UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 35 and 370

(Docket No. RM05-35-000)

Standard of Review for Modifications to Jurisdictional Agreements

(December 27, 2005)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing a notice of proposed rulemaking to propose a general rule regarding the standard of review applicable to proposed modifications to Commission-jurisdictional agreements under the Federal Power Act and Natural Gas Act. The intent of the proposed rulemaking is to promote the sanctity of contracts, recognize the importance of providing certainty and stability in competitive electric energy markets, and provide adequate protection of energy customers. The Commission is inviting comments on the notice of proposed rulemaking.

DATES: Comments are due [**insert date 30 days after publication in the FEDERAL REGISTER**]

ADDRESSES: Comments may be filed electronically via the eFiling link on the Commission's web site at http://www.ferc.gov. Commenters unable to file comments electronically must send an original and fourteen (14) copies of their

comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, N.E., Washington, D.C., 20426. Refer to the Comment Procedures section of the preamble for additional information on how to file comments.

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Standard of Review for Modifications to
Jurisdictional Agreements Docket No. RM05-35-000

NOTICE OF PROPOSED RULEMAKING

(December 27, 2005)

I. Introduction

1. The Commission is proposing to amend its regulations to provide a general rule regarding the standard of review that must be met to justify proposed modifications to Commission-jurisdictional agreements under the Federal Power Act (FPA) and the Natural Gas Act (NGA) that are not agreed to by the signatories (or their successors). Specifically, the Commission proposes to repeal its regulation[1] at 18 CFR 35.1(d), which provides:

> (d)(1) The provisions of this paragraph (d) shall apply to rate schedules tendered for filing on or after August 1, 1976, which are applicable to the transmission or sale of firm power for resale to an all-requirements customer, whether tendered pursuant to Sec. 35.12 as

[1] We also terminate our proposed policy statement in Docket No. PL02-7-000.

an initial rate schedule or tendered pursuant to Sec. 35.13 as a change in an existing rate schedule whose term has expired or whose term is to be extended.

(2) Rate schedules covered by the terms of paragraph (d)(1) of this section shall contain the following provision when it is the intent of the contracting parties to give the party furnishing service the unrestricted right to file unilateral rate changes under section 205 of the Federal Power Act:

Nothing contained herein shall be construed as affecting in any way the right of the party furnishing service under this rate schedule to unilaterally make application to the Federal Energy Regulatory Commission for a change in rates under section 205 of the Federal Power Act and pursuant to the Commission's Rules and Regulations promulgated thereunder.

(3) Rate schedules covered by the terms of paragraph (d)(1) of this section shall contain the following provision when it is the intent of the contracting parties to withhold from the party furnishing service the right to file any unilateral rate

changes under section 205 of the Federal Power Act:

> The rates for service specified herein shall remain in effect for the term of ---------- or until ----------, and shall not be subject to change through application to the Federal Energy Regulatory Commission pursuant to the provisions of section 205 of the Federal Power Act absent the agreement of all parties thereto.

(4) Rate schedules covered by the terms of paragraph (d)(1) of this section, but which are not covered by paragraphs (d)(2) or (d)(3) of this section, are not required to contain either of the boilerplate provisions set forth in paragraph (d)(2) or (d)(3) of this section.

2. In its place, the Commission proposes a regulation which provides that, in the absence of prescribed contractual language enabling the Commission to review proposed modification to agreements that are not agreed to by the signatories (or their successors) under a just and reasonable standard, the Commission will review such agreements under a public interest standard, in accordance with the Mobile-Sierra doctrine.[2] However, this regulation will not apply to transmission service agreements executed under an open access transmission tariff as provided for

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[2] See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (Mobile-Sierra).

under Order No. 888 [3] and agreements for the transportation of natural gas (to the extent that they are executed pursuant to the standard form of service agreements in pipeline tariffs), as these forms of service agreement already mandate the use of the just and reasonable standard of review.

3. This regulation will be applied on a prospective basis, i.e., it will become effective for all Commission-jurisdictional contracts under the FPA or the NGA executed 30 days or more after the final rule is published in the Federal Register.

II. Background

4. The FPA and the NGA require that rates, terms, and conditions of service must be "just and reasonable" and not unduly discriminatory or preferential.[4] The seller can propose rates, terms, and conditions of service and the Commission can approve them if it finds they meet the just and reasonable standard.[5] The Commission can also on its own motion or on the filing of a complaint of a third party investigate existing rates, terms, and conditions of jurisdictional service and

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[3] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

[4] 16 U.S.C. 824d; 15 U.S.C. 717c.

[5] Id.

alter them prospectively, if it finds that such rates are no longer just and reasonable.[6] The FPA and the NGA also provide that contracts between individual parties can be used to set rates, terms, and conditions.[7] In such contracts, sellers may agree to voluntarily restrict some or all of their freedom to change the contract rates, terms, and conditions, and buyers may agree to restrict their right to request the Commission to change the rate, terms, and conditions. Additionally, sometimes the parties to the contract may attempt to restrict not only themselves but also the Commission from changing the contract provisions under the "just and reasonable" standard. In some cases, the seller and buyer have contracted for a particular rate,[8] and not expressly reserved their rights to propose contractual changes, the contract has been filed with the Commission, and the Commission has permitted the rate to become effective. In these cases, the courts have differed on the applicable standard of review when a seller seeks, over the objections of the buyer, to file a new rate (under section 205 of the FPA or section 4 of the NGA), or the buyer or the Commission seeks (under section 206 of the FPA or section 5 of the NGA) to change the existing contract rate. In particular, courts have differed on whether the “just and reasonable” or the “public interest”

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[6] 16 U.S.C. 824e; 15 U.S.C 717d.

[7] See, e.g., 16 U.S.C. 824d(d) and 824e(a); 15 U.S.C. 717c(d) and 717d(a).

[8] Although this proposed rulemaking applies to rates, terms, and conditions, of both electric and gas contracts, most of the cases have involved rates.

standard of review should apply in that situation.[9] Although not clearly defined,[10] the "public interest" standard of review has been held to be higher or stricter than the "just and reasonable" standard of review.[11]

5. In 1958, in United Gas Pipeline Co. v. Memphis Light, Gas and Water Division,[12] the Supreme Court held that the Mobile-Sierra public interest standard of review does not apply to service agreements entered into pursuant to the "tariff-and-service agreement" system used by natural gas pipelines. That system is currently implemented through section 154.110 of the Commission's regulations,[13] which requires interstate pipelines to include in their tariffs pro forma service agreements. Since Memphis, the Commission and the industry as a whole have consistently interpreted pipeline forms of service agreements as permitting changes in pipelines' tariff and service agreements to be made pursuant to the just and reasonable standard of review, rather than the public interest

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[9] See Boston Edison Co. v. FERC, 233 F.3d 60 (1st Cir. 2000) (Boston Edison) (citing Mobile-Sierra).

[10] See Northeast Utilities Service Co., 55 F.3d 686, 690 (1st Cir. 1995) (describing the Mobile-Sierra standard of review: "[N]owhere in the Supreme Court opinion is the term 'public interest' defined. Indeed, the Court seems to assume that the Commission decides what circumstances give rise to the public interest").

[11] See Papago Tribal Utility Authority v. FERC, 723 F.2d 950, 954 (D.C. Cir. 1983).

[12] 358 U.S. 103 (1958) (Memphis).

[13] 18 CFR 154.110.

standard of review. This is true whether the change is initiated by the pipeline under section 4 of the NGA or by a shipper or the Commission under section 5.[14]

6. In the electric industry, Order No. 888 adopted a "tariff and service agreement" contracting system for open access electric transmission service very similar to the system used by interstate pipelines for their open access transportation service. Thus, as is the case with natural gas pipeline service agreements, when an electric transmission provider negotiates a service agreement with a customer, the issue of what standard of review the Commission will apply when acting on proposed tariff or contract modifications is generally not a matter for negotiation between the parties. The just and reasonable standard of review must apply, since it is provided for in the OATT and in the mandatory form of service agreement in the Transmission Provider's tariff.[15]

III. Discussion

7. A great deal of time and expense is incurred, and much uncertainty is engendered, when the parties involved in contract disputes and the Commission

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[14] There are two primary situations where the form of service agreement set forth in the pipeline's tariff does not apply. First, when a project is being certificated, the pipeline generally negotiates precedent agreements with the shippers (and there is no form of service agreement for precedent agreements). The second situation is the negotiation of rate case settlements.

[15] However, also similar to the situation with natural gas pipelines, transmission providers may enter into rate case settlements with their customers that are not covered by the form of service agreement, and such settlement agreements may contain provisions limiting the parties' section 205 and 206 rights in particular ways.

attempt to resolve the issues of whether the parties intended to invoke a public interest standard of review, and whether this standard binds only one party, both parties, third parties, and/or the Commission.

8. Moreover, courts have been divided as to whether to apply the public interest or the just and reasonable standard in the face of contractual silence. As the (First Circuit) court said in Boston Edison, "cases even within the D.C. Circuit . . . do not form a completely consistent pattern." [16] The Boston Edison court also stated that these issues would remain in a state of confusion until the Commission "squarely confronted the underlying issues," and if the Commission "wanted to eliminate much of the existing uncertainly regarding the parties' intent, it might prescribe prospectively the terms that parties would have to use to invoke Mobile-Sierra protection."[17]

9. Upon review of the case law, we conclude that the weight of precedent supports the conclusion that the public interest standard applies in the case of contractual silence. See, e.g., Texaco Inc. v. FERC, 148 F.3d 1091, 1096 (D.C. Cir. 1998) ("absent contractual language 'susceptible to the construction that the rate may be altered while the contract[] subsists,' the Mobile-Sierra doctrine applies," quoting Appalachian Power Co., 529 F.2d 342, 348 (D.C. Cir. 1976)).[18]

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[16] Boston Edison, 233 F.3d at 67.

[17] Boston Edison, 233 F.3d at 68.

[18] But see Union Pac. Fuels, Inc. v. FERC, 327 U.S. App. D.C. 74, 129 F.3d

Moreover, we note that, in the initial cases, the Supreme Court interpreted silence as requiring the public interest standard of review. See Sierra, 350 U.S. at 355 ("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").

10. Thus, rather than prescribe specific terms for invoking Mobile-Sierra, as suggested by Boston Edison, the Commission believes that, in keeping with precedent, recognizing the importance of providing certainty and stability in energy markets, and to promote the sanctity of contracts, it is preferable to interpret contractual silence on this issue as the intent to invoke a Mobile-Sierra standard of review. Stated differently, parties seeking to reserve the contractual right to seek modification under a just and reasonable standard of review must do so clearly and explicitly. Accordingly, we propose to prescribe terms parties must use to evidence an intent to have the Commission review modifications to jurisdictional agreements that are not agreed to by the signatories (or their successors) under the just and reasonable standard. In the absence of such prescribed language, we propose to review modifications to jurisdictional agreements that are not agreed to by all signatories (or their successors) under the public interest standard. New agreements and modifications to jurisdictional

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157, 161-162 (D.C. Cir. 1997).

agreements that are agreed to by all signatories (or their successors), however, will continue to be reviewed under the just and reasonable standard. As we have explained with regard to the former,[19] we are not bound to employ a public interest standard of review when we undertake our initial review of an agreement.[20]

IV. Information Collection Statement

11. The Commission is not imposing an information collection requirement upon the public. Therefore, this proposed rule is not subject to review by the Office of Management and Budget.

V. Environmental Analysis

12. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[21] The Commission concludes that neither an Environmental Assessment nor an Environmental Impact Statement is required for this NOPR pursuant to section 380.4(a)(2)(ii) of the Commission

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[19] See, e.g., ITC Holdings Corp., 102 FERC ¶ 61,182 at P 77, reh'g denied, 104 FERC ¶ 61,033 (2003); Florida Power & Light Co., 67 FERC ¶ 61,141 at 61,398-99 (1994); Southern Company Services, Inc., 67 FERC ¶ 61,080 (1994).

[20] See also Northeast Utilities Service Co., 993 F.2d 937 at 961 (1st Cir. 1993).

[21] Regulations Implementing the National Environmental Policy Act, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,783 (1987).

regulations, which provides a "categorical exclusion" for rules that do not substantively change the effect of legislation.[22]

VI. Regulatory Flexibility Act Certification

13. The Regulatory Flexibility Act of 1980 (RFA)[23] requires that a rulemaking contain either a description and analysis of the effect that the proposed rule will have on small entities or a certification that the rule will not have a significant economic impact on a substantial number of small entities. However, the RFA does not define "significant" or "substantial" instead leaving it up to an agency to determine the impact of its regulations on small entities.

14. In drafting this rule, the Commission has followed the provisions of both the RFA and the Paperwork Reduction Act to consider the potential impact of regulations on small business and other small entities. The cost of compliance with the rule proposed herein, if finalized, will be minimal. Accordingly, pursuant to § 605(b) of the RFA, the Commission hereby certifies the rule proposed herein, if finalized, will not have a "significant economic impact on a substantial number of small entities."

VII. Comment Procedures

15. The Commission invites interested persons to submit comments on the

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[22] 18 CFR 380.4(a)(2)(ii).

[23] 5 U.S.C. 601-12.

matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due **[insert date 30 days from publication in the FEDERAL REGISTER]**. Comments must refer to Docket No. RM05-35-000, and must include the commenter's name, the organization represented, if applicable, and the commenter's address. Comments may be filed either in electronic or paper format.

16. Comments may be filed electronically via the eFiling link on the Commission's web site at http://www.ferc.gov. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments electronically must send an original and fourteen (14) copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street N.E., Washington, D.C., 20426.

17. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VIII. Document Availability

18. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view

and/or print the contents of this document via the Internet through FERC's Home Page (http://www.ferc.gov) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington, D.C., 20426.

19. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

20. User assistance is available for eLibrary and the FERC's website during normal business hours. For assistance, please contact FERC Online Support at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at FERCOnlineSupport@FERC.gov), or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at public.referenceroom@ferc.gov).

List of subjects in 18 CFR Part 370

Electric power; Natural gas; Pipelines.

By direction of the Commission. Commissioner Kelly dissenting with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

In consideration of the foregoing, the Commission proposes to amend Chapter I, Title 18, Code of Federal Regulations, as follows:

PART 35 – FILING OF RATE SCHEDULES AND TARIFFS

1. The authority citation continues to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7252.

2. In § 35.1, paragraph (d) is removed, and paragraphs (e), (f), and (g) are redesignated as paragraphs (d), (e), and (f).

3. Part 370 is added to read as follows:

PART 370 -- STANDARD OF REVIEW FOR MODIFICATIONS TO JURISDICTIONAL AGREEMENTS

Authority: 15 U.S.C. 717-717w, 3301-3432; 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7252.

Sec.

370.1 Applicability.

(a)(1) The provisions of this paragraph shall apply to all Commission-jurisdictional agreements under the Federal Power Act executed on or after _____, except for transmission service agreements under an open access transmission tariff as provided for under Order No. 888. If contracting parties intend to permit the Commission, either on its own motion or upon complaint under section 206 of the Federal Power Act, to modify a previously-executed agreement under the "just and reasonable" standard of review, rather than the

"public interest" standard of review, the agreement shall contain the following language:

> The standard of review the Commission shall apply when acting on proposed modifications to this agreement, either on the Commission's own motion or on behalf of a signatory or a non-signatory, shall be the "just and reasonable" standard of review rather than the "public interest" standard of review.

(2) If the agreement does not contain the aforementioned language, the Commission shall review proposed modifications to a previously-executed agreement that are not agreed to by the signatories (or their successors) under the "public interest" standard of review rather than the "just and reasonable" standard of review.

(b)(1) The provisions of this paragraph shall apply to all Commission-jurisdictional agreements under the Natural Gas Act executed on or after _____, except for transportation agreements executed pursuant to the pro forma form of service agreement contained in the interstate pipeline's tariff pursuant to § 154.110 of this chapter. If contracting parties intend to permit the Commission, either on its own motion or upon complaint under section 5 of the Natural Gas Act, to modify a previously-executed agreement under the "just and reasonable" standard of review, rather than the "public interest" standard of review, the agreement shall contain the following language: The standard of

review the Commission shall apply when acting on proposed modifications to this agreement, either on the Commission's own motion or on behalf of a signatory or a non-signatory, shall be the "just and reasonable" standard of review rather than the "public interest" standard of review.(2) If the agreement does not contain the aforementioned language, the Commission shall review proposed modifications to a previously-executed agreement that are not agreed to by the signatories (or their successors) under the "public interest" standard of review rather than the "just and reasonable" standard of review.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Standard of Review for Modifications to Jurisdictional Agreements — Docket No. RM05-35-000

(Issued December 27, 2005)

KELLY, Commissioner, *dissenting*:

In this NOPR, the Commission proposes to bind itself to the "public interest" standard of review, pursuant to the *Mobile-Sierra* doctrine, when acting under FPA section 206 or NGA section 5, unless parties include language allowing the Commission to apply the "just and reasonable" standard specified by the statutes. This proposal is an abdication of the statutory authority and obligations entrusted to the Commission by Congress and is contrary to the will of Congress. In addition, this proposed regulation is not compelled by court or Commission precedent and it will not achieve the stated goal of "providing certainty and stability in energy markets."[1] On the contrary, in order to foster certainty and stability, the Commission should apply the same "just and reasonable" standard of review to these jurisdictional agreements that the Commission proposes to retain with respect to electric transmission and gas transportation service agreements. Therefore, I dissent from this NOPR.

I. Abdication of the Commission's Statutory Authority

The Federal Power Act and the Natural Gas Act clearly direct the Commission to follow the "just and reasonable" standard when acting under FPA section 206 or NGA section 5. Section 206(a) of the FPA provides that, whenever the Commission may find an "unjust, unreasonable, unduly discriminatory or preferential" rate or contract, it "shall fix the same by order."[2] Section 5 of the Natural Gas Act grants the Commission similar authority in the gas field. These provisions are essential to carrying out the Commission's obligations and must not be effectively read out of the statutes as the Commission proposes to do here.

In spite of Congress' clear directive that the Commission use a "just and reasonable" standard of review, the Commission proposes in this NOPR to eschew such a review and instead follow a stricter *Mobile-Sierra* "public interest"

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[1] NOPR at P 10.

[2] 16 U.S.C. § 824e(a) (2000).

standard unless contracting parties specify that they intend to permit the Commission to act under the "just and reasonable" standard.[3] Thus, with this NOPR, the Commission proposes to abdicate its statutory obligation to review rates, terms and conditions under the just and reasonable standards of the FPA and NGA.

Parties can bargain away by contract their statutory rights to Commission review of future rate changes under the "just and reasonable" standard. However, the NOPR goes far beyond this well-established principle. First, under this NOPR, the Commission presumes that the parties intended the *Mobile-Sierra* "public interest" standard to apply even when the contract is silent as to the parties' intent. Second, the Commission would apply this imputed *Mobile-Sierra* "public interest" standard in FPA section 206 or NGA section 5 proceedings initiated by the Commission acting on its own motion, or on behalf of a party or a third party. When a jurisdictional contract is unclear as to what the parties intended, I believe the default standard should be that which is contained in the governing statute. I also do not believe that the Commission should bind itself to a *Mobile-Sierra* public interest standard of review, which some courts have described as "practically insurmountable," where the Commission is acting on its own motion or on behalf of third parties. As the D.C. Circuit recently held in *Atlantic City*, a case in which the court struck down Commission action denying jurisdictional utilities their FPA section 205 filing rights, the Commission may not take away rights expressly granted by statute.[4] With its action today, the Commission proposes to do just that.

II. Court and Commission Precedent Do Not Require This Proposed Action

The NOPR states that the Commission acts today, in part, at the suggestion of the First Circuit in *Boston Edison*[5] to eliminate uncertainty regarding whether the *Mobile-Sierra* "public interest" or the "just and reasonable" standard applies in

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[3] The Ninth Circuit Court of Appeals is currently reviewing Commission orders involving standard of review issues within the context of complaints seeking modification of long-term contracts executed during the Western energy crisis in 2000-2001. *See Public Utility District No. 1 of Snohomish County, Washington, et al. v. FERC* , 9th Cir. Nos. 03-72511, *et al*. and *Public Utilities Commission of the State of California, et al. v. FERC*, 9th Cir. Nos. 03-74207, *et al*.

[4] *See Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 9-10 (D.C. Cir. 2002).

[5] *Boston Edison Co. v. FERC*, 233 F.3d 60 (1st Cir. 2000).

the face of contractual silence.[6] Specifically, the court in *Boston Edison* suggested that the Commission prescribe prospectively the terms that parties would have to use to invoke the "public interest" standard. That is not what the Commission has done here. Instead of telling contracting parties what language they can use to invoke the "public interest" standard, the Commission provides that the parties need take no action, nor use any language, to invoke that standard. Under the NOPR, the "public interest" standard will be available at all times, in all circumstances, when the contract is silent. Thus, a "public interest" standard becomes the default standard, and the Commission prescribes terms that parties must include in their contract to *keep* their statutory right to a "just and reasonable" standard. This turns the statute on its head.

In addition, the NOPR does not explain that the *Boston Edison* court went on to opine that "FERC has reasonably broad powers to regulate the substantive terms of filings that it accepts and allows to become effective," which may "include the power to require prospectively, by regulation that all contracts set their rates subject to FERC's just and reasonable standard."[7] That is the action that the Commission should be proposing today.

The Commission erroneously relies on the initial *Mobile*[8] and *Sierra*[9] cases as support for its proposal to default to the *Mobile-Sierra* "public interest" standard in FPA section 206 or NGA section 5 proceedings. The NOPR states that these cases stand for the proposition that the Supreme Court interpreted contractual silence as requiring the "public interest" standard of review. The implication is that the Court requires a "public interest" standard of review in FPA section 206 and NGA section 5 proceedings initiated by a buyer or the

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[6] The *Boston Edison* court noted that even cases within the D.C. Circuit "do not form a completely consistent pattern." *Id.* at 67, citing *Texaco Inc. v. FERC*, 148 F.3d 1091, 1096 (D.C. Cir. 1998) and *Union Pacific Fuels, Inc. v. FERC*, 129 F.3d 157, 161-62 (D.C. Cir. 1997) (where the D.C. Circuit, faced with contracts in which parties did not expressly state what standard of review would apply to rate changes initiated by the Commission held in the former case that the Commission could only modify the contract under a "public interest" standard but, in the latter case, that the Commission could apply a "just and reasonable" standard).

[7] *Boston Edison*, 233 F.3d at 68

[8] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956).

[9] *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

Commission. That is not the case. *Mobile* and *Sierra* involved what standard of review should apply when regulated sellers with contracts already on file with the Commission attempted to unilaterally raise the contractual rate by filing for a new rate under section 205 and section 4 and showing that the new rate was just and reasonable. These cases did not involve what standard of review should apply when a buyer or the Commission challenges the rate on file as unjust and unreasonable under FPA section 206 or NGA section 5. Here, the Commission proposes to bind itself to the stricter *Mobile-Sierra* "public interest" standard of review when acting under section 206 or section 5 where parties are silent as to the applicable standard of review. *Mobile* and *Sierra* do not support this proposed action.

The proposed regulation also departs abruptly from the Commission's precedent on what standard of review applies when the Commission acts *sua sponte* or on behalf of non-parties.[10] Yet the NOPR relies on this same precedent to support its assertion that the Commission is not bound to employ a "public interest" standard of review when the Commission undertakes an initial review of an agreement.[11]

III. Certainty and Stability in Energy Markets

I disagree with the NOPR's assertion that the proposed regulation will provide certainty and stability in energy markets. Adopting a *Mobile-Sierra* "public interest" standard as the new default standard of review in section 206 and section 5 proceedings with respect to these jurisdictional agreements will inject uncertainty and instability into the industries. As the NOPR recognizes, the "public interest" standard of review is not clearly defined. Courts have variably described this standard as "practically insurmountable"[12] and as not being "considered 'practically insurmountable' in all circumstances."[13] The First Circuit

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[10] *See ITC Holdings Corp.,* 102 FERC ¶ 61,182 (2003); *Southern Company Services*, 67 FERC ¶ 61,080 (1994); and *Florida Power & Light Co*., 67 FERC ¶ 61,141 (1994).

[11] *See* NOPR at P 10 & n. 19.

[12] *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984).

[13] *Northeast Utils. Serv. Co.*, 55 F.3d 686, 692 (1st Cir. 1995). *See also Potomac Electric Power Co. v. FERC*, 210 F.3d 403, 408 (D.C. Cir. 2000) (court concurring with the First Circuit's finding that when acting *sua sponte* or at the

has opined that "[i]t all depends on whose ox is gored and how the public interest is affected."[14] Adoption of a new, default "public interest" standard of review opens the door to uncertainty and extensive future litigation to resolve its meaning.

To achieve the goal of certainty and stability in energy markets, the Commission should act to preserve the application of the statutory "just and reasonable" standard of review as the default when the parties' intent is unspecified or unclear. The "just and reasonable" standard has been used extensively over the last 70 years to review rates, terms and conditions in both the electricity and gas industries. It is well-known and well-defined. It has guided contracting in these industries for the life of them. It has provided a clear benchmark against which to draft a contract and craft performance of that contract. There is no evidence that this standard has been a problem for contracting parties, or for the industries themselves. There is no evidence that this standard has been a hindrance to contract sanctity. In fact, this NOPR acknowledges as much by proposing to continue to apply the "just and reasonable" standard to electric transmission and gas transportation service agreements. Certainty and stability in the electric and gas industries will only be fostered by consistent regulation.

Accordingly, for the reasons discussed above, I respectfully dissent.

	_____ Suedeen G. Kelly

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request of a third party to change rates, the Commission is not bound to a standard of review that is "practically insurmountable").

[14] 55 F.3d at 691.