

103 FERC ¶ 61,344

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

v.
001

000

Docket No. EL03-123-

Docket No. EL03-134-

NRG Power Marketing, Inc.

Connecticut Light and Power Company

Docket No. EL03-129-000
Docket No. EL03-135-000

ORDER ADDRESSING AMENDED COMPLAINT,
ESTABLISHING PROCEDURES FOR THE
SUBMISSION OF ADDITIONAL INFORMATION,
REQUIRING COMPLIANCE WITH CONTRACT,
AND ESTABLISHING HEARING PROCEDURES

(Issued June 25, 2003)

1. In this order, the Commission considers an amended complaint (Docket No. EL03-123-001) filed by Richard Blumenthal, Attorney General for the State of Connecticut (CTAG), and the Connecticut Department of Public Utility Control (CDPUC) (collectively, the Connecticut Representatives). That complaint requests that the Commission determine that a bankruptcy court's approval of NRG Power Marketing, Inc.'s (NRG-PMI) request to reject a Standard Offer Service Wholesale Sales Agreement (SOS Agreement) between it and Connecticut Light and Power Company (CL&P)

(NRG/CL&P Agreement) does not preclude the Commission from making an independent determination as to whether NRG-PMI must continue to provide service to CL&P. For the reasons discussed below, the Commission establishes procedures for the submission of information to develop a factual record in this proceeding concerning whether NRG-PMI's proposed cessation of service meets the Mobile-Sierra¹ "public interest" standard and requires NRG-PMI to continue to perform its contractual obligations under the NRG/CL&P Agreement until the Commission rules on the merits of the public interest issue.

2. This order also addresses a related petition for declaratory order (Docket No. EL03-129-000). That petition requests a declaration from the Commission that the implementation of the SMD² in New England beginning on March 1, 2003 results in certain sellers being responsible for congestion charges and losses under the SOS Agreements, which were entered into between those sellers and CL&P before the implementation of the SMD. We set that issue for hearing.

I. Background

3. Prior to the adoption of ISO-NE's Standard Market Design (SMD) on March 1, 2003, congestion costs were socialized throughout NEPOOL by allocating total congestion costs to all load-serving entities in New England on a pro rata basis (based on transmission load) as a separate uplift charge. In addition, transmission losses in NEPOOL were treated in a manner similar to congestion costs; they were recovered on an average cost basis from all transmission customers. Consequently, before that date, the NEPOOL Transmission Facilities (PTF), i.e., the transmission network, was essentially considered a single point at which wholesale deliveries and receipts of energy

¹United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) (Mobile); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (Sierra) (collectively, Mobile-Sierra).

²On July 15, 2002, NEPOOL and ISO-NE filed a proposal to replace the design of the then-existing NEPOOL markets with Market Rule 1, commonly referred to as the SMD. See New England Power Pool and ISO New England, NEPOOL Standard Market Design, Docket No. ER02-2330 (2002). The Commission approved the SMD in a pair of orders issued in 2002. See New England Power Pool and ISO New England Inc., 101 FERC ¶ 61,344 (2002); New England Power Pool and ISO New England Inc., 100 FERC ¶ 61,287 (2002). In addition, the Commission authorized the ISO-NE to implement the SMD on March 1, 2003. New England Power Pool and ISO New England Inc., 102 FERC ¶ 61,248 (2003) (denying stay of the SMD).

were made. In this regard, the point of delivery at which a supplier, pursuant to Connecticut's SOS Agreements, delivered its power to the buyer was irrelevant for the purposes of calculating congestion costs and losses. Pursuant to the SMD's location-based pricing (LMP) market, congestion costs are no longer socialized but instead are charged to customers based upon the cost of those products at particular locations on ISO-NE's transmission system. In addition, under the SMD, the locational prices include the cost of transmission losses calculated on a marginal cost basis for that location.

4. Under Connecticut retail choice law and the CDPUC's rules, CL&P was required to divest its generation and competitively procure wholesale power supply. To meet its continuing obligation to serve retail customers (who do not elect to acquire their electricity from alternative power suppliers in the competitive market), it was necessary for CL&P to enter into SOS Agreements to acquire a firm wholesale requirements power supply.³ Based on CL&P's selection of SOS suppliers through a competitive procurement process conducted under the direction and control of the CDPUC,⁴ CL&P entered into SOS Agreements with three suppliers, one of which is NRG-PMI. The other two SOS suppliers are Duke Energy Trading and Marketing Northeast, L.L.C. (Duke) and Select Energy, Inc. (Select).⁵

5. NRG-PMI and CL&P entered into the NRG/CL&P Agreement on October 29, 1999, and the term of the agreement is from January 1, 2000 until December 31, 2003.⁶ During the term of the contract, the agreement requires NRG-PMI to provide power

³Only a small percentage of Connecticut's retail customers purchase power from competitive suppliers, so the SOS Agreements cover the power supply for almost all of the retail load in CL&P's distribution service territory.

⁴The CDPUC retained J.P Morgan Securities, Inc. as an independent auction agent for purposes of soliciting and evaluating bids.

⁵Under the three SOS Agreements, CL&P's power requirements for SOS are provided in the following manner: NRG-PMI provides 45 percent, Duke provides 5, and Select provides 50 percent. The provisions of the three SOS Agreements are nearly identical.

⁶The NRG/CL&P Agreement is a fixed-rate agreement, and the rate provisions of the agreement provide for a 4.348 cents per kWh charge (with an increase to 4.448 per kWh for load share above 40 percent) applicable throughout the entire term of the agreement. NRG/CL&P Agreement § 4.1.

supply for a specified percentage of CL&P's SOS load.⁷ The Commission's then-applicable regulations did not require the filing of the agreement.⁸ Instead, NRG-PMI was required to satisfy the filing requirements of Section 205(d) of the FPA⁹ by including its wholesale sales to CL&P in its quarterly transaction reports filed with the Commission.

6. On January 1, 2000, NRG-PMI began to supply power to CL&P under the agreement. Shortly thereafter, a dispute arose as to whether NRG-PMI or CL&P was liable for NEPOOL congestion charges and losses. In November 2001, CL&P filed a breach of contract complaint against NRG-PMI in Connecticut Superior Court, seeking recovery for unpaid pre-SMD congestion charges from NRG-PMI. The case was removed to and is pending before the U.S. District Court for the District of Connecticut.¹⁰ In that proceeding, the parties have already submitted motions for summary judgment regarding the responsibility for the congestion costs and losses. However, that proceeding has been stayed by the bankruptcy proceeding, pursuant to the automatic stay imposed by Section 362 of the United States Bankruptcy Code.¹¹ On August 5, 2002, CL&P began to withhold the contested amounts from payments to NRG-PMI for power delivered.¹²

7. CL&P submitted on April 22, 2003 an application with the Connecticut Department of Public Utility Control (CDPUC) to recover from retail customers the post-SMD costs of congestion and losses under the SOS Agreements. On May 1, 2003, the CDPUC issued an order provisionally and temporarily granting (for 60 days) CL&P the relief that it requested, subject to refund. The CDPUC found that CL&P "has a strong

⁷NRG/CL&P Agreement § 3.5 (35% in 2000, 40% in 2001 and 2002, and 45% in 2003).

⁸18 C.F.R. § 35.15 (2003). Although Section 2.1 of the NRG/CL&P Agreement would seemingly require NRG-PMI to file the agreement with the Commission, on December 27, 1999, NRG-PMI and CL&P amended the agreement to clarify that it need not be filed with the Commission.

⁹16 U.S.C. § 824d (2000).

¹⁰Civil Action No. 01-2373 (AWT) (Conn. Super. Ct. 2001).

¹¹11 U.S.C. § 362 (2000).

¹²Those amounts currently total around \$27.5 million.

claim as against all its SOS suppliers [and] that these suppliers are solely responsible for all SMD-related charges at issue."¹³ However, noting the action pending in federal district court and that the SOS Agreements are wholesale power contracts under the jurisdiction of the Commission, the CDPUC declined to assert jurisdiction over the contracts. Nevertheless, the CDPUC ordered CL&P to pursue all potential contract claims against its three SOS suppliers to ensure that the SOS suppliers bear responsibility for congestion costs and losses as required by the terms of their SOS Agreements.

8. Pursuant to the CDPUC Order, on May 5, 2003, the CL&P filed a petition for a declaratory order that asks the Commission to determine, with regard to two of its sellers (Duke and Select),¹⁴ the responsibility for those charges.¹⁵

9. On May 14, 2003, NRG-PMI notified CL&P that it considered CL&P in default of the NRG/CL&P Agreement, because CL&P had withheld: (1) payments due for congestion costs; and (2) congestion costs and losses after the implementation of the SMD. NRG-PMI also stated that it intended to terminate service on May 19, 2003, unless CL&P cured the defaults. Later on May 14, NRG Energy, Inc. (NRG Energy), on behalf of certain of its affiliates (including NRG-PMI), filed, pursuant to Chapter 11 of the U.S. Bankruptcy Code,¹⁶ in the Bankruptcy Court for the Southern District of New York a voluntary reorganization petition seeking protection from certain creditors' claims pending confirmation of a Chapter 11 plan or plans of reorganization. In that filing, NRG-PMI submitted a motion that requested that the bankruptcy court, pursuant to Section 365 of the Bankruptcy Code, reject the NRG/CL&P Agreement.

10. The Connecticut Representatives submitted on May 15, 2003 a complaint asking the Commission to issue an order staying NRG-PMI's termination of the NRG/CL&P

¹³CDPUC Order at 3.

¹⁴Because NRG Energy, Inc. filed a petition for bankruptcy, CL&P is enjoined from initiating an administrative proceeding against NRG-PMI without first obtaining approval of the bankruptcy court. CL&P has not yet been granted relief to do so; therefore, it did not include NRG-PMI in that proceeding.

¹⁵Specifically, the petition requests a declaration from the Commission that, even after the implementation of the SMD, the sellers are responsible for congestion charges and losses under the SOS Agreements, which were entered into before that date.

¹⁶11 U.S.C. §§ 365; 1101 et seq. (2000).

Agreement.¹⁷ They argued that NRG-PMI may not terminate the agreement before the end of the contract term absent CL&P's consent, without first filing a notice with the Commission, pursuant to Section 35.15 of the Commission's regulations.¹⁸ Accordingly, they requested that the Commission state that NRG-PMI may not unilaterally terminate its wholesale contract before December 31, 2003 without prior Commission review. Furthermore, they stated that the Commission has jurisdiction over this matter notwithstanding NRG-PMI's filing for bankruptcy protection and, therefore, asked that the Commission take jurisdiction over this matter. In addition, the Connecticut Representatives requested that the Commission initiate a proceeding under Sections 205 and 206 of the FPA to determine whether NRG-PMI has the contractual right to terminate service in these circumstances and, if it does, whether termination of service under the agreement is consistent with the public interest.

11. On May 16, 2003,¹⁹ the Commission issued an order directing NRG-PMI to continue providing service to CL&P, pursuant to the rates, terms, and conditions of the NRG/CL&P Agreement, until the Commission had an opportunity to evaluate NRG-PMI's proposed termination and the opposition to such action.

12. NRG-PMI filed on May 19, 2003 an adversary proceeding in the bankruptcy court, which named the Connecticut Representatives and the Commission as defendants. That motion sought to have the bankruptcy court enjoin, pursuant to Section 105 of the Bankruptcy Code,²⁰ this proceeding and declare null and void the May 16 Order. NRG-PMI maintained that the Commission had no authority to act because of the automatic stay under the Bankruptcy Code.

¹⁷The Connecticut Representatives state that as a consequence of the automatic stay requirement of the Bankruptcy Code, CL&P had not yet received (at the time the complaint was filed) permission from the bankruptcy court to participate in this proceeding. Subsequently, CL&P sought an emergency order from the bankruptcy court for relief from the automatic stay imposed so that it could intervene and participate fully in this proceeding. At a hearing held on May 19, 2003, the bankruptcy court granted CL&P's motion. In re NRG-PMI Energy, Inc., Ch. 11 Case No. 03-13024 (Bankr. S.D.N.Y. May 19, 2003) (May 19 Hearing).

¹⁸18 C.F.R. § 35.15 (2003).

¹⁹103 FERC ¶ 61,188 (2003) (May 16 Order).

²⁰11 U.S.C. § 105 (2000).

13. At the May 19 Hearing, NRG-PMI stated that it "would stand down" on its motion to enjoin the Commission but would leave the papers on file for possible later renewal.²¹ In addition, the bankruptcy judge indicated that she would deny NRG-PMI's motion to reject the NRG/CL&P Agreement, because NRG-PMI's notice of termination, if allowed, would mean that the agreement was no longer in effect (and thus could not be rejected).²² In light of this, NRG-PMI indicated that it was "withdrawing [the] notice of termination and [did] not intend to terminate [the] agreement."²³ Later that day, NRG-PMI sent a letter to CL&P stating that it had withdrawn its pre-petition notice of termination of the NRG/CL&P Agreement. Nevertheless, NRG-PMI did not withdraw its motion to reject the NRG/CLP Agreement.²⁴

14. On May 29, 2003, the Commission issued two notices that shortened the answer period for all interventions and comments related to this proceeding, requiring all such filings to be filed with the Commission by June 6, 2003. In addition, on that same day, the Commission's Solicitor sent a letter to the bankruptcy court stating:

The terms and conditions of the SOS Agreement are matters subject to FERC's exclusive jurisdiction under the Federal Power Act. . . . Whether NRG-PMI's actions regarding the SOS Agreement are considered as attempts to terminate or to breach that Agreement, those actions involve matters that are at the heart of FERC's regulatory responsibilities because they affect the rates and other terms and conditions under which service is provided to customers. Fulfilling those responsibilities requires the Commission to address a range of public interest concerns. . . .

²¹May 19 Hearing, Tr. at 46.

²²Id. at 40-43.

²³Id. at 45.

²⁴On May 22, 2003, CL&P made a filing with the Commission in which it expressed its intent to not withhold payments regarding disputed congestion costs and losses, assuming that appropriate arrangements could be put in place with NRG-PMI to ensure that CL&P would be paid if NRG-PMI is ultimately found to be liable for those charges. Notice of Intent to Pay Disputed Congestion and Loss Charges Pending Resolution of Contract Dispute, Docket No. EL03-123-000.

That letter also suggested that the bankruptcy court might want to wait to issue a ruling on the motion to reject until the Commission had time to issue an order on the merits in this proceeding.

15. On June 2, 2003, the bankruptcy court granted NRG-PMI's motion to reject the NRG/CL&P Agreement under Section 365 of the Bankruptcy Code, effective that day.²⁵ However, the court stated that “the Debtor must seek an Order from the [Commission] to vacate [the May 16 Order].”²⁶ The court also specifically noted that it “was not . . . willing to get involved in the [May 16 Order] that had been entered by the Federal Energy Regulatory Commission, which directs the Debtor to continue to provide service to Connecticut Power and Light [sic].”²⁷

16. The U.S. District Court for the Southern District of New York issued on June 12, 2003 an “Order to Show Cause and a Scheduling Hearing on NRG Power Marketing, Inc.'s Motion for Preliminary Injunction and Declaratory Relief.”²⁸ That court stated that:

PMI is permitted pursuant to section 365(a) of the Bankruptcy Code, in accord with the findings of the Bankruptcy Court, to cease performance under the CL&P Agreement, effective retroactive to June 2, 2003 . . . [and] that any requirement for PMI to comply with a final exercise of FERC's regulatory jurisdiction preventing rejection of the CL&P agreement pursuant to Section 365(a) of the Bankruptcy Code, or preventing the cessation of PMI's performance thereunder, shall be stayed pending FERC's appearance in the bankruptcy proceeding and an opportunity for judicial review of such final FERC regulatory action, if any, by a court of competent jurisdiction.²⁹

²⁵See In re NRG-PMI Energy, Inc., et al., Ch. 11 Case No. 03-13024 (Bankr. S.D.N.Y. June 2, 2003) (June 2 Hearing).

²⁶Id. Tr. at 136-37.

²⁷Id. at 137

²⁸NRG Power Marketing Inc. v. Richard Blumenthal, et al., No. 03-CV-3754 (RCC) (S.D.N.Y. 2003).

²⁹Id. at Order p. 3.

II. Notice of Filing and Responsive Pleadings**A. Docket No. EL03-123-001**

17. Notice of the Connecticut Representatives' amendment to their complaint was published in the Federal Register, 68 Fed. Reg. 37,143 (2003), with interventions, comments, and protests due on or before June 6, 2003. In addition, notice of NRG-PMI's request for summary disposition was given on the Commission's web site (www.ferc.gov) with interventions, comments, and protests due on or before June 6, 2003.

18. Timely motions to intervene raising no substantive issues were filed by the City of Santa Clara, California, Select Energy Inc., Dominion Energy Marketing, Inc., and the City of Santa Clara, California. The Official Committee of Unsecured Creditors of NRG-PMI Energy, Inc. and its Affiliated Debtors (collectively, Official Committee); Calpine Corporation, El Paso Merchant Energy, L.P., Mirant Americas Energy Marketing, L.P., Mirant New England, LLC, Mirant Kendall, LLC, Mirant Canal, LLC, Morgan Stanley Capital Group Inc., and Sempra Energy Resources (Indicated Intervenors); Alternate Power Source Inc (APS); and CL&P filed timely motions to intervene and comment. NRG-PMI and the Connecticut Representatives filed answers.

B. Docket No. EL03-129-000

19. Notice of CL&P's petition was published in the Federal Register, 68 Fed. Reg. 37,143-44 (2003), with comments, protests, and interventions due on or before June 6, 2003.

20. Timely motions to intervene raising no substantive issues were filed by Dominion Energy Marketing, Inc. APS, CTAG, Duke, and Connecticut Industrial Energy Consumers (Connecticut Industrial) filed timely motions to intervene and comment. In addition, the Connecticut Office of Consumer Council (Connecticut Consumer) filed an untimely motion to intervene and comment and PSEG Power Connecticut LLC (Power Connecticut) filed an untimely motion to intervene. Select filed an answer.

III. Instant Pleadings

A. Docket No. EL03-123-002

1. The Connecticut Representatives' Amended Complaint

21. On May 22, 2003, the Connecticut Representatives filed an amendment to their complaint. They state that to the extent that their initial complaint addressed only the threatened pre-petition termination of the NRG/CL&P Agreement by NRG-PMI, they amend that complaint to address all methods by which the that agreement might be modified or terminated by entities other than the Commission. Because the NRG/CL&P Agreement constitutes a filed rate schedule with the Commission, the Connecticut Representatives maintain that it cannot be unilaterally modified or terminated by any of the parties to the contract, the state, or federal courts (including a bankruptcy court). In addition, the Connecticut Representatives request that the Commission initiate a proceeding under sections 205 and 206 of the FPA to determine whether NRG-PMI has the contractual right to terminate service in these circumstances and, if it does, whether termination of service under the NRG/CL&P Agreement is consistent with the public interest.

2. NRG-PMI's Motion for Summary Disposition

22. NRG-PMI filed on May 27, 2003 a motion that requests that the Commission summarily dispose of this proceeding by issuing an order that vacates the May 16 Order, dismisses the Connecticut Representatives' amended complaint, and terminates this proceeding. NRG-PMI states that the Connecticut Representatives are stayed from filing their complaint to enforce a contractual obligation to which CL&P is a party, because the automatic stay under Section 362(a) of the Bankruptcy Code prevents CL&P from filing a complaint against it.³⁰ In addition, NRG-PMI maintains that the Connecticut Representatives seek two impermissible amendments to the NRG/CL&P Agreement: (1) a limitation of NRG-PMI's termination rights under Section 5.5;³¹ and (2) the elimination

³⁰NRG-PMI Motion for Summary Disposition at 4 n.4 (citing *Elaine Chao v. Hospital Staffing Service, Inc.*, 270 F.3d 374, 390 (6th Cir. 2001)).

³¹See infra note 78.

of a condition in Section 10.1 that provides that enforcement of the agreement is subject to bankruptcy laws.³²

23. In addition, NRG-PMI states that whether the automatic stay applies to the instant proceeding should be decided by the bankruptcy court. NRG-PMI maintains that the Commission's precedent recognizes that: (1) the Bankruptcy Code gives a utility the right to determine at its sole discretion whether to reject or accept an executory contract,³³ and (2) it is "an issue to be resolved before the Bankruptcy Court and not subject to the determination of the Commission."³⁴ NRG-PMI also maintains that the Bankruptcy Code identifies only a few executory contracts that must be performed pending a bankruptcy court proceeding, and power sales agreements, such as the NRG/CL&P Agreement, are not one of them. Moreover, NRG-PMI claims that the Commission has operated under the assumption that the authority granted to it by the FPA fits within the police and regulatory exception to the automatic stay,³⁵ as long as the Commission's actions do not intrude on a bankruptcy court's control over the property of the bankruptcy estate.³⁶

24. NRG-PMI states that its parent, NRG Energy, has arranged a debtor in possession loan (DIP Loan) to finance the continued operation of its Northeast generation facilities (NRG Northeast Facilities), which includes its facilities in Connecticut and New York City. NRG-PMI maintains that a condition precedent to lender funding under the DIP Loan is the entry of an order by the bankruptcy court rejecting the NRG/CL&P Agreement under Section 365 of the Bankruptcy Code. Accordingly, NRG-PMI asserts that continued litigation with the Connecticut Representatives concerning the rejection of the NRG-CL&P Agreement is jeopardizing NRG Energy's pre-arranged reorganization

³²See infra note 83.

³³NRG-PMI Motion for Summary Disposition at 5 n.5 (citing Kern River Gas Transmission Co., 101 FERC ¶ 61,374 at 62,556 (2002)).

³⁴NRG-PMI Motion for Summary Disposition at 5 n.6 (citing Columbia Gas Transmission Corp., et al., 71 FERC ¶ 61,194 at 61,678 (1995)).

³⁵See infra note 59 and accompanying text (discussing the police and regulatory exception).

³⁶NRG-PMI Motion for Summary Disposition at 21 (citing San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services, et al., 95 FERC ¶ 61,021 at 61,051 (2001)).

plan,³⁷ which could severely diminish NRG Energy's value and the amount of recovery available to its creditors. Furthermore, NRG-PMI asserts that consideration of all issues concerning the reorganization must be adjudicated in one forum so that all parties in the process are treated fairly and equitably and all decisions are coordinated to ensure a successful reorganization. Finally, NRG-PMI states that the May 16 Order should be vacated because, among other things, it is: (1) an ex parte order that grants a temporary restraining order of indefinite duration without any finding of harm (much less irreparable harm); and (2) now moot because NRG-PMI rescinded its notice terminating the NRG/CL&P Agreement.

3. Answers

25. The Connecticut Representatives state in their answer that the NRG/CL&P Agreement is within the Commission's exclusive jurisdiction, regardless of NRG-PMI's bankruptcy status. They also maintain that the Commission's authority over the NRG/CL&P Agreement falls squarely within the so-called police and regulatory exception to the bankruptcy code.³⁸ According to the Connecticut Representatives, ample precedent exists sustaining actions by governmental authorities in analogous circumstances acting to protect consumers.³⁹ Moreover, they argue that the Commission's authority to exercise jurisdiction over the NRG/CL&P Agreement is also supported by the terms of the contract itself.⁴⁰

26. The Connecticut Representatives state that they were well within their rights and obligations to file the amended complaint, because the police and regulatory exception in the Bankruptcy Code applies to them in this circumstance. In addition, pursuant to the filed rate doctrine, they state that the agreement can only be changed by the Commission in accordance with Sections 205 and 206 of the FPA. They claim that NRG-PMI's alleged rescission of the notice of termination does not alter the need for the Commission

³⁷NRG-PMI states that from August 2002 through April 2003, NRG Energy and its major creditor constituencies negotiated the terms of a consensual restructuring of NRG Energy's debt and equity ownership and hopes to achieve confirmation of this plan by the end of the summer of the calendar year 2003.

³⁸11 U.S.C. § 362(b)(4) (2000).

³⁹Connecticut Representatives Answer at 10 (citing Pacific Gas & Electric Company v. Cal. PUC, 263 B.R. 306 (Bankr. N.D. Cal. 2001)).

⁴⁰Id. at 14 (citing Section 15.1 of the NRG/CL&P Agreement).

to assert jurisdiction over the NRG/CL&P Agreement, because NRG-PMI waived its rights under the FPA to unilaterally amend or modify the NRG/CL&P Agreement (except under certain limited exceptions that are not here relevant).⁴¹ Accordingly, the Connecticut Representatives maintain that the Commission should require NRG-PMI's continued performance under the terms and conditions of the agreement through December 31, 2003.

27. In its answer, NRG-PMI maintains that the primary support for the Connecticut Representatives' amended complaint is incorrect (*i.e.*, the NRG/CL&P Agreement is a filed rate schedule). NRG-PMI states that because the NRG/CL&P Agreement is not required to be filed with the Commission, it is not a filed rate. Thus, changes to it do not require prior notice or Commission approval. Furthermore, according to NRG-PMI, a "rejection" under the Bankruptcy Code is a breach, which does not constitute a "change."

28. NRG-PMI also states that the Connecticut Representatives have not made any of the requisite showings that are required to be granted a stay, because: (1) CL&P will not suffer irreparable harm but, at most, economic loss; (2) NRG-PMI and its affiliated debtors and their creditors will be harmed by a stay; and (3) the public interest supports efficient and uniform bankruptcy proceedings and the successful resolution of the NRG Energy reorganization.

29. NRG-PMI elaborates in its answer on its reorganization plan. NRG-PMI states that the NRG Northeast Facilities require working capital to prepay for fuel and other services. According to NRG-PMI, its ability to manage and operate those facilities without disruption during the Chapter 11 reorganization hinges on relief from the cash drain of the NRG/CL&P Agreement and access to the working capital available under the DIP Loan. Therefore, NRG-PMI maintains that it must be allowed to exercise its rights under the Bankruptcy Code by ceasing performance under the agreement. By June 16, 2003 (and possibly as soon as June 13), NRG-PMI states that the NRG Northeast Facilities will have to draw \$30 to 35 million in order to meet their current obligations, including operating expenses, working capital, and payment of interest on their long-term bond financing. NRG-PMI argues that the DIP Loan is the only currently available source to cover those amounts. In addition, even if the NRG Northeast Facilities are allowed access to the DIP Loan, NRG-PMI maintains that the cash drain from continued performance under the NRG/CL&P Agreement could cause the NRG Northeast Facilities to go into default under the DIP Loan in the near future.

⁴¹Id. at 15 (citing Sections 4.3 and 4.4 of the NRG/CL&P Agreement).

4. Comments

30. CL&P states that the Commission retains jurisdiction over NRG-PMI's attempt to terminate the NRG/CL&P Agreement if NRG-PMI wants to prematurely terminate the agreement based on a claim of default or by claiming the right to terminate wholesale service via "rejection" of the contract in a bankruptcy court.⁴² The Commission's jurisdiction stems from the fact that the agreement is a rate schedule subject to this Commission's exclusive jurisdiction under Section 205 of the FPA, and, under the filed rate doctrine, only the Commission can change (e.g., prematurely terminate) a filed tariff. Although the Commission exercised its authority under Section 205(c) of the FPA to permit NRG-PMI to satisfy its filing obligations with respect to the NRG/CL&P Agreement through the submission of quarterly reports rather than a filing under Part 35 of the regulations, CL&P argues that the Commission has made clear that wholesale sales transactions under market-based rates remain fully subject to Section 205. CL&P also maintains that the Supreme Court has determined that the filed rate doctrine prohibits federal and state courts from ordering any relief that is inconsistent with the filed rate (and the law provides no exception for the bankruptcy courts, which are agents of the federal district courts).⁴³

31. According to CL&P, the NRG/CL&P Agreement is a fixed rate agreement under the Mobile-Sierra doctrine that NRG-PMI entered into voluntarily; therefore, it may be terminated prior to the end of the contract term only upon a showing that such termination is required by the public interest. In the contract, NRG-PMI waived its FPA Sections 205 and 206 rights to request that the contract be changed. Thus, CL&P argues that this case represents nothing more than an attempt by a public utility seller to be relieved of its improvident bargain. In this regard, CL&P states that early termination of the NRG/CL&P Agreement, pursuant to Section 206, would not be in the public interest.⁴⁴ However, CL&P states that if the Commission believes that it may be in the public interest to terminate the NRG/CL&P Agreement, it requests that the Commission set the issue for hearing.

32. In addition, CL&P maintains that the bankruptcy court, in granting NRG-PMI's motion to reject the NRG/CL&P Agreement, made clear that it did not consider the

⁴²The bankruptcy court granted CL&P's request to intervene in this proceeding.

⁴³CL&P Comments at 2 (citing 28 U.S.C. § 157).

⁴⁴CL&P Comments at 4 (citing Sierra, 350 U.S. at 355).

interests of electric consumers. The court also stated that it did not intend to interfere with this Commission's jurisdiction over the agreement under the FPA. CL&P claims that the court's decision was based exclusively on an alleged showing by NRG-PMI that the NRG/CL&P Agreement was economically detrimental to the debtor. Therefore, CL&P argues that nothing in the court's decision should cause the Commission to reconsider its determination in the May 16 Order to exercise its exclusive jurisdiction over the filed rate. In fact, in light of this Commission's responsibilities under the FPA, CL&P believes that the bankruptcy court does not even have jurisdiction to address NRG-PMI's motion to reject the NRG/CL&P Agreement. CL&P states that Section 362 of the Bankruptcy Code expressly preserves the authority of federal regulatory statutes. In addition, CL&P asserts that the negotiated plan to allocate interests in the debtor's property was accomplished at the expense of ratepayers, who the Commission is bound by statute to protect. Therefore, the Commission retains jurisdiction over the NRG/CL&P Agreement in order to ensure that the interests protected by the FPA are addressed.

33. CL&P also maintains that it is not likely that potential DIP lenders have required or would require the rejection of the NRG/CL&P Agreement as a condition in order to provide DIP financing to NRG Energy. Furthermore, NRG-PMI does not suggest that its DIP lenders will foreclose on the loan if this Commission asserts jurisdiction over the agreement. According to CL&P, NRG-PMI is raising a factual issue that requires a hearing. In such a hearing, CL&P states it is prepared to show that DIP financing is available to NRG-PMI without the agreement being rejected and that NRG Energy has sufficient funds to operate the NRG Northeast Facilities.

34. The Official Committee states that they support NRG-PMI's request to terminate service under the NRG/CL&P Agreement. Because the agreement was not filed with the Commission and was executed after July 9, 1996, pursuant to Section 35.15 of the Commission's regulations, it does not have to be filed with the Commission to terminate it. Furthermore, the Official Committee maintains that due to CL&P's failure to pay to NRG-PMI the amounts due under the NRG/CL&P Agreement, the agreement terminates by its own terms. In addition, according to the Official Committee, service under the agreement is unreasonably costly to NRG-PMI and CL&P's failure to remit to NRG-PMI the full amounts due under the agreement is causing material economic harm to both NRG-PMI and to unsecured creditors.

35. The Indicated Intervenors state that the Commission should avoid any actions or statements that could be construed as limiting the rights of contracting parties to exercise their bargained-for contractual rights to terminate market-based rate contracts. They state that the NRG/CL&P Agreement clearly provides for early termination if a party fails to

cure a default within the prescribed time period. Furthermore, they state that the Connecticut Representatives are taking the position that sellers must satisfy some extra-contractual "public interest" test prior to exercising their contractual early termination rights or rejecting contracts in bankruptcy. Except in the instance when early termination is the result in a change in the terms of the contract by a party, there is absolutely no requirement that a seller make a prior Section 205 filing, as opposed to entering the actual termination date in a quarterly report.⁴⁵

36. Santa Clara asserts that Section 205 of the FPA and the Commission's regulations require notice of termination of contracts relating to jurisdictional sales. According to Santa Clara, the Commission has consistently applied the prior notice requirement to terminations of long-term, market-based power sales agreements. In Southern I and Southern II,⁴⁶ the Commission's orders referenced the fact that the contracts at issue were short-term power sales.⁴⁷ Furthermore, Santa Clara states that in affirming the Commission's ruling, the court noted that the Commission's ruling was limited to short-term transactions.⁴⁸ Because these decisions did not address long-term transactions, Santa Clara argues that the rule set forth in Portland⁴⁹ remains unchanged as to long-term transactions. Accordingly, because NRG-PMI's contract with CL&P had a term in excess of one year, NRG-PMI must file a notice of termination of the contract.

37. Duke states that it is unnecessary to reach the issue of which party (i.e., buyer or seller) is responsible for congestion costs and losses under the SOS Agreements in

⁴⁵Indicated Intervenor Comments at 12 (citing 18 C.F.R. § 35.15 (2003)).

⁴⁶Santa Clara Answer at 10 (citing Southern Co. Energy Mktg., L.P., 84 FERC ¶ 61,199 (1998) (Southern I), reh'g denied, 86 FERC ¶ 61,131 (1999) (Southern II), aff'd sub nom., Power Co. of America v. FERC, 245 F.3d 839 (D.C. Cir 2001) (PCA)).

⁴⁷Santa Clara Answer at 10 (citing Southern I, 84 FERC at 61,986 n.3; Southern II, 86 FERC at 61,458).

⁴⁸Santa Clara Answer at 10 (citing PCA, 245 F.3d at 845).

⁴⁹Portland General Elec. Co., 75 FERC ¶ 61,310 at 62,002, reh'g denied, 77 FERC ¶ 61,171 (1996) (stating that Order 888 specifically retained the notice requirement for terminations of power sales contracts terminating other than at the expiration of their intended term) (Portland), rev'd by Southern II, 86 FERC at 61,457 ("reconsider[ing] and revers[ing] any contrary language in [Portland] indicating that Section 35.15 might apply to short-term discretionary power sales that are not themselves on file.")

Docket No. EL03-123-001, because neither CL&P's SOS Agreements with Duke or Select are the subject of that proceeding. Furthermore, because the proceeding concerning CL&P's petition for declaratory order (Docket No. EL03-129-000) will address the issues related to those costs under the SOS Agreements, Duke requests that the Commission refrain from reaching the merits of those issues in this proceeding. In addition, APS states that the real issue in this matter is which party is responsible for congestion charges both before and after the implementation of the SMD, and if it is CL&P, NRG-PMI should have the right to terminate the NRG/CL&P Agreement unless compensated for those costs.

B. Docket No. EL03-129-000

1. CL&P's Petition for Declaratory Order

38. CL&P requests that the Commission issue a declaratory order regarding its SOS Agreements with two of its suppliers, Duke and Select. According to CL&P, the sellers in the SOS Agreements are responsible for locational congestion and loss charges under the SMD. CL&P points out that in the provisions in the SOS Agreements defining the parties' responsibilities, the charges for congestion and losses imposed by NEPOOL are the responsibility of the sellers. Furthermore, although sellers may deliver power to the NEPOOL PTF at delivery points of their choosing, the SOS Agreements state that sellers are responsible for the costs of congestion and losses associated with the delivery of power from delivery points to the buyer's loads. CL&P also claims that at the time the SOS Agreements were negotiated NEPOOL was considering the adoption of LMP to manage congestion and, as a result, the SOS Agreements address this possibility. For instance, the SOS Agreements state that to the extent that NEPOOL adopts a congestion regime that includes the allocation of congestion rebates to the loads, the rebate rights must be transferred to the sellers. Accordingly, CL&P states that its agreement to transfer congestion rebate rights (*i.e.*, financial transmission rights or their equivalent) to the sellers is consistent with the understanding that sellers are responsible for the costs of congestion after the implementation of the SMD. In addition, CL&P requests that the Commission resolve this matter expeditiously, because the CDPUC has only authorized CL&P to recover SMD-related costs for 60 days.

2. Comments

39. Duke, NRG-PMI, Select, and APS state that CL&P's initial interpretation of the SOS Agreements (*i.e.*, the buyer is responsible for congestion costs and losses) that it advanced in front of the CDPUC was correct. Furthermore, these parties argue that CL&P's new interpretation, as set forth in its petition for declaratory order, is inconsistent

with the plain language of the SOS Agreements. According to these parties, a complete reading of the applicable provisions of the agreements shows that CL&P is responsible for post-SMD related congestion costs and losses, because they require CL&P to take responsibility for the energy supplied from the delivery point to the load. Thus, they argue that the sellers obligations under the SOS Agreements for those charges terminates at the delivery point due to the fact that at that point CL&P assumes responsibility.

40. With regard to losses, these parties state that while sellers are obligated to deliver a specific amount of energy for losses at the delivery point, they are not obligated to pay for marginal loss charges assessed to CL&P by ISO-NE beyond the delivery point. NRG-PMI also argues that the Commission should decline ruling on this petition because this issue is currently pending in district court. APS asks the Commission to consolidate this proceeding with Docket No. EL03-9-000, in which APS brought a complaint against WMECo for losses under its SOS Agreement. In addition, APS requests that the Commission resolve the issue of congestion and loss responsibility before the imposition of the SMD.

41. CTAG, Connecticut Consumers, and Connecticut Industrial state that under the provisions of the SOS Agreements congestion and losses are the responsibility of the seller. They further maintain that the method of calculating and assigning congestion and losses under the SMD does not affect the allocation of these costs under the SOS Agreements. Furthermore, CTAG states that the Request for Proposal that was used in the solicitation process specifically stated that a seller is responsible for requirements and costs associated with meeting the SOS, including losses and any congestion charges.⁵⁰ Thus, according to CTAG, responsibility for those costs was made clear during the bidding process. CTAG also states that "by allocating to the Sellers the responsibility for congestion charges and losses, the SOS Agreements were designed to make the Buyer indifferent as to the Delivery Points chosen by the Sellers."⁵¹ Finally, CTAG and Connecticut Consumers also claim that the provision contained in the agreements that provides that sellers are entitled to congestion rebate rights would only make sense if sellers are responsible for those costs.

⁵⁰CTAG Protest at 9.

⁵¹CTAG Protest at 11.

III. Discussion

A. Procedural Matters

1. Docket No. EL03-123-001

42. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁵² the timely, unopposed motions to intervene serve to make those who filed them parties to this proceeding. In addition, Rule 213(a)(2) prohibits an answer to an answer unless otherwise ordered by the decisional authority.⁵³ We accept NRG-PMI's and the Connecticut Representatives' answers, because they assist us in our understanding and resolution of the issues before us.

43. We will not address herein the requests for rehearing of the May 16 Order. Instead, we will address those requests in a future order.

2. EL03-129-000

44. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁵⁴ the notice of intervention and the timely, unopposed motions to intervene serve to make those who filed them parties to this proceeding. In addition, we find good cause to grant the late, unopposed motions to intervene of Connecticut Consumers and Power Connecticut, given the early stage of this proceeding, their interest in the proceeding, and the absence of any undue prejudice and delay. In addition, Rule 213(a)(2) prohibits an answer to an answer unless otherwise ordered by the decisional authority.⁵⁵ We do not accept Select's answer, because it does not assist us in our understanding and resolution of the issues before us.

⁵²18 C.F.R. § 385.214 (2003).

⁵³Id. at § 385.213(a)(2).

⁵⁴Id. at § 385.214.

⁵⁵Id. at § 385.213(a)(2).

B. Substantive Matters**1. EL03-123-001: Commission's Response**

45. This proceeding raises two principal issues: (1) whether a bankruptcy court's approval of NRG-PMI's motion to reject the NRG/CL&P Agreement precludes the Commission from requiring NRG-PMI to continue its performance of that contract under the standards of the FPA; and (2), if not, whether the Commission should allow NRG-PMI to discontinue its performance of that agreement. In short, with regard to the former question, we conclude that the Commission is not required to forego its regulatory responsibilities simply because a regulated entity, such as NRG-PMI, has filed for bankruptcy. As for the second issue, we find that a paper hearing is needed to develop the factual record to help us determine whether NRG-PMI's proposed cessation of service meets the Mobile-Sierra "public interest" standard.

a. The Commission's Jurisdiction over the NRG/CL&P Agreement

46. Although the Commission's then-applicable filing rules permitted the NRG/CL&P Agreement to be reported in after-the-fact quarterly reports rather than filed before-the-fact,⁵⁶ the agreement is for a jurisdictional, wholesale sale. Furthermore, that agreement was made pursuant to a market-based rate on file with the Commission, and the agreement, together with the market-based rate authorization, constitutes the rates, terms, and conditions of a public utility's sale for resale in interstate commerce. Therefore, the terms and conditions of the NRG/CL&P Agreement are clearly subject to the Commission's jurisdiction and review under Sections 205 and 206 of the FPA. Furthermore, the Commission's authority to exercise jurisdiction over the agreement is consistent with the terms of the contract itself. Section 15.1 of the agreement states that: "[t]he interpretation and performance of this Agreement shall be according to and controlled by the Federal Power Act and regulations and orders of the FERC thereunder. . . ."

b. Bankruptcy Proceeding and the Commission's Jurisdiction

47. Next, we consider whether the Commission retains its authority, pursuant to the FPA, over the NRG/CL&P Agreement even though NRG-PMI has filed a petition for

⁵⁶Quarterly reports are merely the means by which the filing requirements of Section 205 are fulfilled.

bankruptcy. For the reasons discussed below, we conclude that the Bankruptcy Code clearly signals that regulatory agencies, such as the Commission, retain their full rights to review matters within their regulatory ambit during bankruptcy.

48. The filing of a bankruptcy petition operates as an automatic stay of several categories of judicial and administrative proceedings.⁵⁷ Section 362 of the Bankruptcy Code, which governs the automatic stay, addresses the relationship between regulatory action and debtor interests.⁵⁸ That section generally prevents bankruptcy courts from interfering with governmental regulatory actions by providing that the automatic stay of proceedings upon the filing of a bankruptcy petition does not apply to "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."⁵⁹ In addition, in ascertaining the appropriate scope of the exception, courts have looked at its legislative history. Specifically, courts have looked at the House Report that explains the exception by stating: "[W]here a governmental unit is suing a debtor to prevent or stop violation of . . . consumer protection . . . or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay."⁶⁰ In addition, the Bankruptcy Code provides that any "governmental regulatory commission with jurisdiction . . . over the rates of the debtor" retains authority to approve "any rate change provided for" in a planned reorganization.⁶¹ This section of

⁵⁷11 U.S.C. § 362(a).

⁵⁸Id. at § 362(b)(4).

⁵⁹Id. Because this exception takes effect immediately, a governmental agency exercising its police and regulatory power is not required to move in bankruptcy court for relief from the automatic stay prior to commencing or continuing proceedings against a debtor. Thus, we disagree with NRG-PMI's assertion that whether the automatic stay applies to the instant proceeding must first be decided by a bankruptcy court.

⁶⁰See, e.g., *Minn. Corp. v. First Alliance Mortg. Corp.* (In re First Alliance Mortg. Corp.), 264 B.R. 634, 646 (C.D. Cal. 2001) (citing H.R. Rep. No. 595, 95th Cong. 2d Sess. at 343 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6299; see also S. Rep. No. 989, 95th Cong. 2d Sess. at 52 (1978)).

⁶¹11 U.S.C. § 1129(a)(6).

the Bankruptcy Code indicates that an agency retains its traditional control over rates throughout a bankruptcy.⁶²

49. The governing precedent also supports the view that the Commission may take regulatory action that it deems appropriate under the FPA (even if that action conflicts with a course taken by a bankruptcy court) so long as that action serves a regulatory purpose.⁶³ To determine this, the courts first look to whether an agency's action is "designed to advance the government's pecuniary interest," as where the agency is a creditor of the bankrupt entity.⁶⁴ In such cases, the agency's action will be barred by the automatic stay. Next, courts look to whether an agency's action is "aimed at effectuating public policy" consistent with an agency's statutory responsibilities. If it is, the agency may act notwithstanding the automatic stay.⁶⁵ Applying these two tests to this matter, it is clear that the Commission is not seeking to enforce a monetary judgment against NRG-PMI related to any pecuniary interest in the debtor's property that the Commission might have. Rather, the Commission's actions are designed to effectuate public policy; in particular, the Commission's actions are related to carrying out the FPA's public interest considerations.

⁶²See infra note 66 and accompanying text.

⁶³See, e.g., Eddleman v. Dept. of Labor, 923 F.2d 782, 790 (10th Cir. 1991), overruled in part on other grounds by Temex Energy, 968 F.2d 1003, 1005 n.3 (10th Cir. 1992) (indicating that most courts agree that "the section 362(b)(4) exception can apply to agency actions, even though such actions may affect debtor assets") (footnote listing cases omitted) (Eddleman).

⁶⁴Eddleman, 923 F.2d at 791.

⁶⁵Id. "Although private parties may benefit financially from" an agency's actions, that does not preclude an agency from acting to protect its regulatory interests. Berg v. Good Samaritan Hospital (In re Berg), 230 F.3d 1165, 1168 (9th Cir. 2000) (citations omitted).

50. In Cajun,⁶⁶ the Fifth Circuit upheld a state commission's order reducing a debtor's rates during the pendency of a bankruptcy proceeding. In doing so, the court found that "the general bankruptcy policy of fostering the rehabilitation of debtors [will not] serve to preempt otherwise applicable state laws dealing with public safety and welfare."⁶⁷ Moreover, the court concluded, where a commission is "entrusted to safeguard the compelling public interest in the availability of electric service at reasonable rates" that "public interest is no less compelling during the pendency of a bankruptcy than at other times."⁶⁸ As the underlying purpose of the FPA is to assure the availability of electric service at reasonable rates, the court's language, which referred to a state public utility commission, applies equally to the Commission.⁶⁹

51. The Second Circuit, which is the circuit in which NRG-PMI's bankruptcy resides, in Nextwave found that a federal agency's "exclusive jurisdiction" over matters delegated to it by Congress controls over bankruptcy court rulings that would interfere with fulfillment of the statutory purpose entrusted to that agency.⁷⁰ That court has also stated that the intrusion by bankruptcy and district courts into an agency's jurisdiction would impair that agency's ability to carry out its statutory duties, upsetting the balance Congress has crafted for such matters: "In order for Congress's prescribed regulatory system to function properly in a dynamic environment, [an agency's] . . . decision must not be interfered with by other instrumentalities of the federal government acting beyond

⁶⁶See, e.g., In re Cajun Elec. Power Coop., Inc., 185 F.3d 446, 453 (5th Cir. 1999) (Cajun) (stating that "a reorganization plan shall be confirmed by the bankruptcy court only if 'any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval'").

⁶⁷Id. at 453-54.

⁶⁸Id. at 453 n.11 (citation omitted).

⁶⁹See Eddleman, 923 F.2d at 786 n.6 (explaining that while the legislative history of Section 362(b)(4) refers specifically to state agency action, the statutory language itself contains no such distinction, and thus, the police and regulatory power exception applies equally to federal and state agencies).

⁷⁰In re NextWave Personal Comm., Inc., 200 F.3d 43, 54 (2d Cir. 1999), cert. denied, 531 U.S. 43 (2000) (NextWave).

their statutory authority."⁷¹ The statute at issue in NextWave and FCC,⁷² like the FPA, leaves no opening for the bankruptcy court to assert jurisdiction regarding rates and other matters entrusted to an agency. Thus, the proper forum for determining issues arising out of the Commission's regulatory jurisdiction is the agency itself, with exclusive review of those decisions lying in the court of appeals, not a bankruptcy court or a district court.

52. Given the previous discussion of the Bankruptcy Code and case law, we disagree with NRG-PMI that the automatic stay under the bankruptcy code supersedes our jurisdiction over the NRG/CL&P Agreement under the FPA. NRG-PMI's interpretation of Section 362 would require the bankruptcy court to intrude on the Commission's jurisdiction in the precise manner that the Supreme Court found "problematic" in MCorp.⁷³ Furthermore, if NRG-PMI could, as it proposes, simply reject its obligations under the FPA in a bankruptcy court, this Commission would be unable to satisfy its statutory mission.⁷⁴

⁷¹Id. at 55-56; see also MCorp, 502 U.S. at 40 (rejecting a reading of Bankruptcy Code that "would require bankruptcy courts to scrutinize the validity of every administrative or enforcement action brought against a bankrupt entity. Such a reading is problematic, both because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the limited authority Congress has vested in bankruptcy courts.") Furthermore, the Second Circuit has concluded that when an agency decides matters within its statutory responsibilities, the only recourse "lies exclusively in the federal court of appeals," consistent with the agency's enabling statute, and "the bankruptcy and district courts lack[] jurisdiction to decide the question." NextWave, 200 F.3d at 54; see In re FCC, 217 F.3d 125, 135 (2d Cir.), cert denied, 531 U.S. 43 (2000) (FCC) (whenever an agency decision implicates its congressionally granted exclusive powers, the decision is regulatory and, therefore, may not be altered or impeded by any court lacking jurisdiction to review it).

⁷²FCC, 217 F.3d at 139.

⁷³See supra note 71 and accompanying text. In this regard, we note that the bankruptcy court based its decision to approve NRG-PMI's motion to reject the contract solely on a showing by NRG-PMI that the NRG/CL&P Agreement was economically detrimental to the debtor over its remaining term. See, e.g., June 2 Hearing, Tr. at 64.

⁷⁴Under the FPA, one of the principal means by which the Commission protects the interests of electric customers is through our regulation of wholesale sales and transmission agreements.

53. NRG-PMI claims that the Commission's precedent recognizes that the decision to reject an executory contract is solely within the discretion of the bankruptcy company. We need not address whether NRG-PMI's assertion regarding the Commission's precedent is accurate, because (as noted) the Commission is not contesting whether Section 365(a) of the Bankruptcy Code confers upon NRG-PMI a right to reject a contract. Instead, the issue in this matter is whether NRG-PMI can cease performance of the contract without satisfying the FPA requirements adopted by Congress to protect wholesale power customers.

54. With regard to NRG-PMI's claim that the Connecticut Representatives are not exempt from the stay under Section 362(b)(4), we need not reach that issue because the Commission has the authority to order an FPA Section 206 investigation of this matter even if the Connecticut Representatives had not brought their complaint. And, as discussed above, the Commission is not automatically stayed in this matter. In this regard, we institute (on our own motion) a Section 206 proceeding in Docket No. EL03-134-000. This renders moot any concerns about procedural defects in this proceeding (Docket No. EL03-123-001). Nevertheless, we note that both of the Connecticut Representatives, the CDPUC and CTAG, would likely fall within the police and regulatory exception to the Bankruptcy Code.⁷⁵ The CDPUC, a Connecticut agency, is charged with regulating public utilities and protecting the public interest in such matters, and CTAG is tasked by state law with the mandate to appear for the state in all suits in which the state has an interest.

55. Where, as here, the Commission initiates a Section 206 investigation on its own motion, Section 206(b) requires that the Commission establish a refund effective date anywhere from 60 days after publication in the Federal Register of notice of its intent to initiate a proceeding to 5 months after the expiration of the 60-day period. In order to

⁷⁵In this regard, NRG-PMI relies on a Sixth Circuit decision to support its position that the Connecticut Representatives are not permitted to bring this complaint in light of the automatic stay. NRG-PMI Answer at 31 (citing *Elaine Chao v. Hospital Staffing Services Inc*, et al., 270 F.3d 374, 382 (6 Cir. 2001)). However, that case stands for the proposition that a government agency cannot pursue legal action to enforce a contract subject to bankruptcy when it is acting solely on behalf of a private party's own economic interests. *Id.* It appears to us that the Connecticut Representatives filed their complaint on behalf of the state of Connecticut and its residents, not to protect the private pecuniary interests of CL&P.

give maximum protection to customers, and consistent with our precedent,⁷⁶ we will establish the refund date at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the investigation is published in the Federal Register.

56. Section 206(b) also requires that if no final decision is rendered in the Commission's investigation by the refund effective date or by the conclusion of the 180-day period commencing upon the initiation of a proceeding pursuant to Section 206, whichever is earliest, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonable expects to make such a decision. In this proceeding, we estimate that we will issue a decision on this matter in approximately two months of the filing of answers and responses, or by October 3, 2003.

c. Right to Terminate

57. We now turn to whether NRG-PMI is entitled under the FPA to cease performance under the contract. The NRG/CL&P Agreement is clear and unambiguous on the consequences of CL&P's nonpayment of disputed charges. Although CL&P has withheld disputed costs regarding congestion costs and losses from its payments to NRG-PMI, pursuant to the agreement,⁷⁷ until CL&P is determined to be liable for congestion costs and then refuses to pay those charges, CL&P is not in default. Accordingly, NRG-PMI does not currently have a right to terminate the contract for CL&P's withholding of payment.⁷⁸

⁷⁶See, e.g., Canal Elec. Co., 46 FERC ¶ 61,153, reh'g denied, 47 FERC ¶ 61,275 (1989).

⁷⁷Section 5.4 of the NRG/CL&P Agreement states: "If the Buyer disputes the amount of any bill, . . . at the discretion of the Buyer, [it may] be held until the dispute has been resolved."

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

58. We agree with NRG-PMI that the NRG/CL&P Agreement was never required to be filed with the Commission (*i.e.*, the relevant contract information is provided pursuant to quarterly reports but the contract itself is not filed). However, we disagree with NRG-PMI's assertion that this means that "any change to it (including termination) need not receive prior approval by the Commission."⁷⁹ If a seller seeks to modify or abrogate a jurisdictional contract, the seller must make appropriate filings under FPA Sections 205 or 206 to change the contract, whether or not the contract itself has been physically filed.

59. In support of its position, NRG-PMI cites Southern I and Southern II.⁸⁰ In that case, the Commission held that a seller under a contract that is not "required to be on file" under the FPA need not file a notice of termination under Section 35.15 of the Commission's regulations before terminating service under that agreement.⁸¹ Although, like the contracts at issue in that case, the NRG/CL&P Agreement is not required to be on file with the Commission, the dominant issue in that case involved arrangements in which a party had an existing contractual right to terminate, either because the contract has ended by its own terms or the other party has defaulted on its contractual obligations.⁸² Here, as noted, NRG-PMI does not (at this time) have such a right under the NRG/CL&P Agreement.

⁷⁹NRG-PMI Answer at 33.

⁸⁰Southern I, 84 FERC ¶ 61,199, reh'g denied, Southern II, 86 FERC ¶ 61,131, aff'd sub nom., PCA, 245 F.3d 839.

⁸¹18 C.F.R. § 35.15 (2003).

⁸²In Southern I, "[t]wenty-five utilities . . . filed notices of suspension of power sales transactions in circumstances where the other party to the transaction . . . defaulted on past obligations to the utilities or others." 84 FERC at 61,985-86. To the extent that Southern I is read as allowing parties to unilaterally cease performance of their contracts (*i.e.*, terminate despite having no contractual grounds for doing so) without the Commission's approval, we clarify that any such interpretation of that case is incorrect. However, we note that, consistent with that case, we are not limiting in this proceeding the rights of contracting parties to exercise their contractual rights to terminate market-based rate contracts and do not intend by this order to disturb that case on this issue. In addition, Section 35.15 is simply a notice provision and does not prevent us from acting, as here, under Section 206 regarding the potential cessation of jurisdictional service of which we become aware.

60. NRG-PMI suggests that the boilerplate language in Section 10.01 of the NRG/CL&P Agreement gives it the right to terminate performance upon entering bankruptcy.⁸³ However, Section 10.1 merely contains standard, mutual representations and warranties that the parties gave to each other at the time the NRG/CL&P Agreement was entered into, and does not negate NRG-PMI's obligations under the FPA.

61. NRG-PMI argues that under bankruptcy law, a rejection of an executory contract constitutes a breach of the contract, as opposed to a termination, and that a breach does not require prior notice and approval by the Commission. However, a breach is still a cessation of performance of a FERC-jurisdictional contract and has the same effect for our purposes as a termination that is unauthorized by the contract itself: NRG-PMI is no longer performing its obligations under the agreement.

d. Public Interest

62. The NRG/CL&P Agreement states that it was "the result of a competitive bid solicitation and shall apply for the entire Term unless both Parties agree to a change in charges set forth in a written amendment to the Agreement that is accepted for filing by the FERC."⁸⁴ Furthermore, the agreement specifically states that neither party to the agreement has a unilateral right to file changes to it. In particular, Section 4.3 provides:

It is the intent of the Parties that . . . neither the Seller and its affiliates nor the Buyer and its affiliates shall have the unilateral right to make a filing with the FERC under any Section of the Federal Power Act, or with the [C]DPUC, seeking to change the charges or any other terms or conditions set forth in this Agreement for any reason.⁸⁵

Section 4.4 also states that "[i]t is the intention of the Parties that any authority of FERC . . . to change the Agreement be strictly limited to that which applies when the contracting

⁸³Section 10.1 (Representations and Warranties) provides: "This Agreement is its [sic] valid and binding obligation, enforceable against [a party to it] in accordance with its terms, except as [] such enforcement may be subject to bankruptcy, insolvency, [and] reorganization. . . ."

⁸⁴NRG/CL&P Agreement § 4.2.

⁸⁵Id. at § 4.3.

parties have irrevocably waived their right to seek to have the FERC . . . change any term of this Agreement."⁸⁶

63. Thus, the NRG/CL&P Agreement is clearly a fixed-rate agreement and subject to the Mobile-Sierra doctrine. To abrogate its contractual obligation to provide service under the agreement, NRG-PMI must demonstrate that its contract is contrary to the public interest.⁸⁷ In this regard, as the Commission stated in Nevada Power, "parties who seek to overturn market-based contracts into which they voluntarily entered will bear a heavy burden."⁸⁸ Consistent with Sierra, NRG-PMI must show, for example, that its contract "might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."⁸⁹

64. NRG-PMI states that the public interest requires it to stop selling power to CL&P at agreed to prices that it claims are now below market. According to NRG-PMI, a condition precedent to the lender funding under the DIP Loan is entry of an order by the bankruptcy court rejecting the NRG/CL&P Agreement under section 365 of the Bankruptcy Code. NRG-PMI asserts that as long as it is required to continue to perform under the agreement its pre-arranged plan of reorganization is jeopardized, which could severely diminish NRG Energy's value and the amount of recovery available to its creditors and deny it working capital to prepay for fuel and other services that the NRG Northeast Facilities require. Therefore, NRG-PMI maintains that it must be allowed to exercise its rights under the Bankruptcy Code to cease performance under the NRG/CL&P Agreement.

⁸⁶Id. at § 4.4.

⁸⁷NRG-PMI asserts that because NRG-PMI has not made a filing with the Commission under either Sections 205 or 206 to change the agreement, there are no Mobile-Sierra issues raised by the rejection. However, a party cannot evade the Mobile-Sierra requirements merely by unilaterally implementing abrogation and refusing to make a filing with the Commission for authorization of such abrogation.

⁸⁸Nevada Power Co. and Sierra Pacific Power Co. v. Duke Energy Trading and Mktg. L.P., et al., 99 FERC ¶ 61,047 at 61,190, reh'g order, Nevada Power Company, et al. v. Morgan Stanley Capital Group, Inc., 100 FERC ¶ 61,273 (2002), order on initial decision pending (Nevada Power).

⁸⁹350 U.S. at 355. Furthermore, the purpose of the power given the Commission by Section 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities. Id.

65. On the other hand, CL&P maintains that the interests of electric customers require that NRG-PMI be held to its contract. In this regard, CL&P maintains that if the NRG/CL&P Agreement is prematurely terminated, CL&P will have to replace it with much higher priced power acquired in the New England market; therefore, ratepayers in Connecticut will likely have to pay considerably more for their electricity. CL&P also claims that (contrary to NRG-PMI's assertion) it is not likely that potential DIP lenders have required NRG-PMI to reject the agreement as a condition precedent in order to receive DIP financing. Furthermore, according to CL&P, there is no evidence that DIP lenders will foreclose on the loan if this Commission asserts jurisdiction over the agreement. CL&P states that it is prepared to show that DIP financing is available to NRG-PMI without such a condition. In addition, CL&P maintains that it has doubts that NRG Energy will not have sufficient funds to maintain and operate the NRG Northeast Facilities if NRG-PMI is not allowed to terminate the agreement.

66. Based on the record we have received to date, we are unable to determine whether NRG-PMI has public interest grounds for abrogating the NRG/CL&P Agreement. Accordingly, we establish procedures for the submission of information (*i.e.*, "paper hearing procedures") regarding the public interest issue. In this regard, we direct NRG-PMI, on behalf of itself and its affiliates, to provide evidence sufficient to demonstrate that continued performance under the contract will impair its financial ability or the ability of its public utility affiliates to continue service, cast upon other customers an excessive burden, or be unduly discriminatory. Such evidence shall include:

- (1) Whether continued performance by NRG-PMI under the NRG/CL&P Agreement financially harms NRG-PMI affiliates that are not parties to the contract. And, if so, why?
- (2) Whether the structure of NRG Energy's bankruptcy caused NRG-PMI's generation affiliates to become financially exposed to losses resulting from the NRG/CL&P Agreement, which absent such bankruptcy would have been borne solely by NRG-PMI.
- (3) What are the specific NRG Northeast Facilities⁹⁰ that NRG-PMI states are in jeopardy of being shut down if NRG-PMI is not allowed to cease performance under the NRG/CL&P Agreement?

⁹⁰Specifically, NRG-PMI states that there are eleven such facilities in Connecticut, New York, and Massachusetts.

(4) NRG-PMI shall provide appropriate revenue and cost data for each of the NRG Northeast Facilities that will allow the Commission to determine whether such facility can continue service in the event the NRG/CL&P Agreement is not abrogated (including, whether relief provided by the Commission for the Devon units is inadequate for such units to meet their obligations). In addition, NRG-PMI shall identify all categories of revenue and costs for each plant (i.e., amounts of revenues and costs by category for the last three fiscal years and projections for the next two years).

67. As well as providing answers to the above questions, NRG-PMI is permitted to provide any evidence that it considers relevant to demonstrating that it meets the Mobile-Sierra standard. NRG-PMI must file answers to these questions within ten days from the issuance of this order and all interested parties to this proceeding must file (if they so choose) their responses to those answers within ten days from the date that the Commission receives NRG-PMI's answers.

68. Until the Commission reaches a final determination on the merits of the "public interest" issue, we require NRG-PMI to comply with the rates, terms, and conditions of the NRG/CL&P Agreement. We note that this includes providing service to CL&P, pursuant to the agreement, until that time.

e. NRG-PMI's Motion for Summary Disposition

69. We deny NRG-PMI's motion that the Commission summarily dispose of this proceeding by issuing an order that vacates the May 16 Order, dismisses the Connecticut Representatives' amended complaint, and terminates this proceeding. Summary disposition is inappropriate and is denied. Motions for summary disposition are governed by Rule 217.⁹¹ That rule provides that summary disposition is appropriate if "there is no genuine issue of fact material to the decision of a proceeding or part of a proceeding" Conversely, if an issue of material fact is in dispute, then summary disposition is not appropriate.⁹² As discussed above, the facts surrounding the issue of whether NRG-PMI has public interest grounds for abrogating the NRG/CL&P Agreement have not been fully developed at this time. Accordingly, we deny NRG-PMI's motion for summary disposition.

⁹¹18 C.F.R. § 385.217 (2000)

⁹²See, e.g., Independent Oil & Gas Association of West Virginia, 26 FERC ¶ 61,017 at 61,032-33 (stating that a motion for summary disposition is not appropriate if a matter raises issues of material fact), reh'g denied, 26 FERC ¶ 61,288 (1984).

B. EL03-129-000: The Commission's Response

70. The issue that CL&P asks the Commission to resolve through its petition is whether the implementation of SMD on March 1, 2003 considered in conjunction with the terms of the SOS Agreements, which were entered into before that date, results in a change in Duke's and Select's responsibility for congestion charges and losses under the SOS Agreements relative to the pre-SMD period.⁹³

71. As noted in our discussion of Docket No. EL03-123-001, SOS Agreements are contracts within the Commission's jurisdiction. Having decided that we do have jurisdiction over the issue of congestion charges and losses, we now turn to whether we should nevertheless decline to assert jurisdiction in deference to the Connecticut courts. The test for determining whether the Commission should assert jurisdiction over contractual issues, such as this one, (which are otherwise litigable in state courts) consists of three factors:

(1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.⁹⁴

72. Applying this test to the present proceeding, we find that it is appropriate for the Commission to resolve this matter.⁹⁵ First, the Commission has unique expertise over the fundamental issues regarding the responsibility for congestion costs and losses under the

⁹³The question of whether, prior to the implementation of SMD, the suppliers under the SOS Agreements were responsible for congestion charges is not an issue in the case of Duke and Select, because both of those parties paid for those charges without contesting them. In addition, as noted, a district court lawsuit is pending regarding NRG-PMI's responsibility for the pre-SMD costs under its SOS Agreement.

⁹⁴Arkansas Louisiana Gas Co. v. Hall, 7 FERC ¶ 61,175 at 61,322, reh'g denied, 8 FERC ¶ 61,031 (1979).

⁹⁵In addition, we disagree with NRG-PMI that the Commission should decline ruling on this petition because this issue is currently pending in district court. The district court proceeding concerns the responsibility for congestion costs and losses pre-SMD and involves NRG-PMI. In contrast, this proceeding involves the question of responsibility for those charges post-SMD and involves Duke and Select.

SOS Agreements. Specifically, this matter requires an understanding of how the costs for congestion and losses are calculated under the LMP regime implemented in the SMD, and the Commission has a special expertise in the area of LMP.⁹⁶ The second and related point is that there is a need for uniform regulatory policy on implementing LMP. In this regard, market participants must be able to rely on uniform policies regarding the impact of changes brought about by the implementation of LMP on parties' rights under pre-existing contracts. Finally, the issues presented here are central to the Commission's regulatory responsibilities, because (as noted) the Commission has jurisdiction under the FPA to interpret and enforce wholesale power contracts in interstate commerce, such as the SOS Agreements. Furthermore, as discussed in the context of NRG-PMI, the SOS Agreements provide that their "interpretation and performance . . . shall be according to and controlled by the Federal Power Act and regulations and orders of the FERC thereunder and, to the extent not controlled thereby, by the laws of the State of Connecticut."⁹⁷

73. The SOS Agreements require the sellers to supply "SOS Requirements Power" and the buyer, CL&P, to provide "Delivery Services." With respect to the former, Section 3.1 provides: "SOS Requirements is the wholesale power delivered at the Delivery Point(s) [and] . . . includes all of the power supply . . . , including . . . electrical losses [and] congestion charges." Section 1.3 defines the "Delivery Point" as "any point on the NEPOOL PTF where the Seller delivers SOS Requirements Power to Buyer, and at which point title to and liability for electricity passes from the Seller to the Buyer." With regard to the obligations of the buyer, Section 1.4 states: "Delivery Services shall not include losses [and] congestion charges . . . all of which shall be the responsibility of the Seller."⁹⁸ In addition, Section 3.12 addresses the possibility of a change in the manner in which congestion charges are assessed in NEPOOL. That section states: "If and to the extent that, at any time during the [contract], the congestion management scheme in effect under the NEPOOL Transmission Tariff provides for the automatic

⁹⁶See Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, Notice of Proposed Rulemaking, Docket No. RM01-12-000 at PP 203-220 (July 31, 2002) (proposing the use of LMP along with congestion revenue rights); see also White Paper, Wholesale Market Platform, http://www.ferc.gov/Electric/RTO/Mrkt-Strct-comments/White_paper.pdf at 1-2, 10.

⁹⁷Duke SOS Agreement § 15.1; Select SOS Agreement § 15.1.

⁹⁸Delivery services are measured from the Delivery Point to CL&P's retail customers.

assignment of rights to rebates of transmission congestion charges to retail load of the Buyer, the Seller shall be entitled to a portion of such congestion rebate rights.”

74. These provisions when read together suggest that suppliers are responsible for all post-SMD congestion costs and losses to the buyer's load and not just for those charges to the Delivery Point. However, based on the pleadings, the Commission believes the contractual language regarding which party (*i.e.*, the buyer, CL&P, or seller, Duke and Select) is properly allocated those costs under the SOS Agreements after the implementation of the SMD is not as clear as it first appears. Furthermore, this ambiguity is only enhanced by the fact that CL&P has endorsed both interpretations; as noted, it initially took the position in front of the CDPUC that the SMD-related congestion costs are its responsibility but now asserts before the Commission that those costs are the responsibility of the sellers. Thus, the Commission sets for hearing the issue of which party is responsible for SMD-related congestion and losses.

75. Where, as here, the Commission initiates a Section 206 investigation on its own motion, Section 206(b) requires that the Commission establish a refund effective date anywhere from 60 days after publication in the Federal Register of notice of its intent to initiate a proceeding to 5 months after the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with our precedent,⁹⁹ we will establish the refund date at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the investigation is published in the Federal Register.

76. Section 206(b) also requires that if no final decision is rendered in the Commission's investigation by the refund effective date or by the conclusion of the 180-day period commencing upon the initiation of a proceeding pursuant to Section 206, whichever is earliest, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonable expects to make such a decision. Therefore, we will direct the presiding judge to provide a report to the Commission no later than 15 days in advance of the refund effective date in the event the presiding judge has not by that date issued an initial decision. The judge's report, if required, shall advise the Commission of the status of the investigation and provide an estimate of the expected date of issuance of an initial decision. This, in turn, will allow the Commission, on or before the refund effective date, to estimate the date when it expects to render its decision.

⁹⁹See supra note 76.

Docket No. EL03-123-001, et al.

- 35 -

The Commission orders:

(A) The Connecticut Representatives' amended complaint is hereby granted in part, as discussed in the body of this order.

(B) NRG-PMI's motion for summary disposition is hereby denied, as discussed in the body of this order.

(C) Until further notice, NRG-PMI is directed to provide service to CL&P, pursuant to the rates, terms, and conditions of the NRG/CL&P Agreement, as discussed in the body of this order.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held in Docket No. EL03-134-000 concerning whether NRG-PMI's proposed cessation of service meets the Mobile-Sierra "public interest" standard.

(E) NRG-PMI is hereby directed to file answers in Docket No. EL03-134-000 to the questions (regarding whether its proposed cessation of service meets the Mobile-Sierra "public interest" standard) within ten days from the issuance of this order, as discussed in the body of the order.

(F) Responses to NRG-PMI's answers filed pursuant to Ordering Paragraph (E) may be submitted by all interested parties to this proceeding within 10 days of the date of the filing of NRG-PMI's answers, as discussed in the body of this order.

(G) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly Section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held in Docket No. EL03-135-000 for the purpose of determining whether the terms of Select's and Duke's SOS Agreements require suppliers or buyers to bear SMD-related congestion and losses incurred by the buyer in transmitting power from the point of delivery to the buyer's retail load.

Docket No. EL03-123-001, et al.

- 36 -

(H) A presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in Docket No. EL03-135-000 to be held within approximately fifteen (15) days of the date of issuance of this order, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. That conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided for in the Commission's Rules of Practice and Procedure.

(I) The Secretary shall promptly publish notices of the Commission's initiation of the proceedings in Docket Nos. EL03-134-000 and EL03-135-000 in the Federal Register.

(J) The refund effective dates in Docket Nos. EL03-134-000 and EL03-135-000, established pursuant to Section 206(b) of the FPA, shall be 60 days following publication in the Federal Register of the notices discussed in Ordering Paragraphs (D) and (G) above.

(K) The presiding judge shall advise the Commission, no later than 15 days prior to the refund effective date established in Docket No. EL03-135-000, in the event that the presiding judge has not by that date issued to the Commission an initial decision, as to the status of the proceeding and a best estimate when the proceeding will be disposed of by the presiding judge.

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

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

v.

Docket No. EL03-123-001

NRG Power Marketing, Inc.

Connecticut Light and Power Company

Docket No. EL03-129-000

(Issued June 25, 2003)

BROWNELL, Commissioner, dissenting in part

1. This order requires NRG-PMI to continue providing power to CL&P under the SOS Agreement notwithstanding the fact that a bankruptcy court has approved NRG's rejection of the contract, a district court has issued a temporary restraining order authorizing NRG-PMI to cease performing under the contract, and our own precedent allows NRG-PMI to terminate the contract without seeking Commission approval. I respectfully dissent.

2. This order puts the Commission on a collision course with the bankruptcy court and with the district court tasked with interpreting and enforcing the bankruptcy court's rulings. In past utility bankruptcies, the Commission, as well as the bankruptcy courts, have avoided direct conflicts. Judging from the transcript of the bankruptcy hearing, the bankruptcy court in this case was attempting to do just that here, by sending NRG-PMI back to the Commission. But significantly, the bankruptcy court did not send NRG-PMI back to obtain a ruling from the Commission on the merits of this dispute, but rather the court directed NRG-PMI to seek an order vacating the May 16 Order. Such a directive does not appear to be a concession that we have the authority to override the bankruptcy court's approval of NRG-PMI's rejection of an executory contract.

Docket Nos. EL03-123-001 &
EL03-129-000

-2-

3. The leading Supreme Court decision on rejection of executory contracts subject to agency regulation is National Labor Relations Board v. Bildisco and Bildisco.¹ Bildisco involved rejection of a collective-bargaining agreement. After filing a bankruptcy petition, Bildisco sought to reject a collective-bargaining agreement as an executory contract. The union argued that Bildisco could reject the agreement only if it complied with the National Labor Relations Act (NLRA), which provided a specific process for negotiating with the union prior to modification of a collective-bargaining agreement. The Supreme Court rejected the union's argument. The Court also held that the National Labor Relations Board (NLRB) was barred from pursuing unfair labor practice charges against Bildisco for violating the NLRA, because "the practical effect of the enforcement action would be to require adherence to the terms of the collective-bargaining agreement."²

4. Perhaps there is a basis for distinguishing Bildisco, but it is not apparent to me what that would be. As the order points out, the Bankruptcy Code does include explicit provisions for certain exercises of authority by regulatory agencies such as the Commission; however, none of those provisions explicitly apply to rejection of executory contracts.³ When it comes to executory contracts, bankruptcy is all about giving debtors a clean slate. As the Court said in Bildisco, "The authority to reject an executory contract is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful

¹465 U.S. 513 (1984).

²Id. at 532.

³Section 365 of the Bankruptcy Code is the section that governs rejection of executory contracts. Today's order relies on section 362(b)(4) of the Bankruptcy Code, which authorizes governmental agencies to enforce their police or regulatory power against a debtor in bankruptcy. However, that provision is an explicit exemption to the automatic stay provision of section 362(a); it makes no reference to section 365. Similarly, section 1129(a)(6) of the Bankruptcy Code provides that a court may not confirm any reorganization plan that changes rates unless "any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan." However, again, this provision makes no reference to section 365. Section 365 itself contains no language to suggest that this Commission can override a bankruptcy court's approval of rejection of an executory contract.

Docket Nos. EL03-123-001 &
EL03-129-000

-3-

reorganization.”⁴ Prior Commissions have acknowledged this fact and stated quite clearly that “[a bankrupt's] decision to reject its contracts is an issue to be resolved before the Bankruptcy Court and not subject to the determination of the Commission.”⁵ If the NLRB could not enforce the NLRA because to do so would indirectly enforce a rejected executory contract, then I do not see how we, acting under the Federal Power Act, can directly enforce this rejected executory contract.

5. Moreover, even if the district court were to conclude that I am wrong about Bildisco and were to lift the restraining order, I would still not require NRG-PMI to continue service under the contract. Bankruptcy law aside, I believe that Southern Company Energy Mktg., L.P.⁶ controls here and I would not overturn that decision. As the order points out, NRG-PMI, as a power marketer with market-based rate authority, was not required to file the SOS Agreement with the Commission.⁷ Rather NRG-PMI was required to include its wholesale sales to CL&P in its quarterly transaction reports filed with the Commission. In Southern, the Commission ruled that power marketer sellers need not seek prior Commission approval to stop supplying power under contracts that were not required to be filed with the Commission. The Commission noted that “it makes little sense for the Commission to review the termination of transactions when we did not review the specific terms and conditions upon which they were entered into.”⁸ The Commission reached its conclusion notwithstanding the fact that some of the sellers involved in the case did not claim any default by the buyer that would have justified the

⁴465 U.S. at 528.

⁵Columbia Gas Transmission Corp., 71 FERC ¶ 61,194 at 61,677 (1995). The majority asserts that we need not reach the issue of the Commission's own precedent on our jurisdiction over rejection of executory contracts because the order “is not contesting whether Section 365(a) of the Bankruptcy Code confers upon NRG-PMI a right to reject a contract.” But asserting the authority to enforce a contract that the bankruptcy court has already allowed NRG-PMI to reject does amount to contesting NRG-PMI's rights to reject the contract under the Bankruptcy Code.

⁶84 FERC ¶ 61,199 (1998), reh'g denied, 86 FERC ¶ 61,131 (1999), affirmed sub nom., Power Company of America v. FERC, 245 F.3d 839 (D.C. Cir. 2001).

⁷18 C.F.R. § 35.15.

⁸86 FERC at 61,458.

Docket Nos. EL03-123-001 &
EL03-129-000

-4-

termination.⁹ The Commission explained that the buyer could pursue any breach of contract claims it might have in court.¹⁰ Similarly, CL&P is free to pursue a breach of contract claim in the appropriate judicial forum.

6. Today's order confuses the issue of abrogating a contract with the issue of remedying the breach of a contract. Contract abrogation involves allowing a party to escape free and clear from a deal. For me, neither this case nor Southern is about contract abrogation. Southern did not absolve the sellers from liability under their contracts—those sellers who did not have a contractual right to terminate the contract remained liable for breach of contract. Similarly, I am not advocating that we absolve NRG-PMI from liability under its contract. The issue in this case and in Southern is whether sellers who terminate service in breach of their contract should be liable for specific performance or monetary damages. In Southern, the Commission was essentially concluding that restructured, competitive wholesale power markets should operate more like other commercial markets, in which sellers who breach their contracts are subject to a judicial claim for monetary damages rather than held to specific performance. I believe this approach is still good policy and should be applied here.

7. Finally, the order notes that Southern involved an interpretation of a notice provision in our regulations and does not prevent us from taking action under section 206 of the Federal Power Act regarding potential cessation of service about which we become aware. That is correct and there may be circumstances where court-ordered monetary damages would not adequately compensate for a breach, for example where nonperformance would threaten reliability. In those circumstances, it might be appropriate for this Commission to step in and order specific performance of a contract. However, those circumstances are not present here.

Nora Mead Brownell

⁹84 FERC at 61,986. Since the Commission explicitly noted the fact that some of the sellers in Southern were not claiming any contractual right to stop performance and, in fact, dismissed the complaints against those sellers, it is incorrect to characterize this portion of Southern as dicta.

¹⁰86 FERC at 61,459.