45. Our decision in the June 25 Order should be contrasted with our recent decision in Vermont Public Power Supply Authority v. PG&E Energy Trading, et al., 104 FERC ¶ 61,185 (2003) (Vermont). In Vermont, the Commission denied a complaint that

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required NRG-PMI to continue providing service to Connecticut Light and Power Company (CL&P) under its Standard Offer Service Wholesale Sales Agreement (NRG/CL&P Agreement) until the Commission ruled on whether NRG-PMI's proposed cessation of service meets the Mobile-Sierra<sup>3</sup> “public interest” standard.<sup>4</sup>

## I. BACKGROUND

2. On October 29, 1999, NRG-PMI and CL&P entered into the NRG/CL&P Agreement, which required NRG-PMI to provide a fixed amount of energy to CL&P at a fixed price from January 1, 2000 until December 31, 2003.<sup>5</sup> On May 14, 2003, NRG-PMI notified CL&P that it intended to terminate the agreement on May 19, 2003, because CL&P purportedly was in default for failure to pay certain congestion charges. Later that day, NRG-PMI filed a voluntary Chapter 11 bankruptcy petition and moved for an order

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<sup>2</sup>(...continued)

the Commission should direct a service provider to resume providing service to a buyer under the contract, “because the parties' contract provide[d] that it shall automatically terminate if either party is the subject of a bankruptcy proceeding.” Id. at P 2. “Th[at] being the case, we [found] without merit [the buyer's] contention that we should direct [the seller] to resume deliveries under the contract.” Id. at 16. In this regard, we understand that in recent power sales agreements bankruptcy is often considered an event of default. See, e.g., Master Power Purchase & Sale Agreement, 21 Energy L. J. 301, 319 (2000) (quoting Article 5.1, “Events of Default,” which states that “[a]n 'Event of Default' shall mean, with respect to a Party (a 'Defaulting Party'), the occurrence of any of the following: . . . (d) such Party becomes Bankrupt”). On the other hand, in this proceeding, the NRG/CL&P Agreement (as discussed in further detail below) does not provide either that bankruptcy is an event of default or that it automatically terminates upon either of the parties becoming the subject of a bankruptcy proceeding.

<sup>3</sup>United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) (Mobile); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (Sierra) (collectively, Mobile-Sierra).

<sup>4</sup>June 25 Order, 103 FERC ¶ 61,344 at P 66. In this regard, the Commission is issuing concurrently with this order an order that addresses the merits of the public interest issue. See Richard Blumenthal, Attorney General of the State of Connecticut, and The Connecticut Department of Public Utility Control v. NRG Power Marketing, Inc., Docket No. EL03-134-000 (Order Upholding Contract).

<sup>5</sup>The factual background regarding this matter is laid out in greater detail in the June 25 Order. See 103 FERC ¶ 61,344 at P 3-16.

under § 365(a) of the Bankruptcy Code authorizing NRG-PMI to reject the NRG/CL&P Agreement.

3. On May 15, 2003, Richard Blumenthal, Attorney General for the State of Connecticut (CTAG), and the Connecticut Department of Public Utility Control (CDPUC) (collectively, the Connecticut Representatives) jointly filed a complaint asking that the Commission stay NRG-PMI's proposed termination. On May 16, 2003, the Commission issued an order that found that NRG-PMI's proposed deadline of May 19 to terminate the agreement left it "with insufficient time to evaluate" the effects of the proposed cessation of service.<sup>6</sup> Therefore, in that order, the Commission set an abbreviated 10-day deadline for comments and stated it "intend[ed] to act as expeditiously as possible in th[at] proceeding."<sup>7</sup> In addition, pending further Commission notice, NRG-PMI was directed "to continue to provide service to CL&P pursuant to the rates, terms and conditions of the [NRG/CL&P] Agreement."<sup>8</sup>

4. On May 22, 2003, the Connecticut Representatives filed an amendment to their complaint. Among other things, they requested that the Commission initiate a proceeding under Sections 205 and 206 of the FPA<sup>9</sup> to determine whether NRG-PMI had a contractual right to terminate service with CL&P under the NRG/CL&P Agreement and, if it does, whether termination of service pursuant to that contract is consistent with the public interest.

5. On June 2, 2003, "the Bankruptcy Court found that the money-losing character of the Agreement satisfied the business judgment standard for rejection of an executory contract"<sup>10</sup> under Section 365 of the Bankruptcy Code.<sup>11</sup> However, the bankruptcy court declined to enjoin the Commission or vacate the May 16 Order. Thereafter, NRG-PMI sought declaratory and injunctive relief in the District Court for the Southern District of

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<sup>6</sup>Richard Blumenthal, Attorney General of the State of Connecticut v. NRG Power Marketing, Inc., 103 FERC ¶ 61,188 (2003) (May 16 Order).

<sup>7</sup>Id. at P 8.

<sup>8</sup>Id. at Ordering Paragraph (A).

<sup>9</sup>16 U.S.C. §§ 824 d, e (2000).

<sup>10</sup>In re NRG Energy, Inc. et al., Case No. 03-13024 (Bankr. S.D.N.Y. Jun. 2, 2003) (June 2 Hearing).

<sup>11</sup>11 U.S.C. § 365.

New York that would allow it to cease performance under the NRG/CL&P Agreement. In response, the court issued an ex parte temporary restraining order allowing NRG-PMI to cease service and staying any requirement that NRG-PMI comply with future Commission orders preventing cessation of service under the agreement.<sup>12</sup>

6. The Commission concluded in the June 25 Order that based on the record received to date, we were unable to determine whether NRG-PMI's proposed cessation of service meets the Mobile-Sierra public interest standard. Accordingly, we established procedures for the submission of information (i.e., "paper hearing procedures") regarding that issue.<sup>13</sup> In this regard, we directed NRG-PMI, on behalf of itself and its affiliates, to provide evidence sufficient to demonstrate that continuing to provide service under the contract will "impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."<sup>14</sup> We stated that until the Commission reaches a final determination on the merits of the public interest issue, we require NRG-PMI to comply with the rates, terms, and conditions of the NRG/CL&P Agreement.<sup>15</sup> We noted that this includes providing service to CL&P, pursuant to the agreement, until that time.<sup>16</sup>

7. On June 30, 2003, the District Court for the Southern District of New York dismissed NRG-PMI's motion for declaratory and injunctive relief, agreeing with the Commission that the Court lacked subject matter jurisdiction to grant the requested relief.<sup>17</sup> Thereafter, on July 3, 2003, NRG-PMI sought from the Commission a stay of the June 25 Order pending judicial review or, in the alternative, pending entry of a final, reviewable order from the Commission. Without waiting for the Commission to rule on its stay request, on July 8, 2003, NRG-PMI filed a motion with the D.C. Circuit seeking an emergency stay of the June 25 Order.

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<sup>12</sup>NRG Energy, Inc., et al., Case No. 03 CV 3754 (RCC) (S.D.N.Y. Jun. 12, 2003).

<sup>13</sup>June 25 Order, 103 FERC ¶ 61,344 at P 66.

<sup>14</sup>Id. at P 63 (quoting Sierra, 350 U.S. at 355).

<sup>15</sup>Id. at P 68.

<sup>16</sup>Id.

<sup>17</sup>NRG Energy, Inc., et al., Case No. 03 CV 3754 at 2 (RCC) (S.D.N.Y. Jun. 30, 2003).

8. On July 9, 2003, the Commission denied NRG-PMI's stay request.<sup>18</sup> The Commission found that NRG-PMI failed to show irreparable injury because it provided no factual support for its claim that continuing to provide service under the contract would impair its financial ability to continue service.<sup>19</sup> Furthermore, NRG-PMI failed to demonstrate "certain and great" harm resulting if a stay were not granted, asserting only "potential" consequences of continued performance under the contract.<sup>20</sup> The Commission also stated that CL&P and its customers would likely suffer substantial harm as a result of a stay because they would be unable to recover all the costs of replacement power.<sup>21</sup> Furthermore, given the inadequate record established at that date, the Commission found it premature to evaluate the public interest issue, deferring that determination until the Commission had an opportunity to consider NRG-PMI's answers and the interested parties' responses to them.<sup>22</sup>

9. The D.C. Circuit denied NRG-PMI's "emergency motion" for a stay of the June 25 Order on July 16, 2003.<sup>23</sup> The Court found that NRG-PMI had "not satisfied the stringent standards required for a stay pending review."<sup>24</sup> In addition, on July 18, 2003, NRG-PMI appealed the District Court's June 30 ruling to the Court of Appeals for the Second Circuit.<sup>25</sup>

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<sup>18</sup>Richard Blumenthal, Attorney General of the State of Connecticut v. NRG Power Marketing, Inc., 104 FERC ¶ 61,046 (2003) (July 9 Order).

<sup>19</sup>*Id.* at P 10.

<sup>20</sup>*Id.* at P 12-13.

<sup>21</sup>*Id.* at P 16.

<sup>22</sup>*Id.* at P 18.

<sup>23</sup>In re. NRG Power Marketing Inc., No. 03-1189 (July 16, 2003).

<sup>24</sup>*Id.* (citing Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc. 559 F.2d 841, 843 (D.C. Cir. 1977)).

<sup>25</sup>NRG Power Marketing Inc. v. Richard Blumenthal, *et al.*, No. 03-CV-3754 (RCC) (S.D.N.Y. 2003), appeal pending, No. 03-6148 (2d Cir. Jul. 18, 2003).

10. On July 23, 2003, the Commission directed NRG Energy to file plans to assure the continued service of its generating units in the event of NRG-PMI's liquidation.<sup>26</sup> The next day, NRG Energy filed an affidavit in response to that order.<sup>27</sup>

## **II. DISCUSSION**

### **A. Substantive Matters**

#### **1. Bankruptcy Proceeding and the Commission's Jurisdiction**

##### **a. Automatic Stay**

##### **i. June 25 Order**

11. In the June 25 Order, the Commission noted: "The filing of a bankruptcy petition operates as an automatic stay of several categories of judicial and administrative proceedings. . . . That section generally prevents bankruptcy courts from interfering with governmental regulatory actions by providing that the automatic stay of proceedings upon the filing of a bankruptcy petition does not apply to 'the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.'<sup>28</sup> Because we determined that we were acting in that proceeding in furtherance of our regulatory power, we concluded that our actions were within the exception to the automatic stay. In particular, we stated that our "actions [were] related to carrying out the FPA's public interest considerations."<sup>29</sup>

12. In addition, we stated: "With regard to NRG-PMI's claim that the Connecticut Representatives are not exempt from the stay under Section 362(b)(4), we need not reach

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<sup>26</sup>Richard Blumenthal, Attorney General of the State of Connecticut, and The Connecticut Department of Public Utility Control v. NRG Power Marketing, Inc., 104 FERC ¶ 61,096 (2003).

<sup>27</sup>See Docket No. EL03-123-000.

<sup>28</sup>103 FERC ¶ 61,344 at P 48 (citing 11 U.S.C. § 362(4) (2000)).

<sup>29</sup>Id. at P 49.

that issue because the Commission . . . [is] institut[ing] . . . a Section 206 proceeding. . . . This renders moot any concerns about procedural defects in this proceeding. . . ."<sup>30</sup>

**ii. NRG-PMI's Request for Rehearing**

13. NRG-PMI argues that the Commission in the June 25 Order violated the automatic stay because under Section 362 virtually all actions against the debtor are automatically stayed upon the filing of a bankruptcy petition.<sup>31</sup> NRG-PMI claims that the Commission prevented the automatic stay from achieving its desired goals by depriving NRG-PMI of a breathing spell, frustrating the bankruptcy court's centralization of all disputes concerning NRG-PMI, and attempting to deplete NRG-PMI's estate for the benefit of one creditor but to the detriment of all other creditors.<sup>32</sup>

14. According to NRG-PMI, the Commission may not advance the contract rights of private parties, such as CL&P, through the "regulatory power" exemption to the automatic stay. NRG-PMI notes that the Sixth Circuit has stated: "An extreme example of [a violation of the automatic stay] would be a suit by a state attorney general on behalf of a supplier against its debtor-customer to enforce a contract obligation."<sup>33</sup> NRG-PMI states that the June 25 Order is such an extreme example identified by the Sixth Circuit.

15. NRG-PMI also claims that we violated the automatic stay by granting in part the Connecticut Representatives' amended complaint, because they acted as an agent or proxy to advance the private interests of CL&P over those of NRG-PMI's other creditors. Furthermore, the Commission does not have the authority to grant the Connecticut Representatives relief from the automatic stay; instead, only the court presiding over the bankruptcy proceeding has the authority to grant such relief.

**iii. The Commission's Response**

16. NRG-PMI asks us to reconsider our decision that the Commission retains its authority, pursuant to the FPA, over the NRG/CL&P Agreement even though NRG-PMI has

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<sup>30</sup>Id. at P 54.

<sup>31</sup>NRG-PMI Request for Rehearing at 18 n.75 (citing *SEC v. Brennan*, 230 F.3d 65, 70 (2d Cir. 2000)).

<sup>32</sup>NRG-PMI Request for Rehearing at 25-26.

<sup>33</sup>Id. at 84 & n.270 (quoting *Chao v. Hospital Staffing Serv.*, F.3d 374, 389 (6th Cir. 2001)).

filed a petition for bankruptcy. For the reasons discussed below, we reiterate that the Bankruptcy Code clearly signals that regulatory agencies, such as the Commission, retain their full rights to review matters within their police or regulatory power during bankruptcy.

17. As we noted in the June 25 Order, Section 362 generally prevents bankruptcy courts from interfering with governmental regulatory actions by providing that the automatic stay of proceedings upon the filing of a bankruptcy petition does not apply to a proceeding by a governmental unit to enforce its regulatory power.<sup>34</sup> Thus, the Commission may take regulatory action that it deems appropriate under the FPA so long as that action serves a regulatory purpose.<sup>35</sup> The Commission's actions in the June 25 Order fall squarely within the regulatory powers exception to the Bankruptcy Code because they were in the furtherance of our statutory duties.<sup>36</sup> Specifically, the Commission required NRG-PMI to continue providing service consistent with its contractual obligations until such time as NRG-PMI justifies a change to the contract under the FPA. As a result, the Commission could act notwithstanding the automatic stay.<sup>37</sup>

18. We also disagree with NRG-PMI that the Commission is advancing the contract rights of private parties through the regulatory power exemption to the automatic stay. Although a government agency might not be able to pursue legal action to enforce a contract subject to bankruptcy when it is acting solely on behalf of a private party's own economic interests, ensuring that a sale of power under the FPA continues until its cessation is authorized in compliance with the FPA is a responsibility at the heart of this Commission's police/regulatory power and its duty to protect the public interest. Moreover, it is clear that the Commission is not seeking to enforce a monetary judgment against NRG-PMI related to any pecuniary interest in the debtor's property that the Commission might have.

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<sup>34</sup>June 25 Order, 103 FERC ¶ 61,344 at 48 & n.59 (quoting 11 U.S.C. § 362(b)(4)).

<sup>35</sup>See, e.g., Eddleman v. Dept. of Labor, 923 F.2d 782, 790 (10th Cir. 1991), overruled in part on other grounds by Temex Energy, 968 F.2d 1003, 1005 n.3 (10th Cir. 1992) (indicating that most courts agree that "the Section 362(b)(4) exception can apply to agency actions, even though such actions may affect debtor assets") (citation omitted).

<sup>36</sup>June 25 Order, 103 FERC ¶ 61,344 at P 52.

<sup>37</sup>Id.

19. Rather, our actions were designed to effectuate public policy;<sup>38</sup> in particular, the Commission's actions are related to carrying out the FPA's compelling public interest considerations.<sup>39</sup> Under the FPA, the Commission has jurisdiction over wholesale sales of electric energy, such as the NRG/CL&P Agreement, and has a duty to assure that such sales are performed and discontinued in compliance with the FPA.<sup>40</sup> In addition, "[a]lthough private parties may benefit financially from" an agency's actions, that does not preclude an agency from acting to protect its regulatory interests.<sup>41</sup> Thus, even if our actions in the June 25 Order have financial implications for NRG-PMI or its creditors, this does not mean that the Commission is prevented from carrying out our statutory mandate. Moreover, the police and regulatory powers exception takes effect immediately, so that a governmental agency exercising such power is not required to move in bankruptcy court for relief from the automatic stay prior to commencing or continuing proceedings against a debtor.<sup>42</sup>

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<sup>38</sup>We note that courts have consistently recognized governmental units' authority to pursue regulatory actions that protect consumers in analogous circumstances. See, e.g., *Pacific Gas & Electric Company v. Cal. PUC*, 263 B.R. 306 (Bankr. N.D. Cal. 2001) (finding that California PUC rate-making determination with regards to a bankrupt entity implicitly not subject to injunction and, therefore, not subject to stay by the bankruptcy court); *In re Berry Estates*, 812 F. 2d 67 (2d Cir. 1987), cert. den., 484 U.S. 819 (1987) (enforcement of rent control regulation).

<sup>39</sup>See June 25 Order, 103 FERC ¶ 61,344 at P 62-68 (finding that there is a need to develop a factual record concerning whether NRG-PMI proposed cessation of service meets the Mobile-Sierra public interest standard); Order Upholding Contract, Docket No. EL03-134-000 (stating the reasons that NRG-PMI's abandonment of the NRG/CL&P Agreement is contrary to the public interest).

<sup>40</sup>*NAACP v. FPC*, 425 U.S. 662, 669-70 (1976) ("The use of the words 'public interest' in the [Federal] Power Act[] is [] a directive to the Commission to . . . promote the orderly production of plentiful supplies of electric energy . . . at just and reasonable rates.")

<sup>41</sup>*Berg v. Good Samaritan Hospital (In re Berg)*, 230 F.3d 1165, 1168 (9th Cir. 2000) (citations omitted).

<sup>42</sup>*Board of Governors v. MCorp Fin. Inc.*, 502 U.S. 32, 40 (1991) (MCorp) (rejecting argument that before the police or regulatory exception applies "a court must first determine whether the proposed exercise of police or regulatory power is legitimate"). The Court also held that a bankruptcy court does not have authority to examine the validity of an administrative agency's actions when determining if those actions are excepted from

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20. While we made no finding in the June 25 Order regarding whether the Connecticut Representatives were exempt from the stay under Section 362(b)(4), we noted that their actions appear to be related to carrying out their mandates: the CDPUC is charged with regulating public utilities and protecting the public interest in such matters, and CTAG is tasked by state law to appear for the state in all suits in which the state has an interest. Thus, we note that both of the Connecticut Representatives would appear to fall within the police and regulatory exception to the Bankruptcy Code.<sup>43</sup> Furthermore, as we suggested in the June 25 Order, even assuming that Connecticut Representatives are not exempt from the stay, that issue is moot because the Commission has the authority to order an FPA Section 206 investigation of this matter,<sup>44</sup> and the Commission exercised its independent authority in the June 25 Order to consider whether NRG-PMI's cessation of service under the NRG/CL&P Agreement is just and reasonable.

**b. Rejection of the Contract**

**i. June 25 Order**

21. We concluded in the June 25 Order that Commission action, with regard to cessation of service under the NRG/CL&P Agreement, is not precluded by the bankruptcy court's approval of rejection of that contract. In this regard, we stated: “[T]he Commission is not contesting whether Section 365(a) of the Bankruptcy Code confers upon NRG-PMI a right to reject a contract. Instead, the issue in this matter is whether NRG-PMI can cease

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<sup>42</sup>(...continued)  
the automatic stay.

<sup>43</sup>As noted, the case on which NRG-PMI relies to support its position that the Connecticut Representatives are not permitted to bring this complaint in light of the automatic stay is inapposite. NRG-PMI Answer at 31 (citing *Elaine Chao v. Hospital Staffing Services Inc*, et al., 270 F.3d 374, 382 (6 Cir. 2001)). That case stands for the proposition that a government agency cannot pursue legal action to enforce a contract subject to bankruptcy when it is acting solely on behalf of a private party's own economic interests. Id. The Connecticut Representatives appear to have filed their complaint on behalf of the state of Connecticut and its residents, who will ultimately bear the costs if NRG-PMI ceases service, not to protect the private pecuniary interests of CL&P.

<sup>44</sup>June 25 Order, 103 FERC ¶ 61,344 at P 54.

performance of the contract without satisfying the FPA requirements adopted by Congress to protect wholesale power customers.”<sup>45</sup>

**ii. NRG-PMI's Request for Rehearing**

22. NRG-PMI notes that Section 365(a), which provides that a debtor in possession, subject to the approval of a bankruptcy court, “may assume or reject any executory contract . . . of the debtor,”<sup>46</sup> is not qualified by any regulatory exception.<sup>47</sup> Thus, NRG-PMI asserts that the Commission’s requirement that NRG-PMI must continue to provide service to NRG-PMI is at odds with the bankruptcy court's June 2 Hearing, authorizing the rejection of the NRG/CL&P Agreement.

23. NRG-PMI also argues that the June 25 Order is inconsistent with two Supreme Court cases. According to NRG-PMI, in Bildisco, the Court held that an agency may only stop a debtor's rejection of an executory contract if there is an express exception to such an action in the Bankruptcy Code.<sup>48</sup> Furthermore, the Court explained in that case that the plain language of Section 365(a) "by its terms includes all executory contracts except those expressly exempted."<sup>49</sup> In this regard, NRG-PMI asserts that the Commission has not invoked any such exception because there is not a "regulatory" or "energy sales" exemption. NRG-PMI states that the holding of Bildisco is reinforced by the Court's recent decision in NextWave, in which it held that “where Congress has intended to provide regulatory exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly.”<sup>50</sup>

24. In addition, NRG-PMI states that the governing precedent relied on by the Commission in the June 25 Order is distinguishable from this case.<sup>51</sup> Thus, NRG-PMI

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<sup>45</sup>Id. at P 53; see 11 U.S.C. § 365(a).

<sup>46</sup>NRG-PMI Request for Rehearing at 26 & n.79 (quoting 11 U.S.C. § 365(a)).

<sup>47</sup>Id. at 26 & n.81 (citing FCC v. NextWave Personal Communications Inc., 123 S. Ct. 832, 839 (2003) (NextWave)).

<sup>48</sup>Id. at 24 & n.72 (citing National Labor Relations Board v. Bildisco and Bildisco, 465 U.S. 513 (1984) (Bildisco)).

<sup>49</sup>Id. at 521.

<sup>50</sup>Id. at 24 & n.73 (citing NextWave, 123 S. Ct. at 839 (2003)).

<sup>51</sup>NRG-PMI Request for Rehearing at 35-43 (distinguishing precedent cited in the

states that nothing in the Bankruptcy Code or governing precedent permits the Commission to veto a bankruptcy court order authorizing rejection of a contract. Furthermore, according to NRG-PMI, by requiring its continued performance despite the financial drain on NRG Energy's estate, the Commission in the June 25 Order violated its own precedent in Kern River<sup>52</sup> and Columbia.<sup>53</sup>

### iii. The Commission's Response

25. NRG-PMI states that the issue in this matter is whether a regulatory exception exists to the authority given to bankruptcy courts to authorize rejection of contracts under Chapter 11,<sup>54</sup> even though the Commission did not challenge the bankruptcy court's authority to authorize rejection of the NRG/CL&P Agreement.<sup>55</sup> The real issue here is whether a jurisdictional public utility remains subject to the requirements of Section 205 of the FPA for the early termination of a wholesale power contract after it seeks bankruptcy protection and may cease providing service for a wholesale sale of electric energy in interstate commerce despite requirements imposed under the FPA.

26. This Commission and the bankruptcy court evaluate the NRG/CL&P Agreement under different standards. In deciding whether to permit a rejection of a contract, the bankruptcy court employs the business judgment rule, which only looks to whether the

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<sup>51</sup>(...continued)  
June 25 Order).

<sup>52</sup>Id. at 29 (citing Kern River Gas Transmission Co., Docket No. RP99-274-006, et al., 101 FERC ¶ 61,374 at 62,556 (2002) (Kern River)).

<sup>53</sup>Id. at 29 (citing Columbia Gas Transmission Corp., 71 FERC ¶ 61,194 at 61,678 (1995) (Columbia)).

<sup>54</sup>11 U.S.C. § 365(a).

<sup>55</sup>NRG-PMI seems to suggest that the June 25 Order is contrary to Section 365 and, therefore, cannot be enforced unless the Commission successfully challenges the bankruptcy court's rejection order. However, we note that the bankruptcy court did not see such a conflict between its rejection order and the Commission's May 16 Order. As with the June 25 Order, the May 16 Order was issued pursuant to Commission's jurisdiction under the FPA over the rates, terms, and conditions of wholesale sales of electricity, such as those found in the NRG/CL&P Agreement.

contract at issue is valuable or burdensome to the estate.<sup>56</sup> For instance, in this proceeding, "the bankruptcy court found that the money-losing character of the Agreement satisfied the business judgment standard,"<sup>57</sup> without any consideration of the factors entrusted to the Commission.

27. In contrast, the Commission is obliged to determine whether NRG-PMI's cessation of service under the NRG/CL&P Agreement is consistent with the public interest.<sup>58</sup> That jurisdiction and duty cannot be shifted to a bankruptcy judge. Given that the FPA requires the Commission to balance a different set of public interest factors from those that a bankruptcy judge must consider in a rejection hearing, an order authorizing rejection does not obviate the need for separate consideration by the Commission of its public interest obligations related to a rejected agreement that falls within the Commission's jurisdiction. Accordingly, in the June 25 Order, although the bankruptcy court had authorized NRG-PMI to reject the contract, the Commission considered the matter of NRG-PMI's cessation of service under the agreement in light of the public interest considerations entrusted to it under the FPA.

28. If NRG-PMI is correct that filing for bankruptcy would excuse a debtor in possession, such as NRG-PMI, from complying with any statute or regulation, such as the FPA, then bankruptcy courts could essentially enjoin the effectiveness of any federal regulatory action without any consideration being given to the impact on the public

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<sup>56</sup>Cf. *Orion Pictures*, 4 F.3d at 1098, 1099 (1993) ("[T]he bankruptcy court's 'business judgment' in deciding a motion to assume is just that - a judgment of the sort a business-man would make. In no way is this decision a formal ruling on the underlying disputed issues, and thus will receive no collateral estoppel effect.") For example, a bankruptcy court is required to determine the likelihood of further liquidation or reorganization proceedings if the plan is to be approved.

<sup>57</sup>June 2 Hearing, Tr. at 4.

<sup>58</sup>Cf. *Northeast Utilities Service Co. v FERC*, 993 F.2d 937, 946 (1st Cir. 1993) ("The bankruptcy court and Commission evaluated the merger proposal under different standards. The bankruptcy court was required to determine the likelihood of further liquidation or reorganization proceedings were the plan to be approved. The Commission was obliged to determine whether the plan was 'consistent with the public interest.'") In this regard, the District Court, in considering NRG-PMI's motion for a stay of the June 25 Order, ruled that even though "the bankruptcy court allowed [NRG-PMI] to reject the [NRG/CL&P] Agreement . . . the Commission acted within its legal authority, delegated to it under the FPA, when it ordered [NRG-PMI] to continue to comply with its obligations under the Agreement."

interest.<sup>59</sup> The idea that bankruptcy courts have such an unrestricted license to interfere in the workings of regulatory agencies cannot be squared with "the limited authority Congress has vested in bankruptcy courts."<sup>60</sup>

29. Moreover, NRG-PMI does not point to anything in the Bankruptcy Code or its legislative history demonstrating that a bankruptcy court determination regarding rejection should be viewed as a substitute for the Commission's public policy determinations and, therefore, allowed to supersede our responsibility to protect the public interest under the FPA.<sup>61</sup> Rather, the coexistence of agency regulatory oversight with bankruptcy court jurisdiction is clearly anticipated in the Bankruptcy Code, as evidenced by the exception to the automatic stay for governmental units enforcing police or regulatory powers.<sup>62</sup> Thus, as in other situations under the Bankruptcy Code, the bankruptcy court's ruling on matters within its purview does not preclude a regulatory agency, such as the Commission, which has jurisdiction over a matter, from reviewing it in light of the purposes of the agency's enabling statute.<sup>63</sup> In other words, while NRG-PMI casts this as a "supposed conflict" between the Commission's policy preferences under the FPA and the goals of the

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<sup>59</sup>As a result, bankruptcy courts would have power over regulatory actions that reviewing courts do not have, since the latter can only stay the effectiveness of an agency order if they conclude the order is substantially likely to be reversed.

<sup>60</sup>*MC Corp*, 502 U.S. at 40 (rejecting a reading of Bankruptcy Code that "would require bankruptcy courts to scrutinize the validity of every administrative or enforcement action brought against a bankrupt entity. Such a reading is problematic, both because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the limited authority Congress has vested in bankruptcy courts.")

<sup>61</sup>*MidAtlantic Nat'l Bank v. NJ Dept of Env'tl. Prot.*, 474 U.S. 494, 502 (1986) (the Bankruptcy Code does not grant the debtor "carte blanche to ignore nonbankruptcy law.")

<sup>62</sup>See 11 U.S.C § 362(a)(4).

<sup>63</sup>In this regard, in *Cajun*, the Fifth Circuit found that "the general bankruptcy policy of fostering the rehabilitation of debtors [will not] serve to preempt otherwise applicable state laws dealing with public safety and welfare." *In re Cajun Elec. Power Coop., Inc.*, 185 F.3d 446, 453 (5th Cir. 1999). Moreover, the court concluded, where a commission is "entrusted to safeguard the compelling public interest in the availability of electric service at reasonable rates" that "public interest is no less compelling during the pendency of a bankruptcy than at other times." *Id.* at 453-54. The court's language, which referred to a state public utility commission, applies equally to the Commission.

Bankruptcy Code, nothing in the Code indicates that a Commission-jurisdictional entity and sale is no longer subject to the terms of the FPA upon filing for bankruptcy protection.<sup>64</sup>

30. No conflict exists because the goals of a bankruptcy court and the Commission differ in evaluating the NRG/CL&P Agreement. A rejection hearing before a bankruptcy court is "a summary proceeding" in which the court makes "a judgment of the sort a businessman would make," as to whether it is beneficial for the debtor to abandon that contract. "In no way is this decision a formal ruling on the underlying disputed issues."<sup>65</sup> In contrast, when one party to an FPA-jurisdictional contract seeks a change in that contract, the Commission's duty, under the statute, is to review that change for lawfulness and remedy any perceived unlawfulness.<sup>66</sup> To effectuate this duty, the FPA requires that the Commission engage in reasoned decisionmaking that is subject to judicial review under an arbitrary and capricious standard.<sup>67</sup> Thus, different procedures with different standards of review apply to the separate tasks undertaken by the bankruptcy court and the Commission.

31. At bottom, the standard used by the bankruptcy court – the business judgment rule – to determine whether an FPA-jurisdictional contract should be rejected is one that differs substantially from the standard enacted by Congress and applied by the courts as controlling whether that contract is lawful within the meaning of the FPA. As its name indicates, the business judgment rule looks to whether rejection is, in a business sense, beneficial to the debtor, and thus it leaves the decision as to whether a contract can be changed (in a rejection case, abrogated) to one of the private parties to the contract. Congress, in establishing the FPA, and the Supreme Court, in interpreting the structure of the Act, both determined that, notwithstanding private parties' rights to make and to change the rates, terms, and conditions of agreements governing the wholesale sale of electricity in interstate commerce, the Commission was given the power to review those contracts for lawfulness and to remedy any unlawful provisions.<sup>68</sup>

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<sup>64</sup>See Bildisco, 465 U.S. at 534.

<sup>65</sup>Orion Pictures, 4 F.3d at 1098-99.

<sup>66</sup>Mobile, 350 U.S. at 341.

<sup>67</sup>16 U.S.C. §§ 205, 206, and 313.

<sup>68</sup>Id. at 341-43. Nor, unlike the situation related to natural gas where Congress has deregulated the sale of natural gas as a commodity, see Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 158 (1989), Congress has not given any indication that the sale for resale of electricity as a commodity should no longer be

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32. Congress has entrusted this jurisdiction over such sales exclusively to the Commission under Section 201 of the FPA. As a result, the Commission has gained experience and developed expertise in interpreting these contracts in light of the public interests of assuring adequate supply of electric energy at reasonable prices. A bankruptcy judge does not have that experience or expertise and is not required to deal with the public interests entrusted to the Commission by the FPA. Therefore, a bankruptcy judge has neither the jurisdiction, the mandate, nor the expertise to address these issues in considering whether to reject an FPA-jurisdictional contract.<sup>69</sup>

33. The public interests that apply to these issues are broader than those encompassed within the business judgment rule, which is designed to allow the use of property valuable to the estate and the abandonment of burdensome property.<sup>70</sup> Accordingly, allowing a jurisdictional sale of electricity to be abandoned merely because one party to the contract finds continued service to be burdensome does not satisfy the requirements of the FPA.<sup>71</sup> In general, the public interest in cases of contract modifications revolves around preserving the integrity of contracts, which, in turn, will assure reliable supply at reasonable prices.<sup>72</sup>

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<sup>68</sup>(...continued)

reviewed for reasonableness by the Commission.

<sup>69</sup>It is noteworthy that in Bildisco, the Court expressly indicated that the higher standard applied by a bankruptcy court in determining whether to reject a collective bargaining agreement did not require the court to "make any . . . determination outside the field of its expertise." 465 U.S. at 526-27; see also id. at 533-34 (requiring court to consider another issue "will simply divert the Bankruptcy Court from its customary area of expertise into a field in which it presumably has little or none"). Here, the Commission has exclusive jurisdiction over these sales, which added to its experience and expertise in the area, strongly indicates that it alone has the authority to determine whether the proposed cessation of service that would result from rejection is lawful under the FPA.

<sup>70</sup>Orion Pictures, 4 F.3d 1098 (citation omitted).

<sup>71</sup>Sierra, 350 U.S. at 355 ("But, while it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain.") (emphasis in original; citation omitted).

<sup>72</sup>E.g., Permian Basin Area Rate Cases, 390 U.S. 747, 791 (1968) ("The Commission cannot confine its inquiries either to the computation of costs of service or to

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"By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the . . . industry."<sup>73</sup> This means that we will uphold the bargain struck by the parties unless, for example, continued service under the contract would threaten the reliability of electric service to customers, cast upon other consumers an excessive burden, or be unduly discriminatory.<sup>74</sup> These are precisely the questions on which our June 25 Order asked NRG-PPMI to supply additional information, and that are the subject of the companion order addressing the Mobile-Sierra issues in this matter.<sup>75</sup>

34. In short, we disagree that a conflict exists between the decision reached by the bankruptcy court to approve rejection of the NRG/CL&P Agreement and our review to determine whether cessation of service under the Agreement is lawful within the meaning of the FPA. The bankruptcy court lacks the jurisdiction, the mandate, the expertise, and the experience to address the public interest factors that must be evaluated when cessation of service through contract abrogation is involved. The Commission was delegated exclusive authority to make those decisions by Congress, and has properly done so within the scope of its authority.

35. Furthermore, the D.C. Circuit's decision in NextWave<sup>76</sup> does not require a different conclusion. In NextWave, the court held that the Federal Communications Commission (FCC) was bound by Section 525(a) of the Bankruptcy Code,<sup>77</sup> which explicitly prohibits government agencies from revoking licenses because a debtor has not paid a dischargeable or discharged debt. That court stated that the FCC's action ran afoul of the specific

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<sup>72</sup>(...continued)

conjectures about the prospective responses of the capital market; it is instead obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection by Congress.")

<sup>73</sup>Mobile, 350 U.S. at 344. In this respect, the Court focused on the interests of users who made investments based on the reliability of supply at a fixed price, and indicated that users and their suppliers "can hardly make such commitments if [their] supply contracts are subject to unilateral change by the [utility] whenever its interests so dictate." Id.

<sup>74</sup>Sierra, 350 U.S. at 355.

<sup>75</sup>103 FERC ¶ 61,344 at P 63.

<sup>76</sup>254 F.3d 130 (D.C.Cir. 2001), aff'd, 123 S.Ct. 832 (2003).

<sup>77</sup>11 U.S.C. § 525(a).

prohibition of such action specified in Section 525.<sup>78</sup> However, no such prohibition is present here, and NRG-PMI does not point to a provision in the Code similar to Section 525 that precludes the action taken by Commission in the June 25 Order. Rather, it asserts that the language of Section 525, which specifically states "a government unit may not . . . revoke . . . a license" to a debtor in certain conditions,<sup>79</sup> should somehow be read into Section 365(a). However, NRG-PMI does not provide a basis for asserting that such a revision to the Bankruptcy Code should be made. Thus, the court did not find in NextWave that the FCC was precluded from acting to carry out its regulatory duties; instead, it found that in doing so, the FCC failed to accommodate the explicit intent of Congress in drafting Section 525. Moreover, unlike the FCC in NextWave, the Commission has not taken any action against NRG-PMI because it is in bankruptcy; it is NRG-PMI, not the Commission, who wants to stop providing service to CL&P.

36. With regard to NRG-PMI's arguments that there is a conflict between the June 25 Order and prior Commission precedent, we disagree. Contrary to NRG PMI's assertion, these cases do not stand for the proposition that the Commission loses jurisdiction over contracts when a public utility seller enters bankruptcy. For instance, in Kern River, the question of whether the Commission retained jurisdiction over the disputed contract was not at issue. Instead, the issue in that case was whether Kern River had acted prudently to collect amounts owed to it by Enron, which was in bankruptcy. In deciding that Kern River had acted prudently, the Commission merely agreed with Kern River that the automatic stay prevented Kern River from collecting certain amounts from Enron and that Enron had the sole discretion to choose whether to reject the contract in the bankruptcy court.<sup>80</sup> As noted above, the rejection of a contract in bankruptcy is a separate issue from whether the FPA (or the Natural Gas Act) allows a regulated company to cease providing service. Moreover, neither Kern River nor any other party challenged in that case Enron's cessation of performance under its contract. Thus, Kern River does not contradict our findings here and any inference to the contrary in Kern River is dictum.

37. In the Columbia Gas case, the only issue was whether the Commission had the right to review the prudence of Columbia Gas's decision not to reject its contracts with upstream

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<sup>78</sup>NextWave, 254 F.3d at 156.

<sup>79</sup>Id. at 153.

<sup>80</sup>Kern River Gas Transmission Co, 101 FERC ¶ 61,374 at 62,556 (2002) ("We agree with Kern River that Enron's bankruptcy . . . created an automatic stay under bankruptcy law. . . . Accordingly because [the contract] was an executory contract, the automatic stay gave Enron the right to determine, at its sole discretion, whether to reject or accept [the contract].")

pipelines in the bankruptcy court.<sup>81</sup> The Commission merely held that it was not going to require Columbia Gas to defend the prudence of the decisions it made in the bankruptcy court. The separate issue of whether the Commission retained jurisdiction over Columbia Gas's FERC-jurisdictional contracts was neither considered nor decided. Moreover, because no attempt was made to reject the contracts at issue in bankruptcy, the public policy considerations mandated by the Natural Gas Act were not implicated.

## 2. Contractual Right to Terminate

### a. June 25 Order

38. With regard to whether NRG-PMI is entitled under the FPA to terminate service under the NRG/CL&P Agreement, the Commission stated in the June 25 Order that the agreement is clear and unambiguous on the consequences of CL&P's nonpayment of disputed charges. We stated that (even though CL&P has withheld disputed costs regarding congestion costs and losses from its payments to NRG-PMI, pursuant to the agreement)<sup>82</sup> until CL&P is determined to be liable for congestion costs and then refuses to pay those charges, CL&P is not in default. Accordingly, NRG-PMI did not at that time have a right to terminate the contract for CL&P's withholding of payment.<sup>83</sup>

39. We also stated that we agreed with NRG-PMI that the NRG/CL&P Agreement was never required to be filed with the Commission (*i.e.*, the relevant contract information is provided pursuant to quarterly reports but the contract itself is not filed). However, as we explained in that order, if a seller, such as NRG-PMI, seeks to modify or abrogate a

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<sup>81</sup>Columbia Gas Transmission Corp., 71 FERC ¶ 61,194 at 61,675 (1995) (“[UGI Utilities, Inc.] restates its argument raised in other exit fee proceedings and in Columbia's [Transportation Cost Rate Adjustment] filings that the Commission should determine whether Columbia properly chose not to reject the Ozark contract in bankruptcy.”)

<sup>82</sup>June 25 Order, 103 FERC ¶ 61,344 at 57 & n.77 (citing Section 5.4 of the NRG/CL&P Agreement: “If the Buyer disputes the amount of any bill, . . . at the discretion of the Buyer, [it may] be held until the dispute has been resolved.”)

<sup>83</sup>*Id.* at 57 & n.78 (citing Section 5.5 provides: “In the event that the Buyer fails to pay the amount due . . . , the Seller may notify the Buyer that, unless payment is received, it will be in default of its obligations under [the] Agreement. The Buyer shall have thirty (30) days from the date of receipt of such notification from the Seller to cure its default. In the event that the default is not cured within such 30 day period, the Seller . . . shall have the right to terminate this Agreement upon five (5) days written notice to the Buyer.”)

jurisdictional contract, the seller must make appropriate filings under FPA Sections 205 or 206 to change the contract.

**b. NRG-PMI's Request for Rehearing**

40. NRG-PMI states that the June 25 Order incorrectly concludes that NRG-PMI did not have a right to terminate the contract for CL&P's withholding of payment. According to NRG-PMI, CL&P wrongly withheld payment by off-setting amounts billed to it by the ISO-NE. Specifically, NRG-PMI maintains that Section 5.5 of the NRG/CL&P Agreement provides it with the right to terminate the agreement if CL&P does not pay its bills on time. In addition, NRG-PMI states that Section 10.1(b) expressly provides that the enforceability of the NRG/CL&P Agreement is subject to bankruptcy laws.<sup>84</sup>

41. NRG-PMI also maintains that the NRG/CL&P Agreement is not a filed rate schedule, because it was never required to be filed with the Commission and was not filed. Therefore, any change to it (including termination) need not receive prior approval by the Commission. NRG-PMI states that the June 25 Order unsuccessfully tries to distinguish the Southern Cases<sup>85</sup> by maintaining that those cases "involved arrangements in which a party had an existing contractual right to terminate, either because the contract ended by its own terms or the other party ha[d] defaulted on its contractual obligations."<sup>86</sup> In this regard, NRG-PMI maintains that the Commission is not following its precedent in Southern and has not provided an explanation for this change in policy.

**c. The Commission's Response**

42. With regard to NRG-PMI's claim that, pursuant to the provisions of the NRG/CL&P Agreement, it is entitled to terminate the contract, as we stated in the June 25 Order: "[P]ursuant to the agreement, until CL&P is determined to be liable for congestion costs and then refuses to pay those charges, CL&P is not in default. Accordingly, NRG-PMI

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<sup>84</sup>Section 10.1 (Representations and Warranties) provides: "This Agreement is its [sic] valid and binding obligation, enforceable against [a party to it] in accordance with its terms, except as [] such enforcement may be subject to bankruptcy, insolvency, [and] reorganization. . . ."

<sup>85</sup>Southern Co. Energy Mktg., L.P., 84 FERC ¶ 61,199 (1998) (Southern I), reh'g denied, 86 FERC ¶ 61,131 (1999) (Southern II), aff'd sub nom., Power Co. of America v. FERC, 245 F.3d 839 (D.C. Cir 2001) (PCA) (collectively, Southern Cases).

<sup>86</sup>NRG-PMI Request for Rehearing at 83 & n.216 (quoting June 25 Order, 103 FERC ¶ 61,344 at P 59).

does not currently have a right to terminate the contract for CL&P's withholding of payment.<sup>87</sup> In particular, Section 5.4 of the NRG/CL&P Agreement states: "If the Buyer disputes the amount of any bill, . . . at the discretion of the Buyer, [it may] be held until the dispute has been resolved." Thus, NRG-PMI did not at the time of the June 25 Order, and still does not, have a right to terminate the contract for CL&P's withholding of payment, because the dispute involving the responsibility for the congestion charges has not yet been resolved.<sup>88</sup>

43. Although we agree with NRG-PMI that the NRG/CL&P Agreement was never required to be filed with the Commission, this does not mean that any unilateral change to it (including premature cessation of service) need not receive prior approval from the Commission. We reiterate that if NRG-PMI seeks to abrogate a jurisdictional agreement, such as the NRG/CL&P Agreement, it must make appropriate filings under Sections 205 or 206 of the FPA to change the contract, whether or not the contract itself has been physically filed.<sup>89</sup>

44. That conclusion is consistent with the Southern Cases.<sup>90</sup> In those cases, the Commission held that a seller under a contract that is not required to be on file under the FPA need not file a notice of termination under Section 35.15 of the Commission's regulations before terminating service under that agreement.<sup>91</sup> Although, like the contracts at issue in that case, the NRG/CL&P Agreement is not required to be on file with the Commission, the dominant issue in those cases involved arrangements in which a party had an existing contractual right to terminate, either because the contract had ended by its own terms or the other party had defaulted on its contractual obligations.<sup>92</sup> As we stated in the June 25 Order, in those cases, the Commission did not allow parties to unilaterally cease

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<sup>87</sup>Id. at 57 (citations omitted).

<sup>88</sup>See June 25 Order, 103 FERC ¶ 61,344 (2003) (Docket Nos. EL03-129-000 and EL03-135-000), reh'g pending.

<sup>89</sup>June 25 Order, 103 FERC ¶ 61,344 at 59.

<sup>90</sup>Southern I, 84 FERC ¶ 61,199, reh'g denied, Southern II, 86 FERC ¶ 61,131, aff'd sub nom., PCA, 245 F.3d 839.

<sup>91</sup>18 C.F.R. § 35.15 (2003).

<sup>92</sup>In Southern I, "[t]wenty-five utilities . . . filed notices of suspension of power sales transactions in circumstances where the other party to the transaction . . . defaulted on past obligations to the utilities or others." 84 FERC at 61,985-86.

performance of their contracts (i.e., terminate despite having no contractual grounds for doing so) without the Commission's approval.<sup>93</sup> Here, as noted, NRG-PMI does not yet have such a right under the NRG/CL&P Agreement.<sup>94</sup> Accordingly, consistent with those cases, the June 25 Order did not limit the rights of contracting parties to exercise their contractual rights to terminate market-based rate contracts.

45. With regard to NRG-PMI's contention that Section 10.1 of the agreement states that enforcement of the NRG/CL&P Agreement is subject to bankruptcy law, our action enforcing the contract is allowed by the bankruptcy provision that authorizes a governmental exercise of police or regulatory power. Moreover, the contract provision cited by NRG-PMI does not state, as NRG PMI asserts, that the NRG/CL&P Agreement is subject to bankruptcy law instead of the Commission's jurisdiction under the FPA. In fact, Section 15.1 states precisely the opposite. It makes clear that "interpretation and enforcement" of the NRG/CL&P Agreement will be "according to and controlled by" the FPA and this Commission's orders and regulations.

### **3. Abrogation/Breach and the Requirement to Continue Service**

#### **a. June 25 Order**

46. The Commission found in the June 25 Order that the NRG/CL&P Agreement is clearly a fixed-rate agreement and subject to the Mobile-Sierra doctrine.<sup>95</sup> The order also stated that under bankruptcy law a rejection of an executory contract might constitute a breach of the contract, as opposed to an abrogation. However, the Commission determined that a breach still results in the abrogation of service of a FERC-jurisdictional contract and has the same effect for our purposes as an abrogation (which is unauthorized by the contract itself), because the breaching entity, such as NRG-PMI, is no longer performing its obligations under the agreement.<sup>96</sup>

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<sup>93</sup>June 25 Order, 103 FERC ¶ 61,344 at 59 n.82.

<sup>94</sup>Cf. Vermont, 104 FERC at P 16-21; see id. at P 19 (“[O]nce [the supplier] filed for bankruptcy, this constituted an event of default and, consistent with our precedent in Southern Company, the contract was automatically terminated without notice and without any other action by either party.”)

<sup>95</sup>June 25 Order, 103 FERC ¶ 61,344 at 63.

<sup>96</sup>Id. at 61.

47. In addition, as noted, the Commission stated: “Until the Commission reaches a final determination on the merits of the ‘public interest’ issue, we require NRG-PMI to comply with the rates, terms, and conditions of the NRG/CL&P Agreement. We note that this includes providing service to CL&P, pursuant to the agreement, until that time.”<sup>97</sup>

**b. NRG-PMI's Request for Rehearing**

48. NRG-PMI states that the Mobile-Sierra doctrine does not apply to this proceeding because, contrary to the characterization of the June 25 Order, it is not seeking to abrogate its contractual obligation to provide service. In this regard, the bankruptcy court's order authorizing NRG-PMI to reject the NRG/CL&P Agreement under Section 365(a) does not abrogate the agreement. Instead, NRG-PMI states that the rejection of an executory contract under the Bankruptcy Code, such as the NRG/CL&P Agreement, constitutes a pre-petition breach. According to NRG-PMI, breach does not change, modify, abrogate, or otherwise amend any of the rates, terms, or provisions in the contract. Rather, NRG-PMI asserts that when contracts are breached, a party is “made whole” by way of damages.

49. NRG-PMI further maintains that the practical effect of a bankrupt debtor's rejecting an executory contract has been described as follows: “Rejecting a contract or lease creates a right to prove a claim for damages.”<sup>98</sup> Furthermore, permitting rejection of the contract pursuant to Section 365(a) is no different from any other breach because when an executory contract is rejected, the other party to the rejected contract becomes a general creditor of the estate for any damages flowing from the rejection. Furthermore, NRG-PMI states that the NRG/CL&P Agreement expressly provides for money damages in the event of a breach (i.e., NRG-PMI defaults on its obligation to sell power to CL&P).<sup>99</sup>

50. NRG-PMI also states that “rejection without ceasing specific performance is meaningless,”<sup>100</sup> because “[r]ejection is a device to avoid specific performance.”<sup>101</sup> Because the Bankruptcy court had previously authorized NRG-PMI to reject the

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<sup>97</sup>Id. at 68.

<sup>98</sup>NRG-PMI Request for Rehearing at 65 (quoting 9 Corbin on Contracts § 985 (2003 Spring Cumulative Supplement)).

<sup>99</sup>See id. at 15.

<sup>100</sup>Id. at 27.

<sup>101</sup>Id. at 27 & n. 84 (quoting *Mid. Motor Lodge of Elk Grove v. Innkeepers' Telemgt. & Equip. Corp.*, 54 F.3d 406, 408 (7th Cir. 1995)).

NRG/CL&P Agreement (which constitutes a pre-petition breach (or failure to perform a duty) under the Bankruptcy Code), NRG-PMI argues that the Commission's requirement in the June 25 Order that NRG-PMI continue providing service under the NRG/CL&P Agreement can only be one of two remedies: (1) a de facto temporary restraining order (TRO); or (2), alternatively, specific performance initiated on the Commission's own motion. NRG-PMI argues that each is an equitable remedy and neither is appropriate under these circumstances.

**c. Indicated Intervenor's Request for Rehearing**

51. Mirant Americas Energy Marketing, L.P., Mirant New England, LLC, Mirant Kendall, LLC, Mirant Canal, LLC, Morgan Stanley Capital Group Inc., and Sempra Energy Resources (collectively, Indicated Intervenors) agree with NRG-PMI that the June 25 Order fails to distinguish between breach of contract and contract abrogation. They note that a party unilaterally seeking to abrogate a fixed-rate contract, such as the NRG/CL&P Agreement, should be required to satisfy the Mobile-Sierra public interest standard. However, NRG-PMI has not sought to abrogate (or otherwise to abolish) the agreement. Instead, NRG-PMI has sought to breach the agreement through rejection in bankruptcy.

52. As a consequence of having conflated breach of contract with contract abrogation, the Indicated Intervenors argue that the June 25 Order fails to address “whether sellers who terminate service in breach of their contract should be liable for specific performance or monetary damages.”<sup>102</sup> They agree with NRG-PMI that the Commission did not show that CL&P lacks an adequate remedy at law and, thus, did not demonstrate that specific performance was warranted in this case. In his regard, the Indicated Intervenors maintain that by treating NRG-PMI's planned breach of the NRG/CL&P Agreement through rejection in bankruptcy as if it were a unilateral application to abrogate the agreement, the June 25 Order effectively and improperly granted specific performance until such time as NRG-PMI can prove that the public interest compels that it be permitted to terminate service under the agreement.

**d. The Commission's Response**

53. NRG-PMI frames the issue in this matter in the terms of the relationship between NRG-PMI's and CL&P's contract and bankruptcy law. However, under the FPA, the Commission is tasked under the language of its own statute with assessing the impact that

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<sup>102</sup>Id. at 8 (quoting June 25 Order, 103 FERC ¶ 61,344 at P 6 (Brownell, Comm'r, dissenting)).

will result from NRG-PMI's cessation of service under the agreement. Actions such of those by NRG-PMI are at the heart of the Commission's regulatory responsibilities, because they affect whether customers receive electrical service and, if so, the rates and other terms and conditions under which service is provided to customers.

54. Fulfilling those responsibilities requires the Commission to address a range of public interest concerns that are not confined by the constructs of bankruptcy law. As we explained in the June 25 Order, a breach in these circumstances is tantamount to a cessation of service of a FERC-jurisdictional contract, because it has the exact same effect for our purposes as an abrogation, which is not authorized by the agreement.<sup>103</sup> Either way (abrogation or breach), NRG-PMI is no longer providing service under its obligations, pursuant to the NRG/CL&P Agreement (*i.e.*, it has abandoned service to customers). In this regard, the Commission exercised in the June 25 Order its authority under the FPA, which is independent of authority arising from the contract, to prevent such a stoppage of wholesale service that might be inconsistent with the public interest.<sup>104</sup>

55. Even assuming that NRG-PMI's rejection of the contract is technically a breach under bankruptcy law, this does not mean that the Commission is, therefore, precluded from requiring NRG-PMI, pursuant to the FPA, to continue to provide its service obligations under the agreement. That would only be true if the bankruptcy court's determination that NRG-PMI should be allowed to reject the contract supersedes the Commission's regulatory responsibility to ensure the protection of the public interest in connection with unilateral changes in contracts for jurisdictional service. As discussed above, it does not.

56. Although NRG-PMI argues that the Commission's requirement in the June 25 Order that it continue to provide service, pursuant to the NRG/CL&P Agreement, constituted either a de facto TRO<sup>105</sup> or specific performance,<sup>106</sup> we do not see our actions in those

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<sup>103</sup>June 25 Order, 103 FERC ¶ 61,344 at 61.

<sup>104</sup>*E.g.*, *Sierra*, 350 U.S. at 344; *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 421-23 (1952); *Sunray Mid-Continent Oil Co. V. FPC*, 364 U.S. 137, 152-53 (1960).

<sup>105</sup>Rule 65(b) of the Federal Rules of Civil Procedure, in pertinent part, provides that a TRO may be granted "only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition. . . ." Fed. R. Civ. P. 65(b) (2002) (emphasis added). While this rule does not control the Commission's power to issue injunctive relief, see 16 U.S.C. § 825](c) and 5

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terms. Rather, we ensured that NRG-PMI's service obligations, pursuant to a jurisdictional contract, were not abandoned until the Commission had the opportunity to determine whether such a premature abandonment of service was in the public interest.<sup>107</sup>

57. Nevertheless, leaving aside the fact that we did not impose either of those equitable remedies and assuming that the standards for those remedies apply here, we believe that the Commission's articulated reasons in the May 16 Order, June 25 Order, July 9 Order, and Order Upholding Contract for requiring continued service satisfies those criteria. Thus, we will not undertake in this proceeding a consideration of all the factors for imposing those remedies, because we have already made detailed findings in those other proceedings that would justify applying either of those remedies to this matter.<sup>108</sup> However, we note that, in those orders, the Commission found that customers could be irreparably harmed (which is

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<sup>105</sup>(...continued)

U.S.C. § 705, here, the Rule's requirements have been met, as explained in this order.

<sup>106</sup>In judicial proceedings, specific performance is generally granted where: (1) the legal remedy is not adequate or the plaintiff is subject to irreparable harm by the breach; (2) the hardship to the defendant does not outweigh the plaintiff's legitimate interest in specific performance; (3) the equities or ethical considerations favor the plaintiff; or (4) it is deemed practical because it will not require too much judicial supervision or for other reasons.

<sup>107</sup>May 16 Order, 103 FERC ¶ 61,188 P 8 ("NRG-PMI proposes to terminate its contract on May 19, 2003, a deadline which leaves the Commission with insufficient time to evaluate its proposed action. Accordingly, the Commission directs NRG-PMI, until further notice, to continue to provide service to CL&P pursuant to the rates, terms and conditions of the SOS Agreement."); June 25 Order, 103 FERC ¶ 61,344 P 68 ("Until the Commission reaches a final determination on the merits of the 'public interest' issue, we require NRG-PMI to comply with the rates, terms, and conditions of the NRG/CL&P Agreement. We note that this includes providing service to CL&P, pursuant to the agreement, until that time.")

<sup>108</sup>In deciding whether justice requires a stay, the Commission considers the following factors: (1) the likelihood that the moving party will be irreparably harmed absent a stay; (2) the prospect that others will be harmed if the Commission grants the stay; and (3) the public interest in granting the stay. July 9 Order, 104 FERC ¶ 61,046 at 7.

the touchstone for issuing a TRO or specific performance)<sup>109</sup> if NRG-PMI was allowed to prematurely abandon its service obligations under the NRG/CL&P Agreement.

58. For example, in the July 9 Order, we stated that NRG-PMI had failed to meet any of the criteria for obtaining a stay (which are similar to the benchmarks for imposing a TRO or specific performance).<sup>110</sup> In particular, in reaching that conclusion, we stated that:

[A]s NRG-PMI notes, CL&P will have to replace the power that NRG-PMI ceases to provide (if a stay is granted) with power acquired in the New England market. CL&P and its customers will likely face substantial harm because they will likely bear the entire risk that the prices in the replacement power market will be higher than those in the NRG/CL&P Agreement. By NRG-PMI's own estimate that price difference will be \$500,000 per day. In addition, as they will be treated as any other unsecured creditor in NRG Energy's bankruptcy, CL&P and its customers will be unlikely ever to recover the full difference between the rate at which NRG-PMI agreed to supply them with energy and the amount NRG-PMI's cessation will force them to pay.<sup>111</sup>

In addition, in the Order Upholding Contract, we “find that the speculative and unsubstantiated adverse impacts on the public interest and other adverse impacts that NRG-PMI alleges will result from requiring NRG-PMI to continue to perform under the NRG/CL&P Agreement do not override the demonstrated adverse impact on CL&P (and most likely its ratepayers) from NRG-PMI’s early cessation of service under the contract.”<sup>112</sup>

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<sup>109</sup>See supra notes 105 and 106.

<sup>110</sup>In this regard, the Commission's rationale in the July 9 Order for denying NRG-PMI's stay of the June 25 Order and the basis on which either a TRO or specific performance could be granted are to some extent two sides of the same coin. In other words, in determining that NRG-PMI did not meet the requirements for granting a stay of the June 25 Order (i.e., allowing NRG-PMI to discontinue service), the Commission has to that extent already considered and satisfied the criteria for imposing a TRO or specific performance (i.e., requiring NRG-PMI to continue service).

<sup>111</sup>July 9 Order, 104 FERC ¶ 61,046 at 16 (citations omitted).

<sup>112</sup>Docket No. EL03-134-000 at P 66.

59. In summary, the Commission has demonstrated that the public interest<sup>113</sup> supported the maintenance of the status quo until the Commission could determine how that interest was best served, regardless of the manner one chooses to characterize our requirement that NRG-PMI continue to provide service. Thus, even if this issue were to be considered in the context of imposing either a TRO or specific performance, the Commission's prior findings that the harm to CL&P, and possibly to its ratepayers, outweighs any claimed detriment to NRG-PMI justify the Commission, consistent with our mandate under the FPA, requiring NRG-PMI to continue service.

#### **4. Constitutional Arguments**

##### **a. NRG-PMI's Request for Rehearing**

60. According to NRG-PMI, the Commission's decision in the June 25 Order violates NRG-PMI's constitutional rights. In particular, NRG-PMI asserts that “by preventing NRG-PMI from discontinuing performance under the NRG/CL&P Agreement, the June 25 Order has denied NRG-PMI of its constitutionally protected property interest in its contract with CL&P, and a constitutionally protected liberty interest in the uniform application of the U.S. Bankruptcy law.”<sup>114</sup> In addition, NRG-PMI argues that “the destruction of NRG-PMI's vested contract rights is an unconstitutional action for which the government must pay [*i.e.*, violates the Takings Clause of the Fifth Amendment].”<sup>115</sup> The June 25 Order also violates NRG-PMI's equal protection rights guaranteed by the Fifth Amendment, because (by requiring it to continue to perform under the NRG/CL&P Agreement) “it prevents [NRG-]PMI being treated like other debtors, who with the approval of the Bankruptcy Court, can reject and cease performing under an executory contract.”<sup>116</sup>

##### **b. The Commission's Response**

61. As discussed below, NRG-PMI has provided no valid legal or factual basis to support its arguments that our June 25 Order resulted in the Commission violating its constitutional rights. First, we disagree with NRG-PMI's claim that the Commission's June 25 Order violated its “constitutionally protected liberty interest in the uniform application

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<sup>113</sup>See, e.g., *id.* at P 68.

<sup>114</sup>NRG-PMI Request for Rehearing at 40.

<sup>115</sup>NRG-PMI Request for Rehearing at 40.

<sup>116</sup>*Id.* at 40 & n.130 (citing U.S. CONST. Amend. V).

of bankruptcy law.”<sup>117</sup> The Commission in the June 25 Order considered NRG-PMI's cessation of service to CL&P in light of the FPA, as authorized by the Bankruptcy Code's provision on police or regulatory powers. The June 25 Order is constitutional (in this regard) if there is a legitimate governmental objective and rational relation between the means chosen and that objective. In the June 25 Order, the Commission stated that it must consider the impact of NRG-PMI's cessation of service on the public interest before we would allow NRG-PMI to discontinue that service. Thus, the Commission's objective in that order to ensure service is clearly a legitimate interest of the Commission, pursuant to its mandate under the FPA to protect the public interest, and the requirement that NRG-PMI continue service is rationally related to that objective.

62. Moreover, although valid contracts are property,<sup>118</sup> the Commission has not impaired the NRG/CL&P Agreement. In Energy Reserves,<sup>119</sup> the Court articulated a three-part test for evaluating Contract Clause challenges: (1) whether the regulation substantially impaired the contractual relationship; (2) whether there has been a significant and legitimate public purpose that the regulation is intended to serve; and (3) whether the adjustment of the rights and responsibilities of the contract is based upon reasonable conditions and is appropriate to serving the public purpose.

63. Under that test, it is clear that the Commission, by requiring NRG-PMI to continue providing service, was only enforcing the terms of the contract and, therefore, did not impair it. Even assuming that the June 25 Order did impair the NRG/CL&P Agreement, that order did not substantially impair the contractual relationship. NRG-PMI could not have had a reasonable, investment-backed expectation that the Commission would never require it to continue service under the NRG/CL&P Agreement, if it sought to abandon such service. The agreement itself states that its "interpretation and enforcement" will be "according to and controlled by" the FPA and this Commission's orders and regulations.<sup>120</sup> Thus, NRG-PMI was on notice of the manner in which the Commission was authorized to regulate the agreement<sup>121</sup> and our order did not interfere with its reasonable

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<sup>117</sup>NRG-PMI Request for Rehearing at 40. NRG-PMI never elaborates in what manner the June 25 Order has caused the bankruptcy law to not be uniformly applied.

<sup>118</sup>See, e.g., Lynch v. United States, 292 U.S. 571, 579 (1934) (Lynch).

<sup>119</sup>Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 (1983) (Energy Reserves).

<sup>120</sup>Section 15.1 of the NRG/CL&P Agreement.

<sup>121</sup>Lynch, 292 U.S. at 421 (holding that a Kansas statute did not constitute a

investment-backed expectations in the contract. As a result, the Commission's requirement in the June 25 Order that NRG-PMI continue providing service to CL&P was consistent with our regulatory power under the FPA; therefore, that action was not, as NRG-PMI suggests, a taking for which compensation must be paid.

64. Finally, with regard to NRG-PMI's argument that the Commission violated its equal protection rights, we conclude that the June 25 Order did not treat NRG-PMI differently than others similarly situated. In fact, because this proceeding is the first time that the Commission has addressed the particular issues presented in it, the Commission could not have treated NRG-PMI differently from other entities. Furthermore, because the June 25 Order did not concern a suspect<sup>122</sup> or semi-suspect<sup>123</sup> classification and involved matters that were economic in nature, the classification (i.e., NRG-PMI, as a debtor, must satisfy the FPA before abandoning its service obligations) will be upheld as long as it bears a rational relationship to a legitimate governmental objective.<sup>124</sup> As noted, the Commission's decision in the June 25 Order was certainly rationally related to the legitimate purpose of protecting the public interest under the FPA. Accordingly, we have not violated NRG-PMI's equal protection rights.<sup>125</sup>

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<sup>121</sup>(...continued)

substantial impairment of a contract because the company knew at the time it entered into the contract that the natural gas industry was subject to both state and federal price regulation, so that a change in those regulations could not have impaired the company's reasonable expectations); see also *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980); *Webb's Fabulous Pharmacies*, 449 U.S. 155, 161 (1980).

<sup>122</sup>See, e.g., *Anderson v. Martin*, 375 U.S. 399 (1969).

<sup>123</sup>See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>124</sup>See, e.g., *United States v. Kras*, 409 U.S. 434 (1973).

<sup>125</sup>See, e.g., *United States v. Horton*, 601 F.2d 319, 324 (7th Cir. 1979), cert. denied, 444 U.S. 937 (1979).

**5. Late Intervention and Request for Rehearing**

**a. Request for Rehearing**

65. CL Power Sales Eight, L.L.C. (CL Eight) filed a late intervention<sup>126</sup> that seeks rehearing of certain of the Commission's determinations in the June 25 Order. CL Eight states that it did not intervene during the timely intervention period or before the issuance of that order, because at that time "CL Eight's interest in these proceedings was inchoate."<sup>127</sup>

**b. The Commission's Response**

66. With regard to CL Eight's motion for intervention, we note that when late intervention is sought after the issuance of an order disposing of an application, the prejudice to the other parties and burden upon the Commission of granting late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.<sup>128</sup> CL Eight has not met its burden of justifying late intervention.

The Commission orders:

(A) The Commission hereby denies the requests for rehearing, as discussed in the body of this order.

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<sup>126</sup>Comments, protests, and motions to intervene in Docket No. EL03-123-000 were due on or before June 6, 2003 and, as discussed, that order was issued on June 25, 2003. CL Eight did not file its motion to intervene in that proceeding until July 25, 2003.

<sup>127</sup>CL Eight Request for Late Intervention and Rehearing at 2.

<sup>128</sup>See, e.g., Midwest Indep. Transmission Sys. Operator, Inc., 102 FERC ¶ 61,250 at P 7 (2003).

(B) CL Eight's motion for late intervention is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Brownell dissenting in part with a separate statement attached.

( S E A L )

Magalie R. Salas,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Richard Blumenthal, Attorney General  
of the State of Connecticut, and  
the Connecticut Department of  
Public Utility Control

v.  
NRG Power Marketing, Inc.

Docket No. EL03-123-002

(Issued August 15, 2003)

BROWNELL, Commissioner, dissenting in part

1. I dissented from the decision in the June 25 Order to require NRG-PMI to continue providing power to CL&P.<sup>1</sup> Nothing in the pleadings or today's order convinces me to change my mind on that issue.

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Nora Mead Brownell

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<sup>1</sup>Richard Blumenthal, Attorney General of the State of Connecticut, and the Connecticut Department of Public Utility Control v. NRG Power Marketing, Inc., et al., 103 FERC & 61,344 at 62,325 (2003) (citing National Labor Relations Board v. Bildisco and Bildisco, 465 U.S. 513, 532 (1984) (National Labor Relations Board barred from enforcing the National Labor Relations Act because "the practical effect of the enforcement action would be to require adherence to the terms of the collective-bargaining agreement" that the debtor had rejected under Section 365 of the Bankruptcy Code); and Southern Company Energy Mktg., L.P., 84 FERC & 61,199 at 61,986 (1998) (power marketers not required to seek prior Commission approval to suspend service under contracts not required to be filed with the Commission, even though contracts did not terminate by their own terms and marketers "ha[d] not themselves been the victims of default"), reh'g denied, 86 FERC & 61,131, at 61,459 (1999) (if any suspensions of service were unwarranted, buyer was free to pursue remedies for breach of contract in court), affirmed sub nom., Power Company of America v. FERC, 245 F.3d 839 (D.C. Cir. 2001)).