UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

COMMENTS OF AMERICAN PUBLIC POWER ASSOCIATION AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

The American Public Power Association ("APPA") and National Rural Electric Cooperative Association ("NRECA") appreciate the opportunity to comment on the Notice of Proposed Rulemaking ("NOPR")[1] issued in the above-referenced proceeding. For the reasons set forth below, the Commission should reverse course and provide prospectively[2] that:

- Where contracts are silent as to the standard of review to be applied, proposed modifications will be evaluated using a just and reasonable standard (that is, modifications will be permitted only if the contract is shown to be unjust and unreasonable, and the proposed modifications are shown to be just and reasonable); and

- Notwithstanding contracting parties' language binding each other to a public interest standard of review, contract modifications proposed by *non*-parties to the contract, or resulting from *sua sponte* investigation by the Commission, will be evaluated using the just and reasonable standard.

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[1] *Standard of Review for Modifications to Jurisdictional Agreements*, 113 F.E.R.C. ¶ 61,317 (Dec. 27, 2005), 71 Fed. Reg. 303 (Jan. 4, 2006).

[2] The NOPR states that it will apply prospectively to "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." APPA and NRECA support prospective application of any regulation adopted in this proceeding.

I. EXECUTIVE SUMMARY

APPA and NRECA agree with Chairman Kelliher's appropriate declaration that the Commission's "primary task" under the Federal Power Act ("FPA") is to "guard the consumer from exploitation by non-competitive electric power companies." Hon. Joseph T. Kelliher, "Market Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission," 26 Energy L. J. 1, 1 & n.1 (2005) (*quoting NAACP v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975)). The D.C. Circuit opinion in *NAACP v. FPC* explains that "Congress's central concern with exploitation is … reflected in the statute's emphasis on just and reasonable prices." 520 F.2d at 438.[3] Unfortunately, the NOPR would place a new hurdle in front of the Commission's enforcement of the just and reasonable standard set out in the FPA. Indeed, if adopted, the NOPR would render the Commission's ability to ensure just and reasonable rates, terms, and conditions (both as to the contracting parties themselves and as to third parties) contingent upon the consent of contracting parties, including regulated entities.

Further, the NOPR would require Load Serving Entities ("LSEs"), who serve consumers, to bargain for—and provide consideration to their counterparties for—contract provisions preserving their otherwise explicit and unconditional statutory right to just and reasonable rates (assuming, that is, that their counterparties will even consent to such provisions in the first instance). Thus, the proposed rule would injure LSEs and the end-use customers they serve by forcing them to provide consideration to obtain rights

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[3] *See also* Hon. Joseph T. Kelliher, Opening Statement on Energy Policy Act (EPAct) of 2005 (Feb. 2, 2006) (recognizing that "effective regulation is necessary to protect the consumer from exploitation and assure fair competition") (available at http://www.ferc.gov/press-room/statements/kelliher/2006/02-02-06-kelliher-epact.asp).

that Congress intended them to have. To the best of our knowledge, none of the cases cited in the NOPR for the proposition that the "public interest" test can be applied in cases of contract silence considered or addressed this point.

The NOPR would turn the FPA on its head, effectively amending it by regulation in ways that Congress itself recently decided *not* to do by statute.[4] The NOPR also ignores substantial appellate and Commission precedent holding that the Commission may not deprive parties of statutory rights by regulation, and that waivers of statutory rights must be express and will not be inferred.

Further, the NOPR would harm customers, violate the FPA, and ignore precedent, *without accomplishing the rule's stated purposes*. According to the Commission, the intent of the proposed rule 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." 71 Fed. Reg. at 303. APPA and NRECA appreciate those goals, but, unfortunately, the proposed rule does not serve them. First, as Commissioner Kelly observed in her dissent, the proposed rule *cannot* reduce the uncertainty and expense of contract-modification litigation simply by specifying whether the "just and reasonable" standard or the "public interest" test will apply in particular circumstances. Instead, it will simply shift the focus of contract-related litigation to what the "public interest" test means and whether it permits contract modification in particular circumstances. As both the NOPR and the dissent observe, the

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[4] Just last year, Congress considered and decided *against* adopting a provision that would have made the "public interest" test the default standard for modification of a narrower set of contracts than would be affected by the proposed rule. The Commission should not attempt to do by rulemaking, especially on a broader scale, what Congress itself decided not to do on a narrower one.

"public interest" test is not clearly defined and already has been interpreted in divergent ways, reflecting different levels of resistance to contract modification. While stricter than the just and reasonable standard, the Commission and the courts have interpreted the "public interest" test to allow contract modification in a wide, and not well defined, range of circumstances.[5] The only way to "reduce the uncertainty" associated with contract-modification litigation would be to combine the proposed rule with affirmation of the "nearly insurmountable" version of the "public interest" test—in other words, to purchase certainty at the expense of both reasonableness and respect for the contracting parties' actual intent.[6] The FPA does not permit the Commission to do so.

Moreover (and in part for the reasons stated above), the proposed rule fails to afford ultimate consumers the protection that the FPA requires. Indeed, the NOPR goes astray from the start by aiming to provide merely "adequate" protection of energy consumers (71 Fed. Reg. at 303), rather than the "complete, permanent, and effective bond of protection" that the Supreme Court has said Congress meant the FPA to afford consumers. *Atlantic Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959). Beyond requiring customers to give up valuable consideration in contract negotiations to preserve rights that Congress granted by statute, the proposed rule would preclude modification of admittedly unjust and unreasonable contracts (unless required by the

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[5] *See generally* nn.37 & 38 below.

[6] Contrary to the NOPR's stated intent, the proposed rule undermines rather than promotes "sanctity of contract." It does so by foregoing any attempt to discern the contracting parties' *actual* intent as to the standard by which proposed modification should be judged, in cases where the contract is silent, and adopting instead an irrebuttable presumption that the parties to such contracts intended to waive their rights to seek modification of contracts that become unjust and unreasonable.

even-higher public interest standard) in *exactly* those situations where the party seeking modification requires the most protection:

1. Situations in which an unsophisticated contracting party did not realize that it needed to use specific language to preserve its statutory rights;

2. Cases in which contract terms (or the absence of terms) were dictated by counterparties with market power; and

3. Circumstances in which the contracting parties have acted in concert for their own benefit at the expense of non-parties to the contract or the broader interests of the consumers the Commission is pledged under the FPA to protect.

The proposed rule thus errs in establishing a default bias in favor of applying *Mobile Sierra* restrictions, regardless of the circumstances under which a contract was formed.[7]

Finally, the proposed rule could in many cases undermine rather than promote "sanctity of contract." True sanctity of contract does not mean enforcing the literal terms of a "silent" agreement regardless of what the parties actually intended and regardless of whether the changes that have occurred reflect unforeseen risks that the contracting parties failed to allocate by agreement. By abandoning any inquiry into what the contracting parties intended, and adopting instead an irrebuttable presumption that silent

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[7] *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002) ("[T]he purpose of the *Mobile-Sierra* doctrine is to preserve the benefits of the parties' bargain as reflected in the contract, *assuming that there was no reason to question what transpired at the contract formation stage*.") (emphasis added); *Town of Norwood v. FERC*, 587 F.2d 1306, 1312-13 (D.C. Cir. 1978) ("*Chambersburg* stands for the proposition that when there is no reason to question what occurred at the contract formation stage, the parties may be required to live with their bargains as time passes and various projections about the future are proved correct or incorrect.… In the present case, however, there are allegations wholly different from those in *Chambersburg*, allegations which go to the fairness and good faith of the parties at the contract formation stage.… [S]urely neither *Mobile-Sierra* nor our *Chambersburg* decision permits a utility to use a fixed-rate contract as a device to render unassailable an otherwise prohibited undue preference."); *cf. Public Util. Dist. No. 1 of Grays Harbor County, WA v. FERC*, 379 F.3d 641, 652 & n.13 (9th Cir. 2004) (*Mobile-Sierra* not implicated by complaint focused on contract formation issues.).

contracts intend to preclude modification unless required by the public interest, the NOPR elevates regulatory certainty over contract sanctity.[8]

The Commission should reverse course. It should of course respect parties' efforts, reflected in express contract language, to adopt the public interest test as the standard of review for changes sought by one of the parties, at least where "there [is] no reason to question what transpired at the contract formation stage."[9] However, the Commission must revise the NOPR to hold that *non*-parties to a contract, the Commission acting *sua sponte*, and the contracting parties themselves (absent express contract language to the contrary) may seek modification of jurisdictional agreements under Section 206 of the FPA on grounds that the contract has become unjust and unreasonable.

Allowing contract modification under the statutory just and reasonable standard neither undervalues the "sanctity of contract" nor permits disgruntled buyers and sellers to evade their responsibilities. As the Commission has made perfectly clear, it "does not take contract modification lightly" even under the "just and reasonable" standard.[10]

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[8] Indeed, the proposed regulation arguably would preclude the modification of silent contracts (unless required by the public interest) even in situations where the contracting parties *agree* that the contract has become unjust and unreasonable, and should be modified, but cannot agree on the specific modification to be implemented.

[9] *Atlantic City Elec. Co.*, 295 F.3d at 14.

[10] In Order No. 888, the Commission held that it was in the public interest to allow buyers and sellers (regardless of *Mobile-Sierra* provisions in their contracts) to argue that those contracts had become unjust and unreasonable. However, the Commission cautioned that even under that standard:

> The Commission does not take contract modification lightly. Whether a utility is seeking a contract amendment to permit stranded cost recovery based on expectations beyond the stated term of the contract, or a customer is seeking to shorten or eliminate the term of an existing contract, we believe that each [has] a heavy burden in demonstrating that the contract ought to be modified.

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888,

Accordingly, the Commission has rejected requests to modify agreements using that standard simply because the contract had become uneconomic to one of the parties.[11] The NOPR's departure from the FPA's just and reasonable standard goes unnecessarily and impermissibly far in a search for certainty.

II. INTERESTS OF APPA AND NRECA

APPA is the national service organization representing the interests of not-for-profit, publicly owned electric utilities throughout the United States. More than 2,000 public power systems provide over 16 percent of all kilowatt-hour ("kWh") sales to ultimate customers, and do business in every state except Hawaii. Approximately 1,840 of these systems are cities and municipal governments that currently own and control the day-to-day operation of their electric utility systems. Public power systems own about 10 percent of the nation's electric generating capacity, but purchase nearly 70 percent of the power used to serve their ultimate consumers.

NRECA is a not-for-profit national service organization representing 930 not-for-profit, customer-owned rural electric cooperatives located in 47 states and serving more than 39 million end users. Of those 930 cooperatives, 64 are generation and transmission ("G&T") cooperatives that are owned by and sell power at wholesale to their member distribution cooperatives.

[1991-1996 Regs. Preambles] FERC Stat. & Regs. ¶ 31,036, at 31,813-14 (1996), *clarified*, 76 F.E.R.C. ¶ 61,009 (1996), *modified*, Order No. 888-A, [1996-2000 Regs. Preambles] FERC Stat. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), *aff'd in part and remanded in part sub nom. TAPS v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd on issues reviewed sub nom. New York v. FERC*, 535 U.S. 1 (2002) (No. 00-568), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998).

[11] Indeed, that is the heart of the Commission's holding in *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956) ("[A] contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility."). *See also Soyland Power Coop., Inc. v. Central Illinois Pub. Serv. Co.*, 51 F.E.R.C. ¶ 61,004, at 61,013 (1990).

APPA, NRECA and their members thus have a strong interest in well-functioning, transparent wholesale power supply markets that are not adversely affected by contracts with unjust and unreasonable rates, terms and conditions.

III. COMMUNICATIONS

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IV. THE COMMISSION SHOULD REVERSE THE PROPOSED RULE

A. The Commission May Not Adopt Regulations Construing Silence as a Contractual Intent to Preclude Modification of Unjust and Unreasonable Agreements

1. The Proposed Rule Violates the FPA and Would Impermissibly Deprive Parties of Statutory Rights

Section 205(a) of the Federal Power Act commands that:

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

16 U.S.C. § 824*d*(a). Section 205(b) prohibits public utilities from "mak[ing] or grant[ing] any undue preference or advantage," *id.* § 824*d*(b)(1), or "maintain[ing] any unreasonable difference in rates, charges, service, facilities, or in any other respect," *id.* § 824*d*(b)(2). These provisions do not merely govern the actions of public utilities, but impose an affirmative obligation on the Commission to ensure compliance with the statutory standards.[12] The FPA "does not permit [the Commission] to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." *Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608, 620 (2nd Cir. 1965). As the Supreme Court has said repeatedly, consumer protection against exploitation is "[a] major purpose"[13] and "primary aim"[14] of the FPA and Natural Gas Act.[15]

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[12] *E.g.*, *Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 41 (2003) ("FERC must ensure that wholesale rates are 'just and reasonable'"); *New York v. FERC*, 535 U.S. 1, 26 (2002); *NAACP v. FPC*, 425 U.S. 662, 666, 668 (1976) (Obligation to establish just and reasonable rates is a "legislative command," which includes the "duty to prevent [public utilities] from charging rates based upon illegal, duplicative, or unnecessary labor costs"); *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1011 (9th Cir. 2004); *Atl. City Elec. Co.*, 295 F.3d at 4.

[13] *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952) ("A major purpose of the [FPA] is to protect power consumers against excessive prices.").

[14] *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944) (The "primary aim" of the Natural Gas Act is "to protect consumers against exploitation at the hands of natural gas companies."); *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 147 (1960) (same).

[15] *See also FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 154 (1962)*; Atlantic Rfg. Co. v. Public Serv. Comm'n, supra* at *388.*

The obligations established by Section 205 are reinforced by the provisions of Sections 206 and 306. Section 206(a) commands that:

> *Whenever* the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification … is unjust, unreasonable, unduly discriminatory or preferential, the Commission *shall* determine the just and reasonable rate, charge, classification, rule, regulation, practice, *or contract* to be thereafter observed and in force, and *shall* fix the same by order.

16 U.S.C. § 824*e*(a) (emphasis added). Section 306 further provides that:

> Any person … complaining of anything done or omitted to be done by any … public utility in contravention of the provisions of this chapter may apply to the Commission by petition…. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be *any* reasonable ground for investigating such complaint, it *shall be the duty of the Commission to investigate the matters complained of* in such manner and by such means as it shall find proper.

16 U.S.C. § 825*e* (emphasis added).

Sections 206(a) and 306 permit any person to complain about unjust and unreasonable rates (providing the right has not been expressly waived). Section 206(a) commands the Commission to fix a just and reasonable rate "[w]henever" it finds the existing rate to be unjust and unreasonable. Section 206(b) requires that any such change take effect no earlier than the date of the filing of such complaint and limits the availability of refunds to the period after the refund effective date. 16 U.S.C. § 824*e*(b). These provisions represent Congress's carefully crafted balancing of competing interests in contract sanctity, on the one hand, and the need to ensure the ongoing reasonableness of rates, terms and conditions of essential services on the other hand. The Commission may not and should not tip Congress's balancing of those interests. As Congress

recognized, striking a balance between contract sanctity and the need for flexibility in responding to changed circumstances is particularly important in the context of an evolving industry characterized by capital-intensive investment and long-term agreements. If anything, Congress's recent decision to permit an earlier refund effective date than was previously allowed under Section 206(b) reflects its intent to strengthen, not weaken, customers' rights to seek redress of unjust and unreasonable rates.[16]

In *Atlantic City Electric Co. v. FERC*, the D.C. Circuit stated clearly that the Commission may not by rule deprive parties of rights that Congress gave them by statute. 295 F.3d at 9 ("FERC cannot point to any statute giving it authority for its unprecedented decision to require the utility petitioners to cede rights expressly given to them in section 205 of the Federal Power Act."). While statutory rights may be waived by agreement, *id.* at 10, the Commission previously held that such waivers must be clear and explicit. For example, in *Sithe/Independence Power Partners, L.P. v. Niagara Mohawk Power Corp.*, the Commission stated that:

> Relinquishment of a known claim or right must be clearly established and *will not be inferred from doubtful or equivocal acts or language*. Waivers of rights under section 206 of the FPA, as voluntary relinquishments of statutory benefits, *must be stated explicitly*. Because the contract between the parties is clearly lacking such a waiver, we will interpret it as not limiting Sithe's right to file a complaint concerning the justness and reasonableness of Niagara Mohawk's existing rates.

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[16] In Section 1285 of the Energy Policy Act of 2005 ("EPAct 2005"), Congress amended FPA Section 206(b), moving the opening of the five-month "window" for the refund effective date from 60 days after the filing of a complaint back to the actual date a complaint is filed. This change implies that Congress was concerned enough about the possibility of unjust and unreasonable rates, terms and conditions remaining in effect (to the detriment of consumers) to shift the refund effective date as far back as possible, while still keeping relief "prospective."

76 F.E.R.C. ¶ 61,285, at 62,458 (1996) (emphasis added) (footnote omitted), *remanded on other grounds sub nom. Sithe/Independence Power Partners L.P. v. FERC*, 165 F.3d 944 (D.C. Cir. 1999); *see also So. Cal. Edison Co.*, 41 F.E.R.C. ¶ 61,188, at 61,491 & nn.17-19 (1987) ("It is hornbook law that a waiver is an intentional abandonment or relinquishment of a known right or advantage which … must be clearly established and will not be inferred from doubtful or equivocal acts or language.").[17] In proposing to deprive parties of their statutory rights to seek redress of unjust and unreasonable rates, terms and conditions, without requiring any express indication of an intent to waive those rights, the NOPR departs without explanation from the cases cited above.

Further, the NOPR proposes to do by regulation what Congress itself decided *not* to do by statute. When the House of Representatives passed H.R. 6, it included a provision (Section 1286) that would have required the Commission to apply the public interest standard to proposed modifications of market-based rate agreements entered into after the effective date of the legislation, unless the contract specified a different standard.[18] However, when the conference committee convened to reconcile the House and Senate legislation and produce a single bill for the President's signature, the committee decided *not* to adopt the House's "contract sanctity" provision. Just as the

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[17] *See also Mississippi Indus. v. FERC*, 808 F.2d 1525, 1552 (D.C.Cir. 1987) ("The APSC incorrectly suggests the Supreme Court's holding in *Sierra* made the public interest standard the sole criteria for contract revision in section 205 or section 206 proceedings. In fact, as this court has made clear, *either* the interest of the public or the interest of the parties in nondiscriminatory rates will suffice to justify the Commission's decision to reform rates, *so long as the parties' contract does not eliminate the Commission's authority over discrimination or preference that operates only against the signatories.* Such discrimination may be waived 'up to the point where it produces some independent harm to the public interest,' but no such waiver took place in the instant case.") (emphasis added).

[18] The H.R. 6 provision was narrower than the rule proposed in the NOPR in that the legislative provision would have applied only to market-based rate agreements, whereas the rule proposed in the NOPR would apply to a significantly wider range of agreements—including agreements employing cost-based rates, *e.g.*, in circumstances where a seller possesses market power.

Commission may not deprive parties of statutory rights, it should not propose regulations that would accomplish by rule what Congress decided against doing by statute—not any time, and particularly not mere months after such proposed legislation was considered and rejected.

Supporters of the NOPR may argue that the proposed rule will not deprive any party of statutory rights because, once the regulation is effective, contracting parties will be on notice of the Commission's intent, and it will then be reasonable to construe silence as an intent to waive the right to challenge agreements that become unjust and unreasonable. However, constructive notice is a legal fiction.[19] In practice, as discussed below, it will rarely be possible to determine whether contract silence reflects inadvertence, coercion, or an actual intent to preclude contract modification unless required by the public interest.

Moreover, the proposed rule's reversal of the default standard that applies in the case of contract silence turns the FPA on its head, placing the onus on customers to negotiate affirmative provisions retaining their statutory right to complain about unjust and unreasonable rates. In carrying out the FPA's "primary aim" of protecting consumers (364 U.S. at 147), the Commission is required to pay attention to the "practical consequences" of its actions. *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. at 155. Here, the unintended but practical consequence of the proposed rule is to require customers to pay the contractual equivalent of ransom to redeem rights that Congress intended to give them by statute—and to do so on terms dictated by the

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[19] *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 573 (1921).

counterparty. The level of consideration required to buy back such rights (assuming a counterparty agrees at all) will be dictated by the degree of market power that the counterparty possesses. To our knowledge, none of the cases cited in the NOPR for the proposition that the "public interest" test can be applied in cases of contract silence considered or addressed this point.

Further, third parties, who are not parties to the agreement and hence are not present at the negotiations, will be unable to preserve their statutory right to challenge unjust and unreasonable rates at any price. Nor will the Commission be able to prevent the contract parties from cutting off the Commission's ability to review the terms of the agreement under the FPA's just and reasonable standard *sua sponte*, for the protection of third parties, even if the terms of the agreement in fact have become unjust and unreasonable. All of these "practical consequences" argue against the course of action the Commission has outlined in its NOPR.

2. The Proposed Rule Does Not Provide "Adequate" Consumer Protection, Let Alone a "Complete, Permanent, and Effective Bond of Protection"

As Chairman Kelliher has appropriately noted (at 1-2 above) and as the Supreme Court has held (*e.g.*, *FPC v. Hope Gas Co.*, 320 U.S. at 610), consumer protection is the "primary aim" of the FPA. The proposed rule would abdicate the Commission's consumer protection role in precisely the circumstances where it is most needed.

If the proposed rule becomes effective and the Commission is faced with a contract that is silent as to the standard of review for proposed contract modifications, there will be four possible explanations for the omission of language preserving the just and reasonable standard: (1) the omission was inadvertent; (2) an unsophisticated

contracting party did not realize it needed to negotiate specific language to retain use of the statutory just and reasonable standard; (3) one party wanted to retain use of the statutory standard and knew that specified language was required but lacked the bargaining power to obtain such language,[20] or (4) both parties knew that specific language was required to retain the statutory standard but decided not to do so.[21]

In the first instance, application of the proposed rule contravenes the parties' mutual intent. In the second and third cases, the failure to include language preserving use of a just and reasonable standard will have occurred in exactly the situations presenting the most risk of abuse and greatest need for review under a just and reasonable standard—namely, situations involving the exercise of market power or the exploitation of less sophisticated market participants by more sophisticated ones.[22] The Commission may not simply ignore or assume away the potential for abuse. The proposed rule would

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[20] It is undeniable that parties with market power sufficient to extract favorable bargains from their counterparties may also have both the means and the desire to compel the inclusion or omission of contract terms (as necessary) to lock in those gains and require application of a "public interest" standard to future modification requests. *Cf. Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) ("[I]f the pipeline has significant market power with which to extract an agreement unfavorable to its LDC customers, then it would not require much imagination for the pipeline also to require that they support the agreement fully before the Commission."). As Commissioner Massey explained in his concurrence to the Proposed Policy Statement issued in Docket No. PL02-7-000 (Aug. 1, 2002), "If a party to a contract would not have agreed to the insertion of the *Mobile-Sierra* clause absent the exercise of market power, then the Commission should allow that party to advocate the use of the just and reasonable standard.").

[21] Although one might expect contracts negotiated in situation (4) to include an express provision invoking the public interest standard, the NOPR would not require the contracting parties to include such a provision, and the contracting parties might well wish to avoid calling attention to limits they would impose on modification of the agreement by the Commission *sua sponte* or on complaint of a third party.

[22] As discussed in Section IV.B below, even the fourth situation (involving a knowing omission by both contracting parties) involves a real risk of abuse. In many cases the contracting parties will have aligned interests and will be attempting to secure benefits for themselves at the expense of non-parties to the contract, and to limit as much as possible non-parties' rights to challenge those agreements. Some contracting parties may be willing to invoke the public interest standard expressly in such situations, but others may prefer to avoid calling attention to the effects their contract may have on third parties or to their attempts to limit review of the agreement. These situations show why the Commission must not allow contracting parties to dictate, either by silence or explicit language, the standard of review to be applied by the Commission acting *sua sponte* or upon complaint by a non-party to the contract.

apply not only to market-based rate agreements but also to cost-based agreements entered into in situations where the seller has undeniable market power.[23]

That the Commission reviews such agreements under a just and reasonable standard when they are filed does not eliminate the harmful effects of the proposed rule. First, even if an overall agreement can be characterized as "just and reasonable," a party who must provide consideration in order to retain statutory contract-modification rights necessarily will have a poorer deal than it could have struck without the need to bargain for those rights. Second, if a contracting party with market power refuses to sign an agreement that preserves its counterparty's right to seek modifications under Section 206's just and reasonable standard, the counterparty (who by definition has few alternatives) may be unlikely to protest lest it lose the deal entirely.[24] Third, provisions that seem just and reasonable when first filed may become (or be revealed to be) unjust and unreasonable over time.[25] Particularly in the context of non-market based agreements, where the risk of abuse and of contractually locking in market power is greatest, the Commission should not give parties with market power another weapon for their arsenal.

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[23] In Section V below, we seek clarification of the exact scope of the proposed rule and, in particular, the scope of the exception for "transmission service agreements under an open access transmission tariff as provided for under Order No. 888." Whatever the reach of that exception, it seems plain that the proposed rule would apply to cost-based power sales agreements entered into by public utilities who do not qualify for market-based rate authority because they possess market power.

[24] Order No. 888 largely extinguished any obligation to continue to sell power to wholesale customers. *See* Order No. 888, at 31,805-06. However, Order No. 888 has not succeeded completely in eliminating undue discrimination by public utility transmission providers, some of whom may still use their ownership and control of essential transmission facilities to benefit their generation interests. *See*, *e.g.*, *Entergy Servs., Inc.*, 111 F.E.R.C. ¶ 61,145, PP 9-12 (2005).

[25] The California ISO and PX tariffs in place during the crisis of 2000-01 were considered to be just and reasonable when they were filed. In rapidly evolving industries, an initial "just and reasonable" determination may offer little assurance that an agreement will remain just and reasonable throughout its term.

Even in the context of market-based rate ("MBR") agreements, where sellers are presumed to lack or to have mitigated market power, application of the proposed rule is problematic because it places all the risk of error, either in granting MBR authority despite the existence of market power or of failing to detect market power that arises after MBR authority is granted,[26] squarely and exclusively on LSEs and the consumers they serve.[27] Given this backdrop of potential abuse, the Commission's consumer protection obligations require it to construe silence as retaining the statutory standard that affords the most protection. Construing silence as an intent to waive the right to challenge unjust and unreasonable contracts fails to protect the consumers who are most in need of protection.

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[26] While Order No. 652 requires sellers with MBR authority to notify the Commission of changed circumstances affecting the facts upon which the Commission relied in granting the original MBR authority, *see* Final Rule, *Reporting Requirement for Changes in Status for Public Utilities with Market Based Rate Authority*, 110 F.E.R.C. ¶ 61,097, P 1 (2005), sellers can accrue market power because of changes in the market that some might argue would not constitute reportable events under Commission rules. For example, load growth and other changes in system conditions or topology may create new transmission constraints that confer or augment market power. Likewise, mergers or acquisitions by other parties may increase concentration and raise the risk of market power exercise by a seller with MBR authority. To the extent these are deemed non-reportable events, several years could pass before the Commission reassesses the seller's market power (in light of the conditions that then exist). In the meantime, an MBR seller with market power (even market power that turns out to be transient) may attempt to lock in and monetize that market power by entering into a long-term agreement.

[27] The Commission's market-based rate regime has had a checkered past. *E.g.*, *California ex rel. Lockyer*, 383 F.3d at 1006. The Commission has appropriately embarked on an effort to tighten its market-power screens and to establish market-behavior rules because the screens that were previously in place did not successfully avoid market manipulation and the exercise of market power. *E.g.*, *Market-Based Rates for Public Utilities.*, 107 F.E.R.C. ¶ 61,019 (2004); *AEP Power Mktg, Inc.*, 107 F.E.R.C. ¶ 61,018, *on reh'g*, 108 F.E.R.C. ¶ 61,026 (2004). In 2005 a number of public utilities that previously possessed market-based rate authority either lost it or voluntarily relinquished it following application of updated screens for generation market power. *E.g.*, July 22, 2005 letter of Entergy Services, Inc. withdrawing its request for market-based rates in the Entergy control area (Docket No. ER91-569); Notice of Withdrawal of Request for Market-Based Rate Authority in Control Area, Intent to Transact under Cost-Based Rates, and Request to Terminate Proceedings, *Xcel Energy Servs. Inc.*, Docket Nos. ER01-205 *et al.* (Aug. 1, 2005); *Duke Power*, 113 F.E.R.C. ¶ 61,192 (2005) (accepting, suspending and setting for hearing Duke's proposed cost-based tariff for sales within its own control area).

3. The Proposed Rule Is Not Required by Appellate Case Law and Is an Unexplained Departure from the Commission's Own Precedent

As Commissioner Kelly observes in dissent, neither court nor Commission precedent compels adoption of the proposed rule. *Mobile*[28] and *Sierra*[29] both considered and rejected public utility attempts to increase rates unilaterally under FPA § 205 or NGA § 4, "simply by filing a new rate schedule," *Mobile*, 350 U.S. at 334. *Sierra* further considered whether the existing rate could be "said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility." 350 U.S. at 355. Neither case stands for the proposition that an agreement that *is* unjust and unreasonable must be allowed to persist unless it expressly permits modification using a just and reasonable standard.

The NOPR appropriately recognizes that precedent does not require the Commission to adopt the rule it has proposed, *see* NOPR at P 8, but concludes that "the weight of precedent supports the conclusion that the public interest standard applies in the case of contractual silence," *id.* at P 9. The NOPR provides virtually no analysis to support the latter assertion. That absence of reasoned decision-making is fatal, rendering the proposed rule an unexplained departure from precedent.[30]

The proposed rule departs from precedent (without explanation) in three respects. First, the proposed rule reverses Commission precedent holding that waivers of statutory rights be explicit,[31] and that silence will not be construed as waiver of the right to

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

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

[30] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

[31] *See, e.g.*, cases discussed at 12 & n.17, *supra*.

challenge contracts as unjust and unreasonable under FPA § 206.[32] Second, the proposed rule represents an unexplained about-face from the proposed policy statement promulgated in Docket No. PL02-7-000.[33] That proposed policy statement required parties to market-based rate agreements to include specific contract language if they intended to invoke the public interest standard for contract modification; otherwise, the Commission would allow parties to seek modification on grounds that the contract was unjust and unreasonable.[34] The NOPR provides no explanation at all for the Commission's change of direction.

Third, the NOPR marks an unexplained departure from the Commission's decision, in promulgating *pro forma* transmission service agreements ("TSAs"), to provide for their modification using a just and reasonable standard. *See* NOPR at PP 5-6. The Supreme Court's decision in *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), did not compel Order No. 888's use of a tariff-and-service-agreement arrangement allowing for change under either Section 205 or 206 using a just and reasonable standard.[35] Rather, the Commission appropriately chose that

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[32] In addition to the cases discussed at 12 & n.17, *see, e.g.*, *Kansas Gas and Elec. Co.*, 17 F.E.R.C. ¶ 61,180, at 61,342 (1981) (finding "service schedules pertaining to the interchange and transmission services [that] are silent on the matter of rate changes" to be subject to change under a just and reasonable standard), *aff'd*, 723 F.2d 82 (D.C. Cir. 1983); *cf. Arizona Pub. Serv. Co.*, 18 F.E.R.C. ¶ 61,197, at 61,398 (1982).

[33] *Standard of Review for Proposed Changes to Market-Based Rate Contracts for Wholesale Sales of Electric Energy by Public Utilities*, 100 F.E.R.C. ¶ 61,145 (Aug. 1, 2002), 67 Fed. Reg. 51,516 (Aug. 8, 2002).

[34] *Id.* at P 3 ("The Commission is proposing precise language that parties would be required to include in their electric power sales contracts if they intend that the Commission apply the 'public interest' standard of review to their contract.… [T]he omission of, or any deviation from, the language quoted below would result in the use of a just and reasonable standard of review.").

[35] Section 9 of the OATT preserves public utility Transmission Providers' rights to propose changes under Section 205 and preserves "the ability of any Party receiving service under the Tariff to exercise its rights under the Federal Power Act and pursuant to the Commission's rules and regulations promulgated thereunder." Order No. 888, at 31,936. Although the NOPR states (at P 6) that the just and reasonable

framework. It did so because it "recognize[d] that the industry, in response to changes in institutions, competitive pressure, and technological innovations, is evolving rapidly," a process that the Commission sought to encourage, Order No. 888 at 31,734, and that is still continuing. Adopting the "public interest" test as the default standard for modification of contracts other than TSAs will make it more difficult for contracting parties and the Commission to accommodate unforeseen changes in the industry and market structures. The NOPR fails to explain why the reasons for choosing a just and reasonable standard for transmission service agreements in Order No. 888 do not also justify a presumption in favor of that standard in other contractual contexts.[36]

4. The Proposed Rule Will Not Reduce Uncertainty And Undermines Rather Than Preserves Sanctity of Contract

The proposed rule will not succeed in its attempt to reduce the uncertainty associated with contract-modification litigation. When faced with requests for unilateral modification, the Commission must answer two questions: (1) what standard applies, and (2) whether that standard permits modification under the circumstances presented. Adopting presumptions regarding the first question is like squeezing one end of a balloon: it simply shifts focus to the other question. As the NOPR recognizes (at P 4 & n.11), the "public interest" test is "not clearly defined," and it is for the Commission to decide what circumstances satisfy the public interest test and permit contract

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standard is provided in both the OATT and the mandatory form of service agreement attached to the tariff, we are not aware of any such provision in the service agreement itself. This raises concerns about the standard of review that would be applied to proposed modifications of transmission service agreements if this aspect of the tariff were modified in the future under FPA Section 205 or 206.

[36] Moreover, the NOPR's application of different rules for modification of "transmission service agreements" and other contracts creates unnecessary ambiguity regarding which standard applies to modification of various transmission-related agreements, such as interconnection agreements, ancillary services agreements, RMR agreements, or other contracts based on *pro forma* agreements attached to a

modification. The Commission and the courts already have interpreted the public interest test in divergent ways,[37] which may either prohibit or still permit contract modification under various circumstances.[38] The bottom line is that contract-modification issues are necessarily fact-specific inquiries into what risks each contracting party undertook when it entered the agreement and whether modification is appropriate under the circumstances.

The Commission may not bypass that inquiry, as it attempts to do in the NOPR, because doing so abdicates the Commission's responsibility to ensure just and reasonable rates and undermines the sanctity of contract by disregarding the contracting parties' actual intent. Given the long-term nature of many contracts entered into and the pace of change in the industries the Commission regulates, it is especially important to preserve

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public utility transmission provider's tariff. *See* Section V below.

[37] *Compare Papago Tribal Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983) ("The public-interest standard is practically insurmountable.") *with Northeast Utils. Serv. Co. v. FERC*, 55 F.3d 686, 691 (1st Cir. 1995) ("[N]either *Mobile* nor *Sierra* stated or intimated that the 'public interest' doctrine was 'practically insurmountable.' … We do not think that *Papago*, read in context, means that the 'public interest' standard is practically insurmountable in all circumstances. It all depends on whose ox is gored and how the public interest is affected."); *see also Florida Power & Light Co.*, 67 F.E.R.C. ¶ 61,141, at 61,398 n.24 (1994) ("[A] standard of review that, even if invoked to protect non-parties to the contract such as ultimate consumers, is 'practically insurmountable' and under which a rate change is a 'dim prospect, hardly worthy of recognition' can hardly be termed a 'public interest' standard of review."); *accord Southern Co. Servs., Inc*., 67 F.E.R.C. ¶ 61,080, at 61,227 (1994); *Northeast Utils. Serv. Co. (Re: Public Serv. Co. of NH)*, 66 F.E.R.C. ¶ 61,332, at 62,081-88 (1994), *aff'd sub nom. Northeast Utils. Serv. Co. v. FERC*, *supra*.

[38] For cases permitting modification under a public interest standard, *see, e.g.*, *Arizona Corp. Comm'n v. FERC*, 397 F.3d 952, 953-54 (D.C. Cir. 2005) ("The Commission did not merely protect El Paso from an 'improvident bargain,' as petitioners allege, but exercised its *Mobile-Sierra* authority to prevent 'the imposition of an excessive burden' on third parties."); *Transmission Access Policy Study Group v. FERC*, 225 F.3d at 711-12 (affirming generic public interest findings relating to modification of requirements contracts infected by the exercise of market power and producing harm to third parties, "*i.e*., customers of the wholesale requirements customers"); *Texaco Inc. v. FERC*, 148 F.3d 1091, 1094, 1097 (D.C. Cir. 1998) (affirming forced conversion from "modified fixed variable" to "straight fixed variable" pricing because retaining the former would "distort the local gas market to the detriment of Mojave's competitors"); *Northeast Utils. Serv. Co.*, 55 F.3d at 693; *Mississippi Indus. v. FERC*, 808 F.2d at 1553; *Kern River Gas Transmission Co*., 62 F.E.R.C. P61,191, at 62,261 (1993), *aff'd on other grounds sub nom. Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157 (D.C. Cir. 1997); *Florida Power & Light Co.*, *supra* n.37; *Southern Co. Servs*., *Inc.*, *supra* n.37.

contracting parties' rights to challenge contracts that later become unjust and unreasonable.[39] It is simply impossible for parties contracting in this industry to foresee all potential developments that may occur within the term of their agreement and that could substantially affect the bargain between them. The NOPR will make it harder for contracting parties to deal with unforeseen changed circumstances, such as the introduction of new markets and market structures, the advent of new system operators, or the dis-integration of contracting parties who were previously vertically integrated.[40] As noted above (at n.8), if applied literally, the proposed regulation may even foreclose contract modification (unless required by the public interest) in cases where the contracting parties agree that the contract has become unjust and unreasonable, and should be modified, but fail to agree on the specific modification. In such circumstances, the proposed rule will impede rather than promote effectuating the contracting parties' intent—a result that cannot be squared with "sanctity of contract."

B. The Commission May Not Adopt Regulations that Foreclose It From Modifying Unjust and Unreasonable Agreements Sua Sponte *or Upon Complaint of a Non-Party*

The proposed rule goes far beyond allowing contracting parties to bind one another, through their silence, to the use of a public interest standard. The NOPR would

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[39] Given the considerable time and expense that mounting *any* legal challenge to a FERC-jurisdictional agreement entails, APPA and NRECA assume that a party to a short-term agreement where subsequent circumstances arguably render the agreement unjust and unreasonable will simply grit its teeth and comply with the contract, while acting to terminate it at the earliest possible time. Hence, these contract disputes will most likely be litigated when the extended length of the contract compels one of the parties to seek relief from the Commission.

[40] Some Commission and court cases on the *Mobile-Sierra* doctrine read as if the only parties who ever seek contract modification are disgruntled buyers or sellers dissatisfied with the terms of their deals. However, particularly in times of dramatic industry change, parties frequently seek contract modification to accommodate circumstances that neither contracting party foresaw, the risk of which cannot fairly be said to have been allocated by contract.

prohibit the Commission itself from modifying unjust and unreasonable agreements, either *sua sponte* or on complaint by a non-party to the contract, unless the public interest required the change or the contract expressly permitted changes using the just and reasonable standard.

The NOPR's decision to make it more difficult for the Commission to modify unjust and unreasonable agreements *sua sponte* or on complaint of a third party represents an unexplained departure from precedent. The proposed policy statement in Docket No. PL02-7-000 would have enabled the parties to market-based rate agreements to require that the public interest standard be applied in such cases, but the contracting parties would be required to do so explicitly. The proposed policy statement recognized (at P 4) that it was "proposing to depart from past precedent by agreeing to be bound to a public interest standard of review for market-based power sales contracts where both parties to the contract agree to bind themselves, and also seek to bind the Commission, to this standard." Indeed, prior to issuance of the policy statement, the Commission had held "that it is not in any circumstance bound, absent its consent, to a public interest standard of review for future changes sought by non-parties to the contract or by the Commission acting *sua sponte* to protect non-parties to the contract." *Florida Power & Light Co.*, 67 F.E.R.C. at 61,398; *Southern Co. Servs. Inc.*, 67 F.E.R.C. at 61,227.

As APPA explained in its comments on the proposed policy, the proposal to allow parties to market-based rate contracts to bind the Commission and third parties with express language was contrary to the FPA and an insufficiently explained departure from

precedent.[41] The instant NOPR is an even graver departure, for two reasons. First, it would apply to a far wider range of agreements than the proposed policy statement did. Second, the NOPR would not even require contracting parties to use express language to bind the Commission and third parties to a higher standard of review; silence now would suffice.

For all the reasons set forth above, one cannot reconcile the NOPR's willingness to allow contracting parties to erect barriers to the protection of third party interests with the Commission's affirmative duty to ensure that the rates, terms and conditions of jurisdictional transactions remain just, reasonable and not unduly discriminatory. Simply put, private agreements cannot diminish the Commission's indefeasible rights and obligation to protect the public. As the Supreme Court itself explained, the *Mobile-Sierra* doctrine "in *no way* impairs the regulatory powers of the Commission." *Mobile*, 350 U.S.at 344 (emphasis added). Further, the protection of third party interests provides "[t]he most attractive case" for exercising that regulatory power and "affording additional protection … despite the presence of a contract." *Northeast Utils. Serv. Co*., 55 F.3d 686 at 691 (*quoting Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 961 (1st Cir. 1993)).[42] Nor can private contracts serve to deprive other, *non*-contracting parties of statutory rights that Congress granted to *them*. As the D.C. Circuit made clear in *Atlantic*

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[41] Comments of American Public Power Association on Proposed Policy Statement, *Standard of Review for Proposed Changes to Market-Based Rate Contracts for Wholesale Sales of Electric Energy by Public Utilities*, Docket No. PL02-7-000, at 7-8 (Sep. 23, 2002) (*available at* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=9566211).

[42] *Cf. Blumenthal v. NRG Power Marketing, Inc.*, 104 F.E.R.C. ¶ 61,210, P 61 & nn.70-71 (2003) ("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.").

City Electric Co., the Commission may not by rule deprive entities of rights that Congress granted by statute. 295 F.3d at 9. While contracting parties may waive their rights by agreement, they may only waive "their" rights. *Id.* at 11. Thus, as the Commission itself has explained:

> *Mobile-Sierra* does not speak to situations … where a non-party to [a contract] … seeks changes under section 206. Under PPL's interpretation, parties to a contract who agree among themselves not to seek rate changes would be able to bind not only one another, but also other entities who are not parties to that contract (and did not receive the contractual benefits in exchange for which the parties traded away their right to seek rate changes). This result is not what the Supreme Court intended in *Mobile-Sierra*.

PJM Interconnection, LLC, 96 F.E.R.C. ¶ 61,206, at 61,878 & n.13 (2001) (citing cases), *pet. for rev. dismissed sub nom. PPL Elec. Utils. Corp. v. FERC*, D.C. Cir. Nos. 01-1369 *et al*. (Nov. 26, 2002) (unpublished).[43]

Because contracts subject to the Commission's FPA jurisdiction are "affected with a public interest," 16 U.S.C. § 824(a), third parties—especially consumers or their representatives—may have very legitimate interests in seeking Commission review of such a contract. Indeed, the Commission's files are filled with examples of jurisdictional agreements that deeply and pervasively affect the interests of ultimate consumers, potential competitors, and other entities who are not parties to the contracts. For example, ISOs and RTOs enter into agreements with transmission owners for the operation of transmission assets, but the transmission customers who are significantly affected by those agreements have little say in their content. Similarly, other agreements

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[43] *See also Midwest Indep. Transm. Sys. Op., Inc.*, 106 F.E.R.C. ¶ 61,219, P 24 & n.16 (2004).

entered into by an ISO or RTO (such as RMR agreements or ancillary services agreements) arise from situations where the customers who are affected by the agreement and pay the resulting costs are neither parties to the agreement nor effectively protected by the participation of either contracting party. Such dynamics make it especially important for the Commission to retain the ability to modify agreements that become unjust and unreasonable to the detriment of third parties.[44]

In many cases, the interests of the contracting parties are not merely unaligned with those of the ultimate consumers and other non-parties to the contract, but are actively opposed to them. For example, public utilities buying power or other services from affiliated entities may have incentives to *maximize* the costs and obligations they incur and pass through to other parties. Yet agreements among affiliated entities are among the most likely to restrict unilateral contract modification to a "public interest" standard, because the contracting parties may be confident that they will be able to agree on necessary changes between themselves.

Because there is no basis for assuming that the contracting parties' interests are aligned with those of the consumer, and because the FPA requires the Commission to

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[44] In *Southern Co. Servs. Inc.*, 67 F.E.R.C. at 61,228-29, the Commission observed that "Oglethorpe, which [was] purchasing from Entergy the power and energy that Southern is transmitting under the Agreement, [was] not a party to the Agreement." The Commission further found that the contracting parties had not shown "that *their* interests … 'are sufficiently likely to be congruent with those of ultimate consumers that [we] may rely upon [their] agreement as dispositive of the consumers' interests.'"; *see also Northeast Utils. Serv. Co. (Re: Pub. Serv. Co. of New Hampshire)*, 50 F.E.R.C. ¶ 61,266, at 61,839 (1990) ("The Mobile-Sierra provision in the Seabrook Power Contract is of particular concern to us given the affiliated nature of the seller and the buyer, both of whom will be operating utilities of Northeast.… While the State of New Hampshire, as a party to the contract, can be presumed to have protected the interest of its retail ratepayers, the State's participation cannot be construed as protecting other retail ratepayers or wholesale ratepayers."), *remanded sub nom Northeast Utils Serv. Co. v. FERC*, 993 F.2d 937 (1st Cir. 1993), *on remand, Northeast Utils. Serv. Co. (Re: Public Serv. Co. of NH)*, 66 F.E.R.C. ¶ 61,332 (1994), *aff'd sub nom Northeast Utils. Serv. Co. v. FERC*, 55 F.3d 686 (1st Cir. 1995).

ensure that rates remain just and reasonable, there is no basis for allowing contracting parties to limit non-parties rights' to challenge unjust and unreasonable rates, terms and conditions, or for allowing the Commission to divest itself of the ability to change such rates, terms and conditions *sua sponte*.[45]

V. AT MINIMUM, THE COMMISSION SHOULD CLARIFY THE SCOPE OF THE PROPOSED RULE

Although the proposed rule seeks to foster certainty, the scope of its application remains uncertain. For example, the NOPR states (at P 2, footnote omitted) that the proposed rule would "not apply to transmission service agreements executed under an open access transmission tariff as provided for under Order No. 888 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."[46] However, the NOPR does not define the term "transmission service agreement" or clearly specify the scope of the exception. Under the proposed rule, what standard of review would apply to proposed modifications to "Interconnection Agreements," "Network Operating Agreements," or other contracts that may be required in order to take service under an Open Access Transmission Tariff? Similarly, what standard of review would apply to proposed modifications of other types of transmission-related agreements (*e.g.*,

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[45] *Compare, e.g., Southern Power Co.*, 104 F.E.R.C. ¶ 61,041, P 25 (2003) ("[W]here affiliates are entering into agreements for which approval of market-based rates is sought, it is essential that customers be protected and that transactions be above suspicion in order to ensure that the market is not distorted.").

[46] As noted above (at n.35), we are unaware of any provision in the *pro forma* service agreement addressing the standard of review. That issue is addressed in Section 9 of the OATT. Especially in light of this NOPR, we are concerned that the failure to include such a provision in the agreement between the customer and the public utility Transmission Provider may prejudice the contracting parties' rights, should the Transmission Provider or the Commission amend Section 9 of the underlying tariff.

RMR agreements), standard forms of which are part of a public utility transmission provider or system operator's tariff? If the Commission does not reverse the proposed rule, and instead adopts its proposal to make the "public interest" test the default standard for modification of jurisdictional agreements, the Commission must at minimum define more clearly the universe of contracts that will be exempt from application of the new rule.

VI. CONCLUSION

For the reasons set forth above, the Commission should reverse course and revise the proposed rule to provide prospectively that: (i) absent specific contract language to the contrary, contracting parties may seek modification of agreements under Section 206 on the basis that they are unjust, unreasonable, unduly discriminatory or preferential, and (ii) contracting parties may not preclude the Commission from modifying contracts on that basis *sua sponte* or upon complaint by a third party. If the Commission does not do so, it should at minimum clarify the scope of the proposed rule and the line of demarcation between exempted "transmission service agreements" and included transmission-related agreements.

Respectfully submitted,

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