

104 FERC ¶ 61,214
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. EL03-134-000

NRG Power Marketing, Inc.

ORDER UPHOLDING CONTRACT

(Issued August 15, 2003)

1. In this order, the Commission considers the submission of information in a “paper hearing,” which was initiated by the Commission in the June 25 Order¹ to develop a factual record concerning whether NRG Power Marketing, Inc.’s (NRG-PMI) proposed cessation of service meets the Mobile-Sierra² “public interest” standard. In addition, 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 fulfill its contractual obligations to

¹See 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).

²United 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).

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.³

2. For the reasons discussed below, we find that NRG-PMI has not carried its burden under Mobile-Sierra of demonstrating that the unilateral modification (*i.e.*, the premature cessation of service under the agreement) it seeks to make to its Standard Offer Service Wholesale Sales Agreement (NRG/CL&P Agreement) with Connecticut Light and Power Company (CL&P) is in the public interest. Accordingly, we require NRG-PMI to comply with the rates, terms, and conditions of the NRG/CL&P Agreement.

I. BACKGROUND

3. 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, 2003.⁴ On May 14, 2003, NRG-PMI notified CL&P that it intended to terminate the agreement 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 under § 365(a) of the Bankruptcy Code authorizing NRG-PMI to reject the NRG/CL&P Agreement.

³*Id.* at P 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 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.

⁴The factual background regarding this matter is laid out in greater detail in the June 25 Order. *See* 103 FERC ¶ 61,348 at P 3-16.

4. 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. The Commission 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.⁵ The Commission set an abbreviated 10-day deadline for comments and stated it "intend[ed] to act as expeditiously as possible in this proceeding."⁶ 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."⁷

5. 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 Federal Power Act (FPA)⁸ to determine whether NRG-PMI has the 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.

6. 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" under the Bankruptcy Code, 11 U.S.C. § 365.⁹ The bankruptcy court declined, however, 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 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 the agreement.¹⁰

⁵Richard Blumenthal, Attorney General of the State of Connecticut v. NRG Power Marketing, Inc., 103 FERC ¶ 61,188 (2003) (May 16 Order).

⁶*Id.* at P 8.

⁷*Id.* at Ordering Paragraph (A).

⁸16 U.S.C. §§ 824 d, e (2000).

⁹In re NRG Energy, Inc. *et al.*, Case No. 03-13024 (Bankr. S.D.N.Y. Jun. 2, 2003).

¹⁰NRG Energy, Inc., *et al.*, Case No. 03 CV 3754 (RCC) (S.D.N.Y. Jun. 12, 2003).

7. On June 25, 2003, the Commission issued another order stating that it was not required to forego its regulatory responsibilities under the FPA simply because NRG-PMI had filed for bankruptcy and sought to reject a Commission jurisdictional contract.¹¹ The Commission further concluded that based on the record it had received to date, it was unable to determine whether NRG-PMI's proposed cessation of service meets the Mobile-Sierra public interest standard.¹² Accordingly, it established paper hearing procedures regarding that issue.¹³ In this regard, the Commission directed NRG-PMI, on behalf of itself and its affiliates, to provide evidence sufficient to demonstrate that providing service consistent with the terms of 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."¹⁴

8. In particular, we stated that such evidence shall include:

(1) Whether continued performance by NRG-PMI under the NRG/CL&P Agreement financially harms NRG-PMI affiliates that are not parties to the contract. And, if so, why?[:]; (2) Whether the structure of NRG Energy's bankruptcy caused NRG-PMI's generation affiliates to become financially exposed to losses resulting from the NRG/CL&P Agreement, which absent such bankruptcy would have been borne solely by NRG-PMI.[:]; (3) What are the specific NRG Northeast Facilities that NRG-PMI states are in jeopardy of being shut down if NRG-PMI is not allowed to cease performance under the NRG/CL&P Agreement?[:; and] (4) NRG-PMI shall provide appropriate revenue and cost data for each of the NRG Northeast Facilities that will allow the Commission to determine whether such facility can continue service in the event the NRG/CL&P Agreement is not abrogated (including, whether relief provided by the Commission for the Devon units is inadequate for such units to meet their obligations). In addition, NRG-PMI shall identify all categories of revenue and costs for

¹¹103 FERC ¶ 61,344 at P 45.

¹²Id. at P 66.

¹³Id.

¹⁴Id. at P 63 (quoting Sierra, 350 U.S. at 355).

each plant (*i.e.*, amounts of revenues and costs by category for the last three fiscal years and projections for the next two years).¹⁵

9. In addition, the Commission allowed NRG-PMI to provide any evidence that it considered relevant to demonstrating that it meets the Mobile-Sierra standard. All interested parties to the proceeding were required to file their responses to NRG-PMI's answers within ten days from the date that the Commission received NRG-PMI's answer.¹⁶ The Commission stated that until the Commission reaches a final determination on the merits of the public interest issue, NRG-PMI is required to provide service consistent with the rates, terms, and conditions of the NRG/CL&P Agreement.¹⁷

10. 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.¹⁸ 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 by 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.

11. On July 9, 2003, the Commission denied NRG-PMI's stay request.¹⁹ The Commission found that NRG-PMI failed to show irreparable injury because it provided no factual support for its claim that continued performance under the contract would impair its financial ability to continue service.²⁰ Furthermore, NRG-PMI failed to demonstrate "certain and great" harm resulting if a stay were not granted, asserting only

¹⁵Id. at P 67 (citation omitted).

¹⁶Id.

¹⁷Id. at P 68.

¹⁸NRG Energy, Inc., et al., Case No. 03 CV 3754 at 2 (RCC) (S.D.N.Y. Jun. 30, 2003).

¹⁹Richard Blumenthal, Attorney General of the State of Connecticut v. NRG Power Marketing, Inc., 104 FERC ¶ 61,046 (2003) (July 9 Order).

²⁰Id. at P 10.

"potential" consequences of continued performance under the contract.²¹ The Commission also stated that CL&P would likely suffer substantial harm as a result of a stay because it would be forced to replace the power due it under the contract with higher-priced power purchased in the market.²² Given the inadequate record established at that date, the Commission found it premature to evaluate the public interest, deferring that determination until the Commission had an opportunity to consider NRG-PMI's answers and the interested parties' responses to them.²³

12. The D.C. Circuit denied NRG-PMI's "emergency motion" for a stay of the June 25 Order on July 16, 2003.²⁴ The Court found that NRG-PMI had "not satisfied the stringent standards required for a stay pending review."²⁵ In addition, on July 18, 2003, NRG-PMI appealed the District Court for the Southern District of New York's decision.²⁶

13. On July 23, 2003, the Commission directed NRG Energy to file its plans to assure continued performance of its generating units in the event of NRG-PMI's liquidation.²⁷ The next day, NRG Energy filed an affidavit in response to that order, which essentially reiterated parts of NRG-PMI's answer in this proceeding.²⁸

²¹Id. at P 12-13.

²²Id. at P 16.

²³Id. at P 18.

²⁴In re. NRG Power Marketing Inc., No. 03-1189 (July 16, 2003).

²⁵Id. (citing *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.* 559 F.2d 841, 843 (D.C. Cir. 1977))

²⁶*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).

²⁷*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).

²⁸Id.

II. Notice of Filing and Responsive Pleadings

14. On July 3, 2003, the Notice of Initiation of Proceedings and Refund Effective Dates was published in the Federal Register, 68 Fed. Reg. 39,920 (2003). The notice stated, among other things, that the Commission had issued an order initiating proceedings in Docket No. EL03-134-000, pursuant to Section 206 of the FPA. In addition, the notice established a refund effective date of 60 days after the issuance of the notice; accordingly, the refund effective date is September 1, 2003.

15. Timely motions to intervene raising no substantive issues were filed by the Official Committee of Unsecured Creditors of NRG Energy Entities; Mirant Americas Energy Marketing, LP, Mirant New England, LLC, Mirant Canal, LLC, and Mirant Kendall, LLC; National Grid USA; Sempra Energy Resources; the Connecticut Representatives; and TransCanada Power Marketing, Inc. New York Independent System Operator, Inc. (NYISO) and Morgan Stanley Capital Group, Inc. (MSCG) filed untimely motions to intervene.

16. Connecticut Industrial Energy Consumers (Industrial Consumers); ISO New England Inc. (ISO-NE); and the Connecticut Office of Consumer Counsel (Connecticut Consumer) filed timely motions to intervene and comment.

17. On July 8, 2003, NRG-PMI filed its answer to the paper hearing, and, on July 18, the Connecticut Representatives and CL&P each filed separate responses to NRG-PMI's answer.

A. NRG-PMI's Answer

18. NRG-PMI takes issue with various decisions reached by the Commission in the June 25 Order. For example, NRG-PMI maintains that the Commission: does not have jurisdiction over this matter (*i.e.*, the Bankruptcy Court does); cannot impose conditions on an entity's ability to reject an executory contract under the Bankruptcy Code;²⁹ and should have allowed NRG-PMI to cease performance under the contract because the NRG/CL&P Agreement gives each party the right to take such an action upon entering bankruptcy.

19. In short, NRG-PMI's answer argues that allowing it to abrogate the NRG/CL&P Agreement meets the Mobile-Sierra public interest standard. In this regard, NRG-PMI maintains that the Commission's inquiry should focus on the harm to NRG-PMI from continued performance under the NRG/CL&P Agreement, specifically, the disruption to

²⁹11 U.S.C. § 365 (2000).

NRG Energy's reorganization and the potential harm incurred by NRG-PMI's counterparties if NRG-PMI is liquidated. NRG-PMI states that the request for information in the June 25 Order focuses almost exclusively on the solvency of NRG-PMI's generating affiliates rather than on NRG-PMI.

20. NRG-PMI maintains that its continued performance under the CL&P Agreement will result in the imminent and complete depletion of its cash available to pay for fuel, post collateral, and fund other transactions essential to NRG-PMI's role as the primary transactional entity for NRG Energy's generation facilities.³⁰ In this regard, NRG-PMI alleges that based on current cash projections it will be driven into permanent insolvency within as early as three weeks of July 8, 2003 if it continues to perform under the NRG/CL&P Agreement, resulting in its complete liquidation.³¹

21. NRG-PMI states that such a liquidation of NRG-PMI will, in turn, impair the ability of its generating affiliates to continue service and could even result in service and reliability disruptions. According to NRG-PMI, it performs the critical functions of buying fuel, timing the dispatch, reserving and scheduling transmission, and bidding into ISO-NE's markets for all of its affiliated generation assets. NRG-PMI claims that faced with a liquidation of NRG-PMI, NRG has only three options, none of which are viable: (1) obtain additional funding for NRG-PMI; (2) have the individual public utility generating affiliates perform the core functions previously performed by NRG-PMI; or (3) outsource the NRG-PMI power marketing function.

22. With regard to those options, NRG-PMI claims that it has only two potential sources of additional funding: the debtor in possession financing (DIP Loan) from the General Electric Capital Corporation (GECC) and NRG Energy's corporate cash; however, neither of these can be made available to fund NRG-PMI's continued performance under

³⁰Because of its current financial situation, NRG-PMI states that it entered into a weekly billing agreement with ISO-NE, whereby to serve the NRG/CL&P Agreement, NRG-PMI must make weekly advance payments to ISO-NE of approximately \$10-\$13 million (or about \$1.4-\$1.9 million per day for each day NRG-PMI is obligated to continue providing service to CL&P). NRG-PMI's Answer at 24.

³¹Specifically, NRG-PMI states that it began the month of July 2003 with a positive cash balance of \$16.1 million; however, weekly receipts and expenditures, including those required to service the NRG/CL&P Agreement, will reduce that balance to a negative \$5.5 million by July 25, which is the first time that the projected cash balances go into negative numbers.

the NRG/CL&P Agreement.³² Furthermore, NRG-PMI maintains that the Northeast Affiliates have secured a temporary agreement with GECC to draw up to \$50 million from the DIP Loan through July 28, 2003 while this matter proceeds, but an express condition of that loan does not allow the funding of the working capital needs of (or losses associated with) servicing the NRG/CL&P Agreement.

23. In this regard, NRG-PMI states that its cessation of service under the NRG/CL&P Agreement is also a condition precedent for the DIP Loan. Therefore, NRG-PMI argues that its continued performance under the contract jeopardizes the DIP Loan because GECC still retains the right not to finalize the DIP Loan and to prevent any further funding after July 28.³³ NRG-PMI asserts that without the DIP Loan, the Northeast Affiliates' generating facilities will not have access to sufficient cash to buy fuel and engage in other transactions critical for operation.

24. NRG-PMI also states that, even assuming NRG Energy's outsourcing of some or all of NRG-PMI's functions to a third party are possible, there are other substantial logistical hurdles involved in making such a change, including Section 203 of the FPA approval from the Commission to transfer NRG-PMI's jurisdictional assets. NRG-PMI also maintains that its generating affiliates do not possess the personnel or expertise to perform the tasks that NRG-PMI currently performs. Accordingly, NRG-PMI maintains that even a temporary disruption in these functions while NRG Energy attempts to find an alternative means to carry them out runs the substantial risk of temporarily impairing the ability of NRG-PMI's affiliates to perform functions necessary for their operation. In addition, NRG-PMI states that such a solution would force NRG Energy to change its business model and, therefore, could contribute to the ultimate failure of its restructuring plan.³⁴

³²NRG-PMI's Answer at 27.

³³According to NRG-PMI, it is difficult to predict which of the Northeast Affiliates would be impacted without the DIP Loan but given the magnitude of the DIP funding required by mid-August (e.g., NRG Northeast Generating LLC, which is the entity that owns the generation assets operating in the same market as NRG-PMI's NRG/CL&P Agreement, will need approximately \$108 million in DIP funds during the week of August 11, 2003), it is likely that most, if not all, of the them would be impacted by the loss of the DIP Loan.

³⁴NRG-PMI's Answer at 28.

25. NRG-PMI argues that requiring it to continue to perform under the NRG/CL&P Agreement could cast an excessive burden on customers in the event that NRG-PMI's insolvency leads to reliability problems in those markets where NRG-PMI's affiliated generation helps maintain reliability. Even if a reliability crisis does not take place, NRG-PMI asserts that the potential interruption in service from NRG-PMI no longer performing various functions could result in significantly higher prices for customers. Thus, NRG-PMI states that its liquidation could harm the public interest and that this harm outweighs any short-term benefits that may accrue to CL&P from continued performance under the NRG/CL&P Agreement.

26. NRG-PMI estimates that the benefit to CL&P of NRG-PMI's continued performance under the NRG/CL&P Agreement from the date of its filing forward is approximately \$26 million of below-market power purchases.³⁵ NRG-PMI asserts that by contrast, the cost to NRG-PMI and NRG Energy and its creditors of the continued performance is likely to be \$78 million.³⁶

27. According to NRG-PMI, its cessation of service under the NRG/CL&P Agreement will not result in wholesale customers in the ISO-NE market paying unjust and unreasonable rates, because CL&P can purchase power directly from a number of entities in the ISO-NE market at Commission-approved market-based rates, which are presumptively just and reasonable. Moreover, NRG-PMI argues that CL&P's rights as a wholesale customer are fully protected if the NRG/CL&P Agreement is rejected, because CL&P will maintain a claim for money damages against NRG-PMI for the difference between the contract price and the increased price it pays for replacement power. Thus, like all other creditors of NRG-PMI, CL&P can pursue such a claim before the bankruptcy court.

28. NRG-PMI maintains that its continued performance under the NRG/CL&P Agreement will cast an excessive burden on all of NRG-PMI's and NRG Energy's creditors, including CL&P, because liquidation of NRG-PMI will result in loss of economic value to these creditors. NRG-PMI also asserts that its continued performance under the contract poses a substantial risk to its reorganization plan, because it could result in a change to NRG Energy's business plan, the loss of the DIP Loan, and delay the

³⁵NRG-PMI Answer at 19 (citing Affidavit of John R. Boken at 23).

³⁶NRG-PMI explains that the current mark-to-market of the NRG/CL&P Agreement is approximately negative \$78 million; thus, NRG-PMI is expected to incur a loss of an additional \$78 million if it is required to continue performance through the remaining term of the NRG/CL&P Agreement.

expected-consummation of the reorganization past December 31, 2003. NRG-PMI also states that the recovery of the claims of all creditors, except CL&P, will be reduced by NRG-PMI's continued performance under the NRG/CL&P. As a result, NRG-PMI argues that CL&P is receiving a priority that exceeds what it negotiated for in the NRG/CL&P Agreement and that exceeds the priority afforded by the Bankruptcy Code for all creditors.

29. In addition, NRG-PMI asks the Commission to consider the effect on the entire marketplace of preventing NRG-PMI from ceasing its performance under the NRG/CL&P Agreement. NRG-PMI argues that if counterparties cannot rely on well-established and mutually accepted bodies of law and procedure to deal with bankruptcy (but must instead anticipate novel and untested adjudication under the FPA), contracts will be more difficult to negotiate and to enforce. Moreover, NRG-PMI maintains that requiring it to continue to perform under the NRG/CL&P Agreement sends a signal to capital markets that public utility customers will have a priority over project lenders in bankruptcy. Thus, lenders will have a lower expectation of recovery, which will, in turn, lead to higher finance charges and less capital investment in the electricity sector.

B. RESPONSES

1. CL&P and the Connecticut Representatives

30. CL&P and the Connecticut Representatives (collectively, the Connecticut Parties) each filed responses to NRG-PMI's answer. The Connecticut Parties and Connecticut Consumer³⁷ argue that NRG-PMI has failed to make the requisite showing pursuant to the Mobile-Sierra doctrine that its continued performance under the terms of the NRG/CL&P Agreement adversely affects the public interest. Therefore, the Connecticut Parties ask that the Commission require NRG-PMI to comply with the NRG/CL&P Agreement.

31. They argue that NRG-PMI has not shown that requiring it to continue service will have adverse impacts on electric customers that are greater than the adverse impacts of premature service termination on CL&P's retail customers. Furthermore, the Connecticut Parties assert that allowing NRG-PMI to cease its performance under the NRG/CL&P Agreement is inconsistent with the Commission's precedent and the Mobile-Sierra case law, which have required the performance of wholesale power contracts when contracts are merely uneconomic and must be performed at a loss to one of the parties.

³⁷The Connecticut Consumer states in its comments that it supports the response of the Connecticut Parties.

32. CL&P argues that NRG-PMI's claim that it is going to run out of cash is belied by the data provided about NRG-PMI in the bankruptcy proceeding. CL&P provides that in the bankruptcy proceeding, NRG-PMI has presented data showing that it has a cash liquidation value of between \$118 million and \$138 million.³⁸ Therefore, CL&P maintains that NRG-PMI and its creditors most likely will not allow the company to be liquidated, especially without transferring the source of this value to another affiliate in connection with a planned reorganization of the enterprise.

33. CL&P also states that in the bankruptcy proceeding NRG-PMI has shown that it has assets of approximately \$386 million, of which \$230 million are accounts receivable (or incoming cash). According to CL&P, NRG-PMI's cash flow statement fails to explain this cash received by NRG-PMI; therefore, NRG-PMI may be understating its capability to obtain cash to operate its business, including servicing the NRG/CL&P Agreement. CL&P also notes that NRG-PMI's projections of cash flow for its generating affiliates provided in the bankruptcy proceeding were very different from the projections that it had previously provided in its answer (i.e., the projections substantially exceeded actual figures).³⁹

34. Moreover, CL&P asserts that even if NRG-PMI does not have sufficient internal sources of cash to satisfy its contractual obligation to CL&P, it certainly has access to external cash sources. CL&P questions why NRG Energy cannot seek money from the 400 subsidiaries, which are not in bankruptcy, to support NRG-PMI.⁴⁰ In this regard, CL&P requests that, if need be, the Commission should pierce the corporate veil to reach NRG Energy's cash to allow NRG-PMI to continue service under the NRG/CL&P Agreement.

35. Furthermore, CL&P argues that because NRG-PMI is a marketing company, its parent could move the employees, its contracts, and any other assets to any NRG-affiliated company with market-based rates and continue providing the same services to the NRG Energy affiliates without significant disruption.⁴¹ In this regard, CL&P notes that NRG Energy has disclosed in the bankruptcy proceeding that it intends to liquidate NRG-PMI and replace it with a new marketing subsidiary.

³⁸CL&P's Response at 14.

³⁹Id. at 15.

⁴⁰Id. at 15-17.

⁴¹CL&P argues that NRG-PMI would only have to obtain section 203 approval from the Commission to assign its existing jurisdictional contracts to an affiliate.

36. CL&P also points out that GECC has provided the first \$50 million of DIP Loan to the NRG Energy affiliates, despite the fact that the Commission has ordered NRG-PMI to continue to provide service under the NRG/CL&P Agreements. Moreover, CL&P refutes NRG-PMI's statement that GECC, as a condition precedent for approving a future DIP Loan, requires that NRG-PMI cease its performance under the NRG/CL&P Agreement.

37. In addition, with regard to NRG-PMI's argument that its liquidation could result in reliability problems in New England, the Connecticut Parties assert that NRG-PMI's affiliated generating companies will be able to reliably operate their power plants even if the Commission requires NRG-PMI to continue service under the NRG/CL&P Agreement. Furthermore, the Connecticut Representatives maintain that the Restated NEPOOL Agreement is structured so that it protects system reliability and would prevent NRG-PMI's generating affiliates from shutting down, even during a gap period.

38. CL&P also argues that the Commission should reject NRG-PMI's claims that requiring it to provide service under the NRG/CL&P Agreement might cause NRG Energy's prepackaged reorganization plan to fail, because the plan is opposed by a number of parties in the bankruptcy proceeding on various grounds and, therefore, may fail regardless of what happens to the NRG/CL&P Agreement. Furthermore, CL&P does not believe that a loss of \$78 million (*i.e.*, the loss NRG-PMI claims it will suffer if it continues to perform under the NRG/CL&P Agreement) would cause NRG Energy's \$11 billion reorganization to fail. Moreover, CL&P asserts that NRG-PMI has failed to demonstrate any harm to the public interest if the prepackaged reorganization plan must be replaced by another plan of reorganization under Chapter 11 of the Bankruptcy Code.

39. The Connecticut Representative argue that the resolution of this matter will have far-reaching implications for Connecticut's ratepayers and for the future of electric restructuring on the state and regional levels. In particular, they state that allowing NRG-PMI to cease its performance under the NRG/CL&P Agreement will cause Connecticut's electric customers to incur significant rate increases.⁴² Furthermore, the Connecticut Representatives believe that allowing NRG-PMI to escape its obligations under the NRG/CL&P Agreement in this case would likely encourage other wholesale electric suppliers to follow its lead and, thereby, undercut the stability of wholesale electrical markets, the future of electric deregulation, and the Commission's ability to carry out its mandate under the FPA.

⁴²The Connecticut Parties argue that the impact of NRG-PMI's early cessation of the NRG-PMI/CL&P Agreement would be a substantial increase in retail electric rates, because CL&P will be forced to pass its higher wholesale purchased power costs through to retail customers.

40. CP&L argues that the Mobile-Sierra public interest standard exists to protect the interest of electric customers.⁴³ Furthermore, the Connecticut Parties maintain that the Commission may consider the impact of a fixed rate contract on a seller's financial situation only in the context of determining whether requiring that seller to continue to provide service will adversely affect its ability to provide electric service to customers.⁴⁴ Thus, according to Connecticut Representatives, before the Commission may accede to NRG-PMI's unilateral rejection of the NRG/CL&P Agreement, NRG-PMI must show that cessation of that agreement will not impact a class of third parties that the Commission is charged to protect (i.e., retail customers or comparably situated purchasers).

41. CL&P states that NRG-PMI's allegation as to the discriminatory impacts on other creditors in a bankruptcy case does not raise a claim of undue discrimination that falls within the purview of the FPA. Moreover, CL&P asserts that the counterparties under those other agreements, which are non-jurisdictional, are not similarly situated to CL&P, because CL&P is a public utility with retail service obligations.

42. With regard to NRG-PMI's contention that the Commission's actions in this proceeding will inject uncertainty into the power contracting process, CL&P argues that sophisticated market participants, such as NRG, enter into comprehensive long-term arrangements, such as the NRG/CL&P Agreement, aware of the Commission's regulatory responsibilities. Moreover, CL&P maintains that facilitating rejection of power contracts will raise costs to customers. In addition, CL&P states that if fixed-rate contracts may easily be broken, utilities such as CL&P undoubtedly will demand higher security from their suppliers, which will raise offer prices and potentially eliminate competitive suppliers from the marketplace.

2. ISO-NE and Connecticut Industrial

43. ISO-NE states that it is concerned about the potentially serious impact on the reliability of the New England power grid (in particular, in southwest Connecticut) in the event that NRG-PMI is unable to function and there is a disruption in the provision of fuel or other necessary activities required to ensure that the generating assets of NRG-PMI's affiliates that participate in the market (i.e., the Northeast Affiliates) are unavailable for

⁴³CP&L's Response at 8 (citing *Maine Pub. Serv. Co. v. FPC*, 579 F.2d 659, 664 (1st Cir. 1978)).

⁴⁴See, e.g., CP&L's Response at 8 (citing *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956)).

dispatch by ISO-NE.⁴⁵ Therefore, although ISO-NE does not take a position on the evidence provided by NRG- PMI regarding its financial status or the specific form of relief that NRG-PMI is seeking, ISO-NE encourages the Commission to take whatever actions are necessary to protect the public interest and reduce the risk of electricity interruptions in New England during any gap period between the time NRG-PMI ceases to function and the time that a replacement entity or process could be established to fill that gap.

44. Connecticut Industrial agrees with the ISO-NE filing that the Commission should not take any actions that would increase the risk of electricity interruptions. However, Connecticut Industrial asks that the Commission conclude that NRG-PMI's cessation of service under the NRG/CL&P Agreement is contrary to the public interest or, if the Commission determines that such cessation of service is in the public interest, the Commission postpone such a termination of service until at least September 2003 (which is the conclusion of the summer peak period).

III. DISCUSSION

A. Procedural Matters

45. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁴⁶ the timely, unopposed motions to intervene serve to make those who filed them parties to this proceeding. In addition, we find good cause to grant the late, unopposed motions to intervene of NYISO and MSCG, given the early stage of this proceeding, their interest in the proceeding, and the absence of any undue prejudice and delay.

B. Substantive Matters

46. In the June 25 Order, we stated that the NRG/CL&P Agreement is a fixed-rate agreement and subject to the Mobile-Sierra doctrine.⁴⁷ Therefore, we explained that in order to abrogate its contractual obligation to provide service under the agreement, NRG-PMI must demonstrate that its contract is contrary to the public interest.⁴⁸ In this regard, we stated that NRG-PMI must show that its contract "might impair the financial ability of

⁴⁵ISO-NE is responsible for protecting the short-term reliability of the New England control area.

⁴⁶18 C.F.R. § 385.214 (2003).

⁴⁷June 25 Order, 103 FERC ¶ 61,344 at 63.

⁴⁸Id.

the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.⁴⁹

47. Accordingly, we are tasked in this proceeding with determining whether NRG-PMI has carried its burden under the Mobile-Sierra standard of demonstrating that modification of the NRG/CL&P Agreement (i.e., to permit it to cease its service under that agreement) is in the public interest.⁵⁰ As we noted in the June 25 Order, “parties who seek to overturn market-based contracts into which they voluntarily entered will bear a heavy burden.”⁵¹ However, before discussing the specific facts of the case before us in relation to the Mobile-Sierra standard, we consider NRG-PMI’s answer and the responses to the questions in the June 25 Order.

48. According to NRG-PMI, if the Commission determines that NRG-PMI must continue to provide service to CL&P under the NRG/CL&P Agreement, it could result in various events that could either individually or collectively be adverse to the public interest; in particular, such a requirement could result in NRG-PMI's liquidation and, in turn, the Northeast Affiliates’ generating facilities being placed at risk of having power production interrupted (creating reliability problems). We discuss NRG-PMI's claims below.

A. Discussion of Answer and Responses

1. Liquidity Crisis

49. Although NRG-PMI states that it will experience significant cash losses if it is required to continue to perform under the NRG/CL&P Agreement (forcing it to liquidate

⁴⁹Sierra, 350 U.S. at 355.

⁵⁰With regard to NRG-PMI's arguments that take issue with various of the Commission's decisions reached in the June 25 Order (e.g., whether the Commission or the Bankruptcy Court has jurisdiction over this matter), we address them in a rehearing order of that order, which is being issued concurrently with this order. See Order on Rehearing, Docket No. EL03-123-002.

⁵¹June 25 Order, 103 FERC ¶ 61,344 at 63 (citing Nevada Power Co. and Sierra Pacific Power Co. v. Duke Energy Trading and Mktg, L.P., et al., 99 FERC ¶ 61,047 at 61,190, reh'g order, Nevada Power Company, et al. v. Morgan Stanley Capital Group, Inc., 100 FERC ¶ 61,273 (2002), order on initial decision, 103 FERC ¶ 61,353 (2003) (Nevada Power)).

as early as the end of July 2003), it has failed to provide sufficient evidence regarding its financial situation to persuade us that such an occurrence is necessarily inevitable.⁵² For instance, NRG-PMI did not reveal, as it did in the bankruptcy proceeding, that the total value of NRG-PMI property, as of June 13, 2003, is approximately \$386 million in assets and, of that amount, it has \$233 million in accounts receivable.⁵³ Similarly, NRG-PMI has presented data showing that it has a cash liquidation value of between \$118 million and \$138 million.⁵⁴ Thus, NRG-PMI appears to have significant assets that appear to be highly liquid, and NRG-PMI never explains why NRG Energy or other creditors would liquidate a company that has substantial economic value (at least without transferring the source of this value to another affiliate in connection with a planned reorganization of the enterprise).

3. Liquidation and Its Impact on the Northeast Affiliates

50. As a result of NRG-PMI's possible liquidation, NRG-PMI maintains that the Northeast Affiliates' generating affiliates will be at risk because they will not have access to services provided by NRG-PMI (such as, marketing and fuel procurement services) that are essential to their operation. However, we are not convinced by NRG-PMI that in the

⁵²In this regard, we note that the numbers that NRG-PMI supplied to us in its answer might be unduly pessimistic. For example, NRG-PMI's earlier estimate that it would have to disburse to ISO-NE \$22.5 million under the weekly billing agreement is markedly higher than the actual disbursement amount of \$8.6 million. See Affidavit of John R. Boken, In re NRG Energy, Inc., et al. at 9, attached to Emergency Motion for Injunction Pending Petition for Review, Case No. 03-6416 (2d Cir. July 18, 2003). Furthermore, in the bankruptcy proceeding, NRG-PMI states that it will lose \$57 million if it continues to perform under the NRG/CL&P Agreement through December 31, 2003, and NRG-PMI acknowledges that this is much lower than its earlier \$78 million estimate, arguing that the new lower estimate is a result of "milder weather in the ISO-NE market and [a] decrease in anticipated demand." Id. at 8. We take official notice of the referenced pleadings in the bankruptcy proceedings that are cited in this order.

⁵³See Schedule D of Schedules of Assets and Liabilities, U.S. Bankruptcy Court S.D.N.Y., Case No. 03-13024 (June 13, 2003).

⁵⁴See id.; see also Liquidation Analysis, Second Amended Disclosure Statement For Debtors' Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code, In re NRG Energy, Inc., et al., Ch.11 Case No. 03-13024 (Bankr. S.D.N.Y. June 26, 2003) (Second Disclosure Statement).

event that it is not able to perform those functions there will, in turn, be a disruption in the provision of fuel or other necessary activities required to ensure that the Northeast Affiliates are available to be dispatched by ISO-NE.

51. Even if the liquidation of NRG-PMI occurs, NRG-PMI never adequately accounts for why it could not move NRG-PMI's employees and support services to another NRG-affiliated company with market-based rates and continue providing the same services to the NRG Energy subsidiaries without significant disruption to them. In this regard, any affiliate of NRG Energy with market-based authority could perform these functions. In addition, the fact that an alternative arrangement may be costlier than the current arrangement is an insufficient rationale to support NRG-PMI's claim that reliance on it is the only means of providing service to its affiliates. We also note that NRG Energy apparently has already disclosed plans in the bankruptcy proceeding that it may liquidate NRG-PMI and replace it with a new marketing subsidiary and has filed for market-based rate authority for that entity.⁵⁵ Nor has NRG Energy explained why its fuel procurement activities cannot be transferred to one or more entities without disrupting service. Accordingly, we do not believe that if NRG-PMI stops performing functions for the Northeast Affiliates there will be a significant gap period, if any at all, until a replacement entity or process is in place to continue to perform those functions.

52. Furthermore, with regard to the risk of NRG-PMI's liquidation resulting in the Northeast Affiliates' generating units being shut down and, therefore, unavailable to help maintain reliability service, we note that Sections 18.4 and 18.5 of the Restated NEPOOL Agreement set forth a very specific process for the deactivation of generating units. Section 18.4 requires the NEPOOL Reliability Committee to review any application to determine whether the proposed deactivation of a resource will have a significant adverse effect upon the reliability or operating characteristics of the transmission systems.⁵⁶ Section 18.5 also provides that if it is determined that there may be significant adverse effect on the reliability of the system, a generating unit may not proceed with its plan

⁵⁵Specifically, NRG sought market-based rate approval for a new affiliate, NRG Marketing Services LLC, which "will engage in the trading and marketing of, inter alia, electricity acquired from affiliated and non-affiliated power generation companies in markets throughout the United States." Petition of NRG Marketing Services LLC for an Order Accepting Market-based Rate Schedule for Filing and Granting Waivers and Blanket Approvals at 2, Docket No. ER03-955-000 (June 16, 2003).

⁵⁶Section 18.4 of Restated NEPOOL Agreement, "Generation and Transmission Facilities: Review of Participant's Proposed Plans."

unless certain mitigation steps are taken.⁵⁷ Unless, NRG Energy intends to ignore these requirements, we believe that NRG-PMI's liquidation will not result in any potential threats to reliability.

2. Continued Performance and the DIP Loan and NRG Energy's Reorganization Plan

53. NRG-PMI asserts that without the DIP Loan, its Northeast Affiliates' generating facilities would not have access to sufficient capital to buy fuel and engage in other transactions critical to operating their facilities. In this regard, NRG-PMI asserts that NRG-PMI's continued performance under the NRG/CL&P Agreement will likely prevent these facilities from receiving the remainder of the DIP Loan as of July 28, 2003 (*i.e.*, the date of its renewal).

54. We note that since the time that NRG-PMI first alleged that the DIP Loan would not be available to it unless it was allowed to cease performance under the NRG/CL&P Agreement,⁵⁸ GECC has provided (on June 30, 2003) the first \$50 million of the loan to the NRG Energy affiliates⁵⁹ (regardless of the fact that the Commission directed, in the June 25 Order, NRG-PMI to continue to provide service under the contract). Nevertheless, NRG-PMI again asks us to come to the conclusion that such a condition precedent exists and, therefore, it must be allowed to discontinue service under the agreement. We also note that the bankruptcy court recently stipulated that NRG-PMI is not permitted to use the loan to cover the costs stemming from the NRG/CL&P Agreement.⁶⁰ With such a safeguard in place to prevent funds from the DIP Loan being used to pay for the NRG/CL&P Agreement, we do not see why requiring NRG-PMI to continue performance under the contract would disturb the availability of the DIP Loan from GECC.

55. With regard to NRG-PMI's contention that requiring it to provide service under the NRG/CL&P Agreement will likely cause its reorganization plan to fail, we note that the reorganization plan has not yet been approved and, therefore, there is no guarantee that it

⁵⁷Section 18.5 of Restated NEPOOL Agreement, "Generation and Transmission Facilities: Participant to Avoid Adverse Effect."

⁵⁸NRG-PMI's Answer at 17.

⁵⁹*Id.* at 27

⁶⁰In re NRG Energy, Inc., *et al.*, Ch. 11 Case No. 03-13024 at 9 (Bankr. S.D.N.Y. July 24, 2003).

will be approved (whether or not it is required to provide service under the agreement). In addition, the Second Disclosure Statement states that any determination to liquidate NRG PMI "will not affect the distributions under the Plan with respect to the other entities treated under the Plan."⁶¹ Thus, NRG-PMI has not adequately explained why a negotiated arrangement involving billions of dollars of debt would break down if NRG-PMI was liquidated or, for that matter, how such an occurrence would impact the public interest.

4. Other Contracts

56. NRG-PMI claims that if it is liquidated, it will not be able to satisfy its obligations under energy agreements other than the NRG/CL&P Agreement, including some in which the counterparties are allegedly public utilities. However, NRG-PMI has neither specified these contracts (*e.g.*, who the counterparties are) or provided any specific evidence concerning the impact of a liquidation on them. In addition, it has not sought to reject them in bankruptcy proceedings. We note that none of the parties to these contracts have intervened in this proceeding and alleged that such a liquidation would have any adverse impacts on them.

B. Mobile-Sierra

57. First, it is important to understand how the public interest standard has been applied by the courts and the legal parameters within which the Commission must address NRG-PMI's contract reformation (*i.e.*, the factors that meet the public interest standard and allow modification to such contracts). In the Sierra decision, the Court sought to mesh the respect for the sanctity of contracts under the FPA with the traditional scheme of regulation under that statute. The Supreme Court ruled in that case that the Commission's power under Section 206 of the FPA to alter an existing contract rate, after its acceptance by the Commission, is limited. In this regard, the Court stated that the doctrine gives the Commission narrow residual authority to modify or abrogate jurisdictional contracts when performance under the contract would be contrary to the public interest.⁶² As the Court further stated: this authority is for "the protection of the public interest, as distinguished from the private interests of the utilities."⁶³ Thus, courts, such as the D.C. Circuit, have

⁶¹Second Disclosure Statement at 6.

⁶²FPC v. Sierra Pacific Power Co., 350 U.S. 348, 355 (1956).

⁶³Id.

interpreted the Mobile-Sierra standard as "contemplat[ing] abrogation of [fixed-rate] agreements only in circumstances of unequivocal public necessity."⁶⁴

58. Based on our review of the totality of circumstances in this case and applying the Mobile-Sierra criteria (as defined in the governing precedent) to them, we conclude that, even considering the facts in a light most favorable to NRG-PMI,⁶⁵ it has not carried its burden under Mobile-Sierra of demonstrating that modification of the NRG/CL&P Agreement to permit it to cease its performance under that agreement is in the public interest. Specifically, NRG-PMI has not shown that requiring it to continue service under the NRG/CL&P Agreement would have adverse impacts on the public interest that would outweigh the adverse impacts of premature service termination on CL&P and its retail customers. To the contrary, NRG-PMI has only demonstrated that the NRG/CL&P Agreement is uneconomic to its private financial interest and possibly to those of its creditors. And, we disagree with NRG-PMI that the results claimed by NRG-PMI are sufficient to satisfy the Mobile-Sierra standard.⁶⁶

59. The law is quite clear on that point: the fact that over time a contract becomes uneconomic does not render it contrary to the public interest.⁶⁷ In orders issued contemporaneously with the June 25 Order, the Commission applied the Mobile-Sierra public interest standard and refused to modify or abrogate various power sales contracts entered into by purchasers in the California markets.⁶⁸ The present case is analogous to the circumstances considered in those orders.

⁶⁴See, e.g., Metropolitan Edison Co. v. FERC, 595 F.2d 851, 858 (D.C. Cir. 1979) (Metropolitan) (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 822 (1968)).

⁶⁵However, as the preceding discussion suggests, NRG-PMI's claims of what will occur if it is not released from performing under the contract have not been demonstrated to our satisfaction.

⁶⁶See NRG-PMI's Answer at 13-14 (arguing that the financial impact on NRG-PMI is the relevant issue for the Mobile-Sierra issue).

⁶⁷Public Utilities Commission of California v. Sellers of Long Term Contracts to the California Department of Water Resources, 103 FERC ¶ 61,354 at P 8 (2003) (PUC of California).

⁶⁸See generally PUC of California, 103 FERC ¶ 61,354; Pacific Corp. v. Reliant Energy Services, Inc., et al., 103 FERC ¶ 61,355 (2003).

60. In this proceeding, NRG-PMI, as a seller rather than a buyer, actively sought through a competitive bid process to provide power at the price specified in the NRG/CL&P Agreement and won the contract with CL&P because it was one of the least-cost bidders. After winning the contract, NRG-PMI apparently took insufficient steps to mitigate its risk that market prices might increase. However, it now wants to cease service under the NRG/CL&P Agreement because the contract price is currently below market (*i.e.*, uneconomic).⁶⁹ As established by these recent Commission orders and the Mobile-Sierra case law, a contract that currently may be uneconomic and that must be performed at loss does not justify contract abrogation.

61. The focus of the Mobile-Sierra doctrine has always been on the impact that proposed contract modifications would have on third parties, not merely the consequences of continued performance on the contracting parties themselves.⁷⁰ Those decisions have consistently rejected unilateral attempts to modify long-term, fixed-price contracts where continued performance impacted only one of the parties' private interests.⁷¹

⁶⁹NRG-PMI Answer at 15, 19.

⁷⁰In Sierra, the Court expressly distinguished public and private interests:

That the purpose of the power given the Commission by § 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in § 201 of the Act that the scheme of regulation imposed “is necessary in the public interest.” When § 206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either “unjust” or “unreasonable” simply because it is unprofitable to the public utility.

350 U.S. at 355.

⁷¹“The most attractive case for affording additional protection [under the public interest standard], despite the presence of a contract is where the protection is intended to safeguard the interests of third parties. . . . As we explained, the Mobile-Sierra doctrine allows FERC to modify the terms of a private contract when third parties are threatened by possible 'undu[e] discrimination' or the imposition of an “excessive burden.” *Northeast Utilities Service Co. v. FERC*, 55 F.3d 686, 691 (1st Cir. 1995) (quoting *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 961 (1st Cir. 1993)).

62. In this regard, in a relatively recent case involving such a contract, the D.C. Circuit stated that the Commission's precedent holds that "the fact that a contract has become uneconomic to one of the parties does not necessarily render the contract contrary to the public interest."⁷² Similarly, in Metropolitan, the D.C. Circuit held that the Mobile-Sierra doctrine was not meant to excuse a utility "improvident enough to enter into a long-term or purportedly perpetual fixed-rate contract" from its contractual obligations.⁷³ The court determined in that case that the relevant inquiry was whether "the public interest warrants revision of the agreement," not whether private parties, including the utility at issue, would be placed in a better position by revision of the agreement.⁷⁴ As the D.C. Circuit has found in another case, the public interest standard "requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract's deleterious effect."⁷⁵

63. Accordingly, the Mobile-Sierra standard does not permit the modification of a contract based solely on what might be in the financial interest of the public utility seller or its creditors; rather, it is the harm to the public interest that must be considered in determining whether to abrogate a contract.⁷⁶ As a result, the Commission in evaluating the impact of NRG-PMI's continued performance under the NRG/CL&P Agreement must primarily evaluate the outcome in terms of whether it will adversely affect the public interest.

⁷²Potomac Electric Power Co. v. FERC, 210 F.3d 403, 409 (D.C. Cir. 2000) (PEPCO).

⁷³Metropolitan, 595 F.2d at 856 n.29 (citing Permian Basin Area Rate Cases, 390 U.S. 747, 820-822 (1968) (Permian) and stating "[T]he central underpinnings of Mobile-Sierra: The terms of the contract determine the parties' obligations; their agreement should be modified by the Commission under § 206(a) only if imperatively demanded by the public interest; and no such mandate arises solely from the unprofitability of the contract to the utility.")

⁷⁴Id. at 864.

⁷⁵Texaco Inc. v. FERC, 148 F.3d 1091, 1097 (D.C. Cir. 1998); see also Atlantic City Electric Co. v. FERC, 295 F.3d 1, 14 (D.C. Cir. 2002).

⁷⁶See, e.g., Permian, 390 U.S. at 821 (stating that Sierra held "the Commission may not, absent evidence of injury to the public interest, relieve a regulated company of 'its improvident bargain.' . . . It follows that the Commission [is] without authority to abrogate existing contract prices unless it first conclude[s] that they 'adversely affect the public interest.'") (citations omitted).

64. To the extent that NRG-PMI alleges that requiring it to provide service will not only adversely impact its own finances but will also adversely affect third parties (*i.e.*, the economic interests of its creditors in the ongoing bankruptcy proceeding and its affiliates), we find, for the reasons discussed above, that NRG-PMI has not with particularity made a showing of definite harm to these parties. Instead, NRG-PMI simply makes conclusory statements.⁷⁷ In particular, NRG-PMI has not demonstrated that its continued performance under the contract, even if it results in its liquidation, will impair or interrupt the reliability of electric service to end users.

65. On the other hand, the Connecticut Parties maintain (and we agree) that if NRG-PMI is permitted to cease its service, the impact will likely be a substantial increase in costs to CL&P and possibly to its retail electric customers (because CL&P will likely pass its higher wholesale purchased power costs through to those customers). In fact, as we stated in the July 9 Order:

[A]s NRG-PMI notes, CL&P will have to replace the power that NRG-PMI ceases to provide . . . 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.⁷⁸

66. Accordingly, 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

⁷⁷In PEPCO, the D.C. Circuit noted that it was rejecting a request to unilaterally modify a contract because the party seeking such a change did not "offer any evidence (beyond speculation) that the only potential non-parties here, its ratepayers, were adversely affected by the existing rates; it did not, for example, even attempt to show how much if any of the rate disparity was passed on to [the utility's] ratepayers rather than borne by the utility itself." PEPCO, 210 F.3d at 408.

⁷⁸July 9 Order, 104 FERC ¶ 61,046 P 16 (2003) (citation omitted).

override the demonstrated adverse impact on CL&P (and most likely its ratepayers) from NRG-PMI's early cessation of service under the contract.

67. In addition, NRG-PMI contends that requiring it to perform under the NRG/CL&P Agreement would be discriminatory, because it would favor the interests of CL&P in relation to other creditors in the bankruptcy proceeding, who will be limited to whatever distributions are available upon completion of the proceeding.⁷⁹ However, we note that relief under Mobile-Sierra is not available to redress alleged discrimination as between counterparties to non-jurisdictional contracts. Those interests are outside the scope of interests under Section 206 of the FPA.⁸⁰

68. In summary, NRG-PMI has not demonstrated that we must abrogate its contract to protect the public interest, e.g., that abrogation is necessary in order to ensure the reliability of electrical service to end users, that its contract is casting an excessive burden on other customers, or that its contract is unduly discriminatory within the meaning of the FPA. Thus, because NRG-PMI has not met the Mobile-Sierra standard, the Commission will not allow it to cease performance under the NRG/CL&P Agreement. In accordance with that decision, we require NRG-PMI to provide service to CL&P, pursuant to the rates, terms, and conditions of the NRG/CL&P Agreement, through December 31, 2003 (i.e., the termination date specified in that contract).⁸¹

⁷⁹NRG-PMI Answer at 20. Such a discriminatory outcome, NRG-PMI argues, would be inconsistent with the public interest standard under the FPA.

⁸⁰See, e.g., National Association for the Advancement of Colored People, et al., v. FPC, 425 U.S. 662, 669 (1976) (“[The Supreme Court's] cases have consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation. . . . The use of the words 'public interest' in [the FPA] is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates.”) (citations omitted). In this regard, we do not believe that Congress had in mind as a purpose for enacting the FPA the prevention of discrimination between creditors that are parties to non-jurisdictional contracts.

⁸¹However, if NRG-PMI files for liquidation under Chapter 7 of the Bankruptcy Code, it can cease providing service under the NRG/CL&P Agreement on the date that it makes such a filing.

The Commission orders:

(A) The Commission hereby finds that NRG-PMI has not carried its burden under Mobile-Sierra of demonstrating that modification of the NRG/CL&P Agreement to permit early cessation of that contract is in the public interest, as discussed in the body of this order.

(B) The Commission directs NRG-PMI to provide service to CL&P, pursuant to the rates, terms, and conditions of the NRG/CL&P Agreement, as discussed in the body of this order.

By the Commission. Commissioner Massey concurring with a separate statement attached.

(S E A L) Commissioner Brownell dissenting with a separate statement attached.

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.

Docket No. EL03-134-000

NRG Power Marketing, Inc.

(Issued August 15, 2003)

MASSEY, Commissioner, concurring,

I agree with the conclusion reached by this order. Although I voted to reform the long term contracts negotiated during the Western energy crisis, the facts in those proceedings are easily distinguishable. Based upon the record before us, it is my opinion that the public interest standard has not been met.

William L. Massey
Commissioner

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.

Docket No. EL03-134-000

NRG Power Marketing, Inc.

(Issued August 15, 2003)

BROWNELL, Commissioner, dissenting

1. Today's order analyzes whether NRG-PMI has "carried its burden under Mobile-Sierra" to make a "unilateral modification" of its contract with CL&P. However, NRG-PMI has never sought a Commission determination on that issue, and law and public policy dictate that the Commission not reach that issue. Therefore, I respectfully dissent.
2. As I explained in my dissent to the June 25 Order, I believe that once the bankruptcy court approved NRG-PMI's rejection of its agreement with CL&P, this Commission lost jurisdiction to enforce that contract.¹ To conclude otherwise would eradicate the carefully crafted legislative protections afforded to creditors, elevating CL&P above all other creditors, secured and unsecured alike.

¹Richard 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, P 3-4 (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)).

3. Moreover, as my prior dissent also explained, even if NRG-PMI were not in bankruptcy, this should have been treated as a simple breach of contract case with CL&P free to go to court to seek monetary damages for any cessation of service by NRG-PMI.² By “clarifying” Southern Company Energy Mktg., L.P., the majority has effectively pre-determined that specific performance is the remedy for any unwarranted contract termination by a power marketer and that the Commission, rather than the courts, is the only forum that can address such breaches of contract. If a breach of contract by a power marketer can be resolved financially, I believe it is better public policy for the Commission to not intrude into the contract dispute. If the breach impairs reliability, I have stated that my analysis may be different, but such is not the case here.

Nora Mead Brownell

²Id. at 62,325, P 5-6 (citing 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 terminations 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)).