

National Regulatory Research Institute

“Excessive Burden” or “Something More Than a Small Dent”? The Supreme Court Parses *Mobile-Sierra*

**Scott Hempling
Executive Director, National Regulatory Research Institute**

July 15, 2008

Table of Contents

I.	Background law and policy: The intersection of <i>Mobile-Sierra</i> and market-based contracts.....	1
A.	Background on Mobile-Sierra.....	1
1.	General principle.....	1
2.	The "public interest" exception in <i>Mobile-Sierra</i>	2
3.	Comment: Two standards or one?.....	2
B.	Background on market-based contracts	3
1.	Definition of market power	3
2.	Seller has the burden of proving it lacks market power	4
3.	FERC measures market power with screening tests.....	4
4.	FERC monitors market power with five reporting requirements	5
II.	Ninth Circuit: FERC erred procedurally and substantively.....	6
A.	FERC's procedural error: It failed to provide timely review of contract terms	7
B.	FERC's substantive error: it disregarded context and it made the buyer's burden too high.....	9
1.	In determining whether to apply the <i>Mobile-Sierra</i> presumption, FERC focused only on the "conduct" of the seller, while disregarding the "context" of market dysfunction.....	9
2.	In determining whether a contract affects the "public interest," FERC set the bar too high.....	10

III. Supreme Court: The Ninth Circuit had it wrong.....	12
A. The Mobile-Sierra presumption applies to market-based contracts	12
1. One statutory standard—"just and reasonable"	12
2. FERC's Mobile-Sierra obligation: The Commission must apply the Mobile-Sierra presumption in its evaluation of market-based contracts. ...	12
3. Escape paths: Unfair dealing, fraud, duress, unfairness, bad faith, but not dysfunctionality or chaos.....	13
4. Timing: Application of the just and reasonable standard does not depend on when a contract rate is challenged.	14
5. Contract rates vs. tariff rates: Does the statute make a distinction?.....	15
6. Additional comments and questions	17
B. Under what circumstances can contract buyers overcome the Mobile-Sierra presumption?.....	20
1. Sierra's three factors are "not precisely applicable" to a purchaser's high-rate challenges; nor are they the exclusive means of overcoming the presumption.....	20
2. The standard for overcoming the presumption is the same for buyers as for sellers	20
3. The Ninth Circuit's "marginal cost" standard conflicts with the statute's goal of "contract stability"	21
4. Comments and questions.....	22
C. What happens to the Mobile-Sierra presumption if (a) the seller manipulated the market, and (b) the manipulation contributed to the high prices?	24
D. What were FERC's errors?	25
E. Buyer "sophistication": Final comments and questions.....	27
Resume: Scott Hempling.....	28

I. Background law and policy: The intersection of *Mobile-Sierra* and market-based contracts

A. Background on Mobile-Sierra

1. General principle

Under the Federal Power Act, wholesale sales of electricity in interstate commerce require authorization from the Federal Energy Regulatory Commission. In 1956, the Supreme Court held that *once a party enters into a FERC-jurisdictional contract, the party cannot ask FERC to change a contract unless the contract itself authorizes the party to seek the change.*¹ The Court's rationale:

Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act. By preserving the *integrity of contracts*, it permits the *stability of supply* arrangements which all agree is essential to *the health of the natural gas industry*.

Mobile, 350 U.S. at 344.

This general rule—that parties must live with their contracts—has become known as the *Mobile-Sierra* doctrine. Under the doctrine, the historical treatment of contracts under the Federal Power Act is

refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid.²

¹ See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 343-44 (1956) ("there is nothing in the structure or purpose of the [Natural Gas] Act from which we can infer the right, not otherwise possessed and nowhere expressly given by the Act, of natural gas companies unilaterally to change their contracts"); *Federal Power Commission v. Sierra Pacific Power Company*, 350 U.S. 348, 352-55 (1956) (applying reasoning of *Mobile* to the Federal Power Act; utility not "entitled to be relieved of its improvident bargain").

² *Richmond Power & Light v. FPC*, 481 F.2d 490, 493 (D.C. Cir. 1973) (citing *Federal Power Commission v. Sierra Pacific Power Company*, *supra*, 350 U.S. at 355; *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *United Gas Pipe Line Company v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1959)).

2. The "public interest" exception in *Mobile-Sierra*

A party seeking to change the terms of a contract may argue that adherence would violate the "public interest." This argument is available only in rare circumstances. As the Supreme Court stated, the Natural Gas Act "*contemplates abrogation of ... agreements only in circumstances of unequivocal public necessity.*" *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968)

The exception's availability *depends on the public interest, not the complaining party's private interest*. In determining whether to relieve a utility of its "improvident bargain,"

the sole concern of the Commission would seem to *be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory*. That the purpose of the power given the Commission in [FPA] Section 206(a) is the protection of the public interest, as distinguished by the private interests of the utilities, is evidenced by the recital in Section 201 of the [Federal Power] Act that the scheme of regulation imposed "is necessary in the public interest." When Section 206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either "unjust" or "unreasonable" simply because it is unprofitable to the public utility.

Sierra Pacific Power, supra, 350 U.S. at 354.

FERC has reaffirmed its adherence to this concept:

In the "classic" *Mobile-Sierra* situation, for example—when a seller utility unilaterally seeks an increase from a fixed-rate contract already on file with the Commission—the *public interest (as opposed to the private interest of the party seeking the rate increase) only rarely is served* by making the requested change (that is, granting the requested increase), and a strict standard is appropriate.³

3. Comment: Two standards or one?

The "public interest" exception to the *Mobile-Sierra's* general principle has become known as the "heavy *Mobile-Sierra* burden." That is, to get out of a contract, to "get around"

³ *Northeast Utilities Service Company (Re: Public Service of New Hampshire)*, 66 F.E.R.C. para. 61,332 (1994).

the *Mobile-Sierra* burden, one must scale the high hurdle of the public interest exception. This understanding has led practitioners to speak of *two distinct burdens*: the “normal” burden borne by a complainant of proving that a contract is unjust and unreasonable; and the “heavy” burden of meeting the “public interest” exception to the *Mobile-Sierra* doctrine.

This oft-repeated dichotomy took a direct hit from a 2006 decision of the Ninth Circuit:

The parties and some of the cases speak as if two alternative standards for reviewing wholesale electricity rates exist - the statutory “just and reasonable” standard and the *Mobile-Sierra* public interest standard. We do not find this way of viewing the statutory terrain useful. The FPA establishes a single, albeit general, standard for FERC's adjudication of contract challenges like the present one: whether the challenged contract is “just and reasonable.” 16 U.S.C. sec. 824e(a). The question therefore cannot be not whether the *Mobile-Sierra* or the “just and reasonable” standard of review applies. Instead, we understand *Mobile-Sierra* to establish presumptions regarding whether certain electricity contracts meet the statutory standard, and hold that lack of profitability alone is not a basis for deeming a contract unreasonable when the seller has agreed to the rate that proves unprofitable.⁴

B. Background on market-based contracts

1. Definition of market power

Market power exists when a firm (or a group of firms acting together) can raise the price of its product or service for a sustained period, increasing its profits without experiencing an unacceptable loss of sales. Courts often define market power as the ability to control prices or to exclude competition. *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-92 (1956).

FERC has defined market power as a seller's ability to “*significantly influence price in the market by withholding service and excluding competitors for a significant period of time.*” *Citizens Power & Light Corp.*, 48 FERC para. 61,210 at 61,777 (1989).

⁴ *Public Util. Dist. No. 1 of Snohomish County v. FERC*, 471 F.3d 1053 at n.7 (9th Cir. 2006).

2. Seller has the burden of proving it lacks market power

FERC allows a seller to sell at market-based rates *if the seller lacks market power or has adequately mitigated market power*. The absence of market power means that competitive forces will keep rates just and reasonable.⁵

A seller has *no statutory right to charge market-based rates*. See *AEP Power Marketing, Inc.*, 108 FERC 61,026 at P 25 (2004) (order on rehearing). The applicant has the burden of showing that it lacks market power, or that any market power it has, is mitigated.

FERC's protection of consumers involves two steps. The first step is *to ensure the absence of market power* prior to granting authorization to charge MBR. The second step is to *monitor a successful applicant* after approval to ensure that the conditions supporting MBR remain. FERC's methodologies for conducting these analyses are discussed next.

3. FERC measures market power with screening tests

An applicant for market-based rates must prove four negatives:

- a. seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission
- b. seller and affiliates cannot erect other barriers to entry
- c. no affiliate abuse
- d. no reciprocal dealing.

⁵ The Federal Power Act requires that all rates demanded by public utilities for the transmission or sale of electric energy be “just and reasonable.” Where there is a competitive market, “[FERC] may rely on [market-based rates] in lieu of cost-of-service regulation to ensure that rates satisfy this requirement.” *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998) (LEPA). See also *California v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004) (finding that MBR is acceptable based on prior finding of a lack of market power and post-approval reporting requirements).

4. FERC monitors market power with five reporting requirements

- a. Electric Quarterly reports
- b. Three-year filing requirement
- c. Change in status that supported the grant of MBR
- d. Compliance with FERC's Market Behavior Rules
- e. Interlocking directorship reporting

II. Ninth Circuit: FERC erred procedurally and substantively

Public Utility District No. 1 of Snohomish County Washington v. FERC,
471 F.3d 1053 (9th Cir. Dec. 19, 2006)

Buyers under wholesale forward contracts, entered into during the California crisis, later asked FERC to modify the contracts due to the high contract price. The buyers alleged that the super-high prices in the dysfunctional spot markets led to unreasonably high prices in the longer-term forward markets. FERC declined to modify the contracts, citing *Mobile-Sierra*: Having voluntarily entered these contracts, the buyers could not seek regulatory help in escaping them without scaling the “public interest” hurdle, which the buyers failed to do.

The Ninth Circuit remanded to FERC, to “determine whether the challenged rates meet the statutory standard.” The Court found that ***it was error to apply Mobile-Sierra literally to the market rate context:***⁶

Mobile and *Sierra* arose in a regulatory context in which there was an ***opportunity for traditional cost-based just and reasonable review before the energy contracts at issue became effective.*** The regulatory regime evolved, however, and FERC shifted its inquiry from the permissible cost-basis of rates to the determination of a seller's market power.

While the object of the *Mobile-Sierra* doctrine was an ***individual contract***, the market-based rate authorization inquiry applies to an ***individual seller***, with regard to ***any covered contract*** for electrical energy it enters into. The former inquiry occurred contemporaneously with a contract's formation, while the latter inquiry transpires before each contract is formed. This dual shift distinguishes the regulatory context here from that present in *Mobile* and *Sierra* in two material respects: (1) ***the timing of the agency's initial review has moved to a point before contract formation, and (2) the substance of that review no longer focuses on the terms of the contract.*** In other words, since *Mobile* and *Sierra* were decided, both the questions that FERC asks in its initial regulatory review of rates and when it asks them have changed.

The Court explained that FERC had committed both procedural and substantive errors, as discussed next.

⁶ Within the block quotes, bold italics are added by the editor to assist reader absorption. Italics only are in the original.

A. FERC's procedural error: It failed to provide timely review of contract terms

FERC's reliance on Mobile-Sierra was misplaced *because its grant of market-based rate authority lacked a mechanism to provide effective, timely relief from unjust and unreasonable rates due to market dysfunction*, thereby creating a *gap in the FPA's protection* against excessive energy prices.

[W]e conclude from the context of Mobile-Sierra and from later cases that *three prerequisites* are necessary to establish the Mobile-Sierra presumption: (1) the contract by its own terms must not preclude the limited Mobile-Sierra review; (2) the *regulatory scheme in which the contracts are formed must provide FERC with an opportunity for effective, timely review of the contracted rates*; and (3) where, as here, FERC is relying on a market-based rate-setting system to produce just and reasonable rates, *this review must permit consideration of all factors* relevant to the propriety of the contract's formation.

We hold that although market-based rate authority can qualify as sufficient prior review to justify limited Mobile-Sierra review, it can only do so when accompanied by effective oversight permitting timely reconsideration of market-based authorization if market conditions change.

... [A] *market-based tariff cannot be structured so as to virtually deregulate an industry and remove it from statutorily required oversight.*

Market-based rate authority provides a meaningful opportunity for prior review and approval of rates under the FPA, an essential prerequisite to the Mobile-Sierra mode of rate review, only insofar as *FERC implements and uses an effective oversight mechanism after the market-based rate authorization is initially granted*. Only then can FERC meet its statutory duty to ensure that all rates are “just and reasonable.”

Here, FERC failed to adopt any monitoring mechanism before applying deferential Mobile-Sierra review to the challenged contracts. ... When FERC encouraged the local utilities to purchase power in the forward market, the agency promised to oversee the forward market contracts to ensure their justness and reasonableness. See December 15 Order, 93 F.E.R.C. at 1| 61,994. FERC later held, however, that its approval of energy sellers' market-based rate authority - long prior to the market failures that gave rise to the December 15 Order - allowed it to apply the

Mobile-Sierra doctrine without any direct inquiry into whether the resulting rates were in fact “just and reasonable,” and *also without any inquiry into the actual state of the market at the time contracts were negotiated.*

FERC's position here ... is that it fulfills its monitoring obligation by imposing on sellers with market-based rate authority the requirement that they *file Quarterly Transaction Reports, make the Reports available for public review, and submit data on a triennial basis* to confirm the continued lack (or mitigation) of market power. ... As demonstrated by what actually happened during the California energy crisis, *this sporadic data collection approach is pragmatically unlikely to expose in a timely manner the impact of market changes*—in this instance, the *impact on the forward market of acknowledged severe market changes within the dysfunctional spot market.* That such impacts can occur without affecting FERC's continuing approval of market-based rate authority undercuts FERC's assertion that initial just and reasonableness review occurred with regard to the challenged contracts sufficient to trigger the Mobile-Sierra mode of review.

In particular, the quarterly reporting requirement, standing alone, permits review of the grounds for market-based rate authority only with regard to contracts entered into after the impact of the market dysfunction or market power on long-term bilateral contracts has already occurred, affecting the likelihood that the contracts in fact set rates within the statutory “just and reasonable” range. There is a *crucial difference between this review - that is, purely prospective review, affecting only future contracts - and one that permits consideration of the market conditions at the time a challenged forward contract was entered....*The latter kind of remedy is the kind the local utilities ask for here: They seek modification of the contracts here at issue, prospectively from the refund effective date but based on *the market circumstances that prevailed at the times the contracts were negotiated.*

Ultimately, the fatal flaw in FERC's approach to “oversight” is that it *precludes timely consideration of sudden market changes and offers no protection to purchasers victimized by the abuses of sellers or dysfunctional market conditions that FERC itself only notices in hindsight.*

Mobile-Sierra cannot apply without a determination that the challenged contract was initially formed free from the influence of improper factors, such as market manipulation, the leverage of market power, *or an otherwise dysfunctional market.*

B. FERC's substantive error: it disregarded context and it made the buyer's burden too high

1. In determining whether to apply the *Mobile-Sierra* presumption, FERC focused only on the "conduct" of the seller, while disregarding the "context" of market dysfunction

FERC failed ever to consider *whether the influence of the spot markets on the forward markets reached a level sufficient to question whether FERC could assume that two private parties had negotiated a "just and reasonable" contract in the first instance and therefore apply the Mobile-Sierra presumption.*

FERC held only that because the local utilities entered into the challenged contracts "voluntarily" and because "*there is no evidence of unfairness, bad faith, or duress in the original negotiations* [of the forward contracts], the [local utilities] are not entitled to change their bargains."

But the local utilities do not allege that the energy companies manipulated their negotiations of the contracts here at issue; *the local utilities challenge the context, not the conduct, of those negotiations.* ... [T]he local utilities are maintaining that *factors exogenous to the forward market, the dysfunction and manipulation of the spot market, artificially influenced the rates in the forward market, creating market dysfunction in the forward market.* The local utilities' argument is that *when such market dysfunction occurs and there is no opportunity to revisit the propriety of the market-based rate authority in effect when the contract was entered, FERC cannot assume that contractual terms were just and reasonable* as between the contracting parties when the agreement was negotiated. As a result, FERC cannot focus only on "public interest" considerations when the rates established are thereafter challenged.

We conclude that FERC's decision to treat the market-function evidence as irrelevant to the question whether Mobile-Sierra applies, and its resulting application of the Mobile-Sierra doctrine, was fundamental error. In a regulatory regime predicated on the grant of market-based rate authority, the decision whether to apply Mobile-Sierra to subsequent contracts formed under that authority *requires FERC and reviewing courts to determine if the contracts at issue were initially entered into in fully functioning markets.* FERC's application of the Mobile-Sierra doctrine without considering the contract formation issues was error.

2. In determining whether a contract affects the “public interest,” FERC set the bar too high

FERC's error in its approach to *deciding whether to apply* the Mobile-Sierra presumption was compounded by its *use of an erroneous standard for determining whether the challenged contracts affect the public interest*. FERC relied on the wrong legal standard, applying factors taken from the context of a low-rate challenge rather than those relevant to the high-rate challenge present in this case.

FERC's briefs in this court, assume, erroneously, that Sierra established a *three-pronged public interest standard*⁷ *applicable across all circumstances*, an assumption with which we do not agree. In particular, the *"excessive burden"* reference in Sierra, heavily relied upon by FERC in this case in concluding that there was no impact on the public interest, *has no application here*.

... [T]he three Sierra factors were specifically identified as relevant to the *low-rate challenge* presented in that case. Rates asserted to be lower than those FERC would approve *ab initio* will not ordinarily directly affect the most obvious "public interest" underlying the FPA—namely, avoidance of unnecessarily high rates for the consuming public.

The primary "public interest" at issue in a low-rate challenge, such as Sierra, is in keeping utilities in operation so the public is not deprived of services. Sierra also mentioned avoidance of rates "so low as to . . . cast upon other consumers an excessive burden." 350 U.S. at 355 (emphasis added). *The reason for concern with "excessive burden" on "other consumers" is that charging rates in some wholesale contracts that are too low to recoup production costs and a fair profit could lead utilities burdened with such low rate agreements to recoup their costs and profit margins by charging higher rates than are just and reasonable to other wholesale customers.*

⁷ [Editor's note] The three factors are set forth in this passage from *Sierra*, supra, 350 U.S. at 354:

...[T]he sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.

FERC must take into account the Supreme Court's admonition that even "a *small dent* in the consumer's pocket" is relevant to the determination of fair rates.

This is not to say that *any* direct impact on consumer rates is enough to demonstrate a public interest effect sufficient to displace the countervailing *Mobile-Sierra* concern with protecting the stability of contract. Market-based rate regulation presumes—appropriately—that a functioning marketplace will drive prices towards marginal cost, and therefore toward such a reasonable range, “at least over the long pull” (INGAA, 285 F.3d at 31). **Even if a particular rate exceeds marginal cost, however, it may still be within this reasonable range—or “zone of reasonableness”—if that higher-than-cost-based price results from normal market forces and is part of a general trend toward rates that do reflect cost. See *id.* at 32 (noting that brief spikes in pipeline rates “are completely consistent with competition”).** Thus, the proper standard for the *Mobile-Sierra* “public interest” mode of review in a high-rate challenge is **not whether the contracted rates pose an “excessive burden” on consumers, but whether the wholesale energy contract is outside the “zone of reasonableness” and results in retail rates higher than would be the case if that zone were not exceeded.** This standard mirrors that endorsed by the D.C. Circuit for determination of a just and reasonable rate under a market-based rate regulation regime, *see* INGAA, 285 F.3d at 31-36, and provides an appropriate context for the Supreme Court’s “small dent” admonition in such a regulatory environment.

Contrary to FERC's supposition in this case, the reference to an "excessive" burden in Sierra did not signal that it is fine to burden customers with unjustifiably higher rates as long as those rates are not so high as to be "excessive" in some absolute sense.

III. Supreme Court: The Ninth Circuit had it wrong

A. The Mobile-Sierra presumption applies to market-based contracts

1. One statutory standard—"just and reasonable"

We are in broad agreement with the Ninth Circuit on a central premise: There is only one statutory standard for assessing wholesale electricity rates, whether set by contract or tariff -- the just-and-reasonable standard.

Slip op. at 16.

2. FERC's Mobile-Sierra obligation: The Commission must apply the Mobile-Sierra presumption in its evaluation of market-based contracts.

- a. Where there is an agreed-upon rate, Mobile-Sierra requires a presumption of "just and reasonable" unless the public interest is seriously affected.
- b. "[I]n a proper regulatory scheme, the ordinary mode for evaluating contractually set rates is to look to whether the rates seriously harm the public interest, not to whether they are unfair to one of the parties that voluntarily assented to the contract." Slip op. at 18.
The reason:

Sierra was grounded in the commonsense notion that "[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them. (Verizon, 535 U. S., at 479)

- (1) Thus, when there is a "mutually agreed-upon rate," the FERC may declare it not just and reasonable only if it "seriously harms the consuming public."
- (2) "Sierra thus provided a definition of what it means for a rate to satisfy the just-and-reasonable standard in the contract context—a definition that applies regardless of when the contract is reviewed." Slip op. at 17.

(3) "What it means for a rate to satisfy" the standard is that two parties have agreed and the public is not seriously harmed. In a contract case, the "public interest" is the "sole concern" Slip op. at 17 n.3 (citing FPC v. Sierra Pacific Power Co., 350 U. S. 348, 355 (1956)).

c. What if the market is "dysfunctional"? FERC has no duty to determine whether a contract was formed in a dysfunctional market before applying the Mobile-Sierra presumption. The Court stated (slip op. at 18):

Markets are not perfect, and one of the reasons that parties enter into wholesale-power contracts is precisely to hedge against the volatility that market imperfections produce. That is why one of the Commission's responses to the energy crisis was to remove regulatory barriers to long-term contracts. It would be a perverse rule that rendered contracts less likely to be forced when there is volatility in the market. (Such a rule would come into play, after all, only when a contract formed in a period of "dysfunction" did not significantly harm the consuming public, since contracts that seriously harm the public should be set aside even under the Mobile-Sierra presumption.) By enabling sophisticated parties who weathered market turmoil by entering long-term contracts to renounce those contracts once the storm has passed, the Ninth Circuit's holding would reduce the incentive to conclude such contracts in the future. Such a rule has no support in our case law and plainly undermines the role of contracts in the FPA's statutory scheme.

3. Escape paths: Unfair dealing, fraud, duress, unfairness, bad faith, but not dysfunctionality or chaos

To be sure, FERC has ample authority to set aside a contract where there is unfair dealing at the contract formation stage—for instance, if it finds traditional grounds for the abrogation of the contract such as fraud or duress. See 103 FERC, at 62,399-62,400 ("[T]here is no evidence of unfairness, bad faith, or duress in the original negotiations"). In addition, if the "dysfunctional" market conditions under which the contract was formed were caused by illegal action of one of the parties, FERC should not apply the Mobile-Sierra

presumption. See Part III, *infra*. But the mere fact that the market is imperfect, or even chaotic, is no reason to undermine the stabilizing force of contracts that the FPA embraced as an alternative to "purely tariff-based regulation." *Verizon*, 535 U. S., at 479. We may add that evaluating market "dysfunction" is a very difficult and highly speculative task-not one that the FPA would likely require the agency to engage in before holding sophisticated parties to their bargains.

Slip op. at 19.

Comments and questions

- (1) Caution: Distinguish (a) escaping the presumption on grounds it does not apply (i.e, fraud, duress); from (b) overcoming the presumption when it does apply (the public interest "exception, discussed at Part III.B below).
- (2) "Unfairness, bad faith or duress": What do these words mean? Is charging what the market can bear, in a market made dysfunctional by events other than the seller's actions, a cause of "unfairness" or "duress"? If FERC has not removed the seller's market-based rate authority, and the buyer agrees to pay a "what the market can bear" rate, is the contract now "just and reasonable" unless the public is harmed?

4. **Timing: Application of the just and reasonable standard does not depend on when a contract rate is challenged.**

- a. *Note:* The Ninth Circuit found that the presumption kicks in if and when the FERC finds the contract reasonable, such as if the FERC gave the contract an initial review. The Supreme Court stated that the presumption kicks in if the parties agree to their contract. Timing is irrelevant.
- b. The time period at which the presumption-eliminating burden can be met (also the time period during which the presumption applies) is anytime during the contract's life, not merely at the time of the contract's commencement.

FERC appears to have looked at the "burden" at the time the contract commenced, comparing the contract rates to the rates that would have existed absent the market dysfunctionality. FERC's analysis was erroneous or incomplete:

... [T]he Commission may have looked simply to whether consumers' rates increased immediately upon the relevant contracts' going into effect, rather than determining whether the contracts imposed an excessive burden on consumers "down the line," relative to the rates they could have obtained (but for the contracts) after elimination of the dysfunctional market. ... The "unequivocal public necessity" that justifies overriding the Mobile-Sierra presumption does not disappear as a factor once the contract enters into force.

Slip op. at 24 (noting that "Sierra ... involved a challenge 5 years into a 15-year contract").

- c. *Mobile-Sierra* is not an "estoppel doctrine," i.e., a doctrine that precludes parties from arguing for contract modification if the FERC has previously found the contract just and reasonable. Slip op. at 17.

5. Contract rates vs. tariff rates: Does the statute make a distinction?

- a. The dissent states (slip op. at 2):

These provisions [in FPA sections 205 and 206] distinguish between the rate-setting roles of utilities (which initially set rates) and the Commission (which may override utility-set rates that are not just and reasonable), but they do not distinguish between rates set unilaterally by tariff and rates set bilaterally by contract. However the utility sets its prices, the standard of review is the same—rates must be just and reasonable.

- b. Although the majority claims there is a single standard for tariffs and contracts—"just and reasonable"—the dissent disagrees (slip op. at 3):

There is no significant difference between requiring a heightened showing to overcome an otherwise conclusive presumption and imposing a heightened standard of review.

...

The statute does not say anything about a mandatory presumption for contracts, much less define the burden of proof for overcoming it or delineate the circumstances for its nonapplication.

c. The majority responds (at n.6):

The dissent claims that we have misread the FPA because its provisions "do not distinguish between rates set unilaterally by tariff and rates set bilaterally by contract." Post, at 2. But the dissent's interpretation, whatever plausibility it has as an original matter, cannot be squared with *Sierra*, which plainly distinguished between unilaterally and bilaterally set rates, and said that the only relevant consideration for the Commission in the latter case is whether the public interest is harmed.

d. Questions on contract vs. tariff

- (1) Does the phrase "whatever plausibility it [i.e., the dissent's interpretation of the FPA] has as an original matter" imply lack of interest in Congress's original intent?
- (2) Which is more important to the majority -- the language of the statute or the language of a Court decision issued 31 years after enactment on facts different from those arising 52 after that decision?
- (3) Is the Court precluded from examining the original intent of the statute just because no Congress since has modified it since *Mobile*, particularly since the facts in *Mobile* and *Sierra* (seller seeking rate increase in a cost-based regime) differ from those in the instant case (buyer seeking rate decrease in a market-based regime)?

- (4) The majority's n.6 refers to the dissent's "interpretation," but if the statute on its face creates no distinction, between bilateral contract and unilateral tariff, in terms of how much "harm" or "burden" converts just and reasonable to unjust and unreasonable, why is the dissent's view an "interpretation"?

6. Additional comments and questions

- a. Does the Court's statement, that FERC can apply the Mobile-Sierra presumption without determining if the market was dysfunctional, mean that FERC is *prohibited from requiring* a showing that the market was functional before applying the presumption? FERC can require a showing that the market is functional before allowing market-based rates. Why cannot FERC then require a showing that the market is functional before applying the presumption? Why cannot FERC say that "before we approve a contract you must show that the market is competitive"? That is what the 9th Circuit said.
- b. Does the Court equate "dysfunction" with "imperfection"?
- (1) Because regulators must tolerate imperfection, they may (or must) tolerate dysfunction?
- (2) Because dysfunctional markets are permissible, contracts entered into in dysfunctional markets are permissible?
- (3) The customer jumps from the hot pan of a dysfunctional market into a hot fire of a seemingly better contract. Because a hot pan is permissible, a hot fire is permissible?
- c. *What if the dysfunctionality were caused by actions other than the illegal action of the seller*, such as regulatory error by the FERC or the state commission? Why should the lawfulness of a rate depend on the source of the dysfunctionality? A high rate resulting from a dysfunctional market is unlawful if the cause of the dysfunctionality was the seller, but the same rate is lawful if the cause of the dysfunctionality was something else?

- d. Is this reasoning consistent with the notion that the *FPA is a consumer protection statute*, as distinct from a seller-inhibition statute? There are plenty of examples where the Commission under the FPA has protected ratepayers from high rates even when the seller was not at fault—such as disallowances on grounds of "not used and useful" as distinct from imprudence.
- e. **Caution:** The Court is not saying that there can be no challenge to rates that are high due to market dysfunctionality:

We reiterate that we do not address the lawfulness of FERC's market-based-rates scheme, which assuredly has its critics. But any needed revision in that scheme is properly addressed in a challenge to the scheme itself, not through a disfigurement of the venerable Mobile-Sierra doctrine. We hold only that FERC may abrogate a valid contract only if it harms the public interest.

Slip op. at 19.

The court is saying that *if the high rates are in a contract*, then the Mobile-Sierra presumption must apply

- f. The court uses interchangeably "*the consuming public*" and "*the public*." Is there a difference? Is there a public interest other than, or broader than, the consuming public? The three factors in Mobile-Sierra suggest there is a difference. On this subject, see the dissent (slip op. at 7):

Sierra used "public interest" as shorthand for the interest of consumers in paying "the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." Permian Basin, 390 U. S., at 793 (quoting Atlantic Refining Co. v. Public Serv. Comm'n of N. Y., 360 U. S. 378, 388 (1959)).

g. What about the number and diversity of adjectives and adverbs?

-- extent of harm

- (1) "excessive burden" (slip op. at 23 (quoting Sierra). ("Excessive" relative to what?))
- (2) "adversely harmed" (slip op. at 23) (as opposed to "harmed")
- (3) "seriously harm" the public interest. (slip op. at 20)
- (4) "excessive burden on consumers or otherwise seriously harm the public interest" (slip op. at 25)
- (5) "something more than a small dent in the consumer's pocket" (slip op at 23 n.6)
- (6) "extraordinary circumstances (slip op. at 23)
- (7) "extraordinary circumstances where the public will be severely harmed" (as opposed to "ordinary," or "unusual" "circumstances where the public will be severely harmed")
- (8) "the standard [is] a high one" (slip op. at 23 n.6)
- (9) "unequivocal public necessity" (from *Permian Basin Area Rate Cases*, and cited by the Snohomish Court)

-- marginal cost standard

- (10) "*ancien regime* of cost-of-service ratesetting," slip op. at 23
- (11) "the regulatory costs would be enormous.," slip op. at 23 [Why would they be greater than the regulatory costs associated with embedded-cost pricing?]
- (12) "onerous new burden" slip op. 22-23 (on the Commission if it had to test contract prices with a marginal cost standard)

B. Under what circumstances can contract buyers overcome the Mobile-Sierra presumption?

1. Sierra's three factors are "not precisely applicable" to a purchaser's high-rate challenges; nor are they the exclusive means of overcoming the presumption

We are again in agreement with the Ninth Circuit on a starting premise: It is clear that the three factors we identified in Sierra—"where [a rate] might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory," 350 U. S., at 355—are not all precisely applicable to the high-rate challenge of a purchaser (where, for example, the relevant question is not whether "other customers" [of the utility] would be excessively burdened, but whether any customers of the purchaser would be); and that those three factors are in any event not the exclusive components of the public interest. (Slip op. at 20).

2. The standard for overcoming the presumption is the same for buyers as for sellers

- a. According to the Court, the Ninth Circuit viewed the standard for overcoming the Mobile-Sierra presumption as "different for a purchaser's challenge to a contract, namely, whether the contract rate exceeds a "zone of reasonableness":

In our view that fails to accord an adequate level of protection to contracts. The standard for a buyer's challenge must be the same, generally speaking, as the standard for a seller's challenge: The contract rate must seriously harm the public interest. (Slip op. at 19-20)

Slip op. at 15 (citing 471 F. 3d, at 1088-1090).

- b. ***Comment on standard vs. presumption:*** According to the majority, the "higher" Mobile Sierra test is not a higher standard, one that allows more abuse of the consumer than the just and reasonable standard. It is rather a presumption which limits situations in which the regulator may intervene in a contract. The dissent sees no practical difference. What do you think?

3. The Ninth Circuit's "marginal cost" standard conflicts with the statute's goal of "contract stability"

a. The Supreme Court described the Ninth Circuit's standard as

whether consumers' electricity bills" are higher than they would otherwise have been had the challenged contracts called for rates within the just and reasonable range," i.e., rates that equal "marginal cost." (Slip op. at 21)

The Court further noted (at n.5) that the Ninth Circuit did anticipate prices above marginal cost but still within a zone of reasonableness ""if that higher-than-cost-based price results from normal market forces and is part of a general trend toward rate that do reflect cost." 471 F. 3d, at 1089." About this passage, the Court expressed confusion:

We are not sure (and we think no one can be sure) precisely what this means.

Slip op. at 21 n. 5.

b. The Supreme Court next asserted that a marginal cost standard violates Mobile-Sierra because it undermines "contract-based regulation" (Slip op. at 22):

A presumption of validity that disappears when the rate is above marginal cost is no presumption of validity at all, but a reinstatement of cost-based rather than contract-based regulation. We have said that, under the Mobile-Sierra presumption, setting aside a contract rate requires a finding of "unequivocal public necessity," *Permian Basin*, 390 U. S., at 822, or "extraordinary circumstances," *Arkansas Louisiana Gas Co. v. Hall*, 453 U. S. 571, 582 (1981). In no way can these descriptions be thought to refer to the mere exceeding of marginal cost.

c. Further, the Supreme Court's majority criticizes the Ninth Circuit's "marginal cost" standard. That standard would

give short shrift to the important role of contracts in the FPA, as reflected in our decision in *Sierra*, and would

threaten to inject more volatility into the electricity market by undermining a key source of stability. The FPA recognizes that contract stability ultimately benefits consumers, even if short-term rates for a subset of the public might be high by historical standards-which is why it permits rates to be set by contract and not just by tariff.

- d. The majority then quotes from the Commission:

As the Commission has recently put it, its "first and foremost duty is to protect consumers from unjust and unreasonable rates; however, . . . uncertainties regarding rate stability and contract sanctity can have a chilling effect on investments and a seller's willingness to enter into long-term contracts and this, in turn, can harm customers in the long run." Market-Based Rates, para. 6, 72 Fed. Reg. 33906-33907. (Slip op. at 22)

4. Comments and questions

- a. **Market confidence:** In discussing contract stability, the majority focuses on confidence in the market from the sellers' perspective. What about the buyers' perspective? The Court's rationale is that if regulators can too easily intervene to modify contracts, sellers will not play. But what about the buy side?
- b. If Mobile-Sierra impedes regulators from intervening, will there be a loss of confidence from the "buy side"?
- c. What if, because of the high Mobile-Sierra presumption, state regulators lose confidence in wholesale markets, and order their utilities to build plants of their own rather than buy power wholesale? What if utilities take this action on their own?
- d. Doesn't this loss of confidence on the buy side damage wholesale markets as much as a loss of confidence on the sell side?
- e. Why did the Supreme Court not look at both sides?
- f. If this decision causes regulators and buyers to avoid wholesale markets, what kind of victory did sellers achieve here?

- g. What did the Court mean by "contract stability"?
- (1) Is "contract stability" a justification for high rates (provided those high rates do not result in "severe harm" to the public?)
 - (a) What do you think of the majority's view that "contract stability" is a justification for high rates?
 - (b) Does this justification always insulate high rates? Is there circular reasoning in establishing contract stability as a justification for high rates without examining the lawfulness of the rates in the contract? Is contract stability a good thing if the contracts at issue lock in high rates? Has the Court given FERC sufficient guidance in how to weigh "contract stability"?
 - (c) Do all contract necessarily stabilize markets? In a positive way or a negative way? Can some contracts that are entered into in dysfunctional markets perpetuate the dysfunctionality rather than "stabilize" the market? What does the Court mean by "stabilize", anyway? How useful is the general term "stability" if there is no reference to the quality of the conditions that the contract is stabilizing?
 - (d) Caution: "contract stability" is not an overriding factor but one to be weighed against burden and harm: "...[I]f that [rate] increase is so great that, even taking into account the desirability of fostering market-stabilizing long-term contracts, the rates impose an excessive burden on consumers or otherwise seriously harm the public interest, the rates must be disallowed." Slip op. at 25.
- h. Is a rate's distance above marginal cost at all relevant to its lawfulness?
- (1) The Court stated that "the standard for reforming a particular contract validly entered into under a market-based scheme is [not] whether the rates approximate marginal cost." The standard is, instead, "severe harm" or "excessive burden." The Court does not provide any definition for

these terms nor any reference to a benchmark by which we could determine when "harm" becomes "severe" or when "burden" becomes "excessive." Antitrust economists do use "cost" (in its many forms) as a base from which to evaluate rents, such as distinguishing scarcity rent from monopoly rent. What other benchmarks could there be? It is doubtful that the Court expects FERC to look at effects of high rates on personal income, economic development or wealth distribution. What else besides "cost," in some form, would be a benchmark?

- (2) Is the problem one of rates that are "high by historical standards," or high by some other standard, such as relationship to cost, relationship to shortages and the absence of options, relationship to factors which could tell us whether the "highness" was consistent with justness and reasonableness?

C. What happens to the Mobile-Sierra presumption if (a) the seller manipulated the market, and (b) the manipulation contributed to the high prices?

1. The Mobile-Sierra presumption is rooted in respect for contracts. A rotten contract gets no presumption. If the contracts arise in a dysfunctional market, where (a) the dysfunctionality results from the seller's market manipulation and (b) the manipulation had a causal connection to the high prices:

[I]f it is clear that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations, the Commission should not presume that the contract is just and reasonable. Like fraud and duress, unlawful market activity that directly affects contract negotiations eliminates the premise on which the Mobile-Sierra presumption rests: that the contract rates are the product of fair, arms'-length negotiations. (Slip op at 25)

2. Comments and Questions

- a. Note the customer's three evidentiary burdens (slip op. at 25):
 - (1) The evidence of manipulation must be "clear."
 - (2) The manipulation must "directly affect" contract negotiations.
 - (3) There must be a "causal connection between the unlawful activity and the contract rate."
- b. What if someone other than the seller engaged in market manipulation, when the manipulation had a "causal connection" to the contract rate?

D. What were FERC's errors?

1. Wrong baseline for price comparison

- a. FERC compared the contract rates to the prices buyers paid just before the contracts went into effect, thereby finding a 20% increase.

FERC did not compare the contract rates to the price

consumers would have paid (but for the contracts) further down the line, when the open market was no longer dysfunctional. That disparity, past a certain point, could amount to an "excessive burden." ... The "unequivocal public necessity" that justifies overriding the Mobile-Sierra presumption does not disappear as a factor once the contract enters into force. Thus, FERC's analysis on this point was flawed-or at least incomplete. (Slip op. at 24)

- b. If the continuing market dysfunction caused the customers to pay more than they would have absent the dysfunction, "and if that increase is so great that, even taking into account the desirability of fostering market-stabilizing long-term contracts, the rates impose an excessive burden on consumers or otherwise seriously harm the public interest, the rates must be disallowed" (Slip op. at 24-25).

c. Questions

- (1) What facts and factors should FERC consider when "tak[ing] into account the desirability of fostering market-stabilizing long-term contracts?" Does "market stabilization" become a mantra or will courts require facts?
- (2) If dysfunction in the spot market infects the long-term contract market, can the long-term contracts themselves ever be just and reasonable?
- (3) The court's language indicates that a high-cost "burden" that would otherwise be "excessive" would not be excessive if the contract played a market-stabilizing role. Is the following a fair interpretation?
 - (a) FERC makes policy errors that cause the spot market to be dysfunctional, causing high prices.
 - (b) Buyers escape the spot market by entering into long-term contracts, at prices higher than would have prevailed absent the spot market dysfunctionality.
 - (c) FERC finds that the long-term contracts calm down the spot markets, correcting the prior dysfunctionality.
 - (d) FERC determines that the burden borne by the long-term buyers is justified in the name of "contract stabilization."
- (4) Is the foregoing sequence a reasonable application of the Court's reasoning? Does "just and reasonable" include "making customers pay to fix regulatory errors"?

2. Unclear treatment of allegations of seller manipulation

- a. The Staff Report had found that, in the Court's words, "abnormally high prices in the spot market during the energy crisis influenced the terms of contracts in the forward market." FERC deemed the Staff Report on this point irrelevant because the prices were not high enough to overcome the Mobile-Sierra presumption.

- b. But the presumption—which FERC applied—is not appropriate if there is a causal relationship between the seller's unlawful behavior and the high prices. Unlawful behavior does not warrant respect for "contract sanctity."
- c. FERC had found no evidence to support a finding of market manipulation [by respondents] that specifically affected the contracts at issue." FERC's order on rehearing, 105 FERC at 61,989. The Court found this statement to be unclear, given FERC's prior misapplication of the Mobile-Sierra doctrine. The remanded for FERC to "amplify or clarify" (Slip op. at 26).

E. Buyer “sophistication”: Final comments and questions

1. The Court's premise for the Mobile-Sierra presumption is buyer sophistication. Should buyer sophistication be a question of fact rather than a conclusive presumption?
2. Let's assume buyer sophistication was a valid premise in 1956, when Wholesale transactions were limited and simple. Is buyer sophistication a valid premise in 2008, when there are spot markets, forward markets, hedge markets, day-ahead markets, hour-ahead markets, and real time markets?
3. Is it realistic to assume that on the sophistication spectrum, "Snohomish County" stands near Morgan Stanley Capital Group?
4. Buyer sophistication does not guarantee buyer alternatives. In a dysfunctional market, sellers can sustain an unreasonable price. The buyer's sophistication does not make the price reasonable.
5. In load pocket situations (i.e., buyer lacks access to transmission highways which would allow shopping), the history of non-shopping would not be conducive to sophistication. Relevant or irrelevant?
6. Are there times when common sense and real-world knowledge are better decisional devices than premises and presumptions? Is this one of those times?

Scott Hempling
Director, National Regulatory Research Institute
shempling@nrri.org

Scott Hempling became Director of the National Regulatory Research Institute October 1, 2006. Prior to his appointment, Mr. Hempling owned and managed a national law practice providing representation and policy advice on matters involving regulated utilities. His expertise includes market structure, including implementation and monitoring of retail and wholesale competition; mergers, acquisitions and corporate restructuring; utility diversification; revenue requirements and rate design; transmission policies affecting renewable and other energy producers; proceedings before the Federal Energy Regulatory Commission; state investigations into utility financial difficulties; and state-federal jurisdictional issues. His former firm's clients included state commissions and legislatures, independent power producers and marketers, investor-owned utilities, municipal power systems, ratepayer representatives and public interest organizations.

Mr. Hempling has appeared frequently before Congressional and state legislative committees, and as a lecturer at industry conferences and training programs. Since 1997 he has organized semiannual legal seminars on introductory and advanced topics in electricity law. Mr. Hempling is a member of the Bars of the District of Columbia and Maryland.

Education

B.A. *cum laude*, Yale University (majors: Economics and Political Science; Music), 1978. Recipient of a Continental Grain Fellowship and a Patterson Research Grant.

J.D. *magna cum laude*, Georgetown University Law Center, 1984. Recipient of *American Jurisprudence* Award for Constitutional Law; editor of *Law and Policy in International Business*; instructor, legal research and writing.

Professional Experience

Director, National Regulatory Research Institute, Ohio State University (2006 -).
Founder and President, Law Offices of Scott Hempling, P.C. (1990-2006).
Attorney, Environmental Action Foundation (1987-1990).
Attorney, Spiegel and McDiarmid (1984-1987).

Past Clients

Independent Power Producers and Marketers

California Wind Energy Association, Cannon Power Company, Electric Power Supply Association, EnerTran Technology Company, National Independent Power Producers, SmartEnergy.com, U.S. Wind Force.

Investor-Owned Utilities

Madison Gas & Electric, Oklahoma Gas & Electric.

Legislative Bodies

Vermont Legislature, South Carolina Senate.

Municipal Power Systems

Connecticut Municipal Electric Energy Cooperative, Iowa Association of Municipal Utilities, City of Winter Park, Florida.

Public Interest Organizations

American Association Retired Persons, American Public Power Association, Consumer Federation of America, Energy Foundation, Environmental Action Foundation, Illinois Citizens Utility Board, Union of Concerned Scientists.

State Commissions and Consumer Agencies

Arkansas Public Service Commission, Arizona Corporation Commission, Connecticut Department of Public Utility Control, Connecticut Office of Consumer Counsel, Delaware Public Service Commission, Hawaii Public Utilities Commission, Indiana Utility Regulatory Commission, Kansas Corporation Commission, Massachusetts Attorney General, Massachusetts Department of Public Utilities, Missouri Public Service Commission, Montana Public Service Commission, National Association of Regulatory Utility Commissioners, Nevada Consumer Advocate, Nevada Public Service Commission, New Hampshire Public Utilities Commission, New Jersey Division of Ratepayer Advocate, North Carolina Utilities Commission, Ohio Public Utilities Commission, Oklahoma Corporation Commission, Pennsylvania Office of Consumer Advocate, South Carolina Public Service Commission, Texas Office of Public Utility Counsel, Vermont Department of Public Service, Virginia State Corporation Commission, Wisconsin Attorney General.

Legislative Testimony

United States Senate

Committee on Energy and Natural Resources, Feb. 2002 (analyzing bill to amend the Public Utility Holding Company Act) (PUHCA).

Committee on Energy and Natural Resources, May 1993 (analyzing bill to transfer PUHCA functions from SEC to FERC).

Committee on Banking and Urban Affairs, Sept. 1991 (analyzing proposed amendment to PUHCA).

Committee on Energy and Natural Resources, March 1991 (analyzing proposed amendment to PUHCA).

Committee on Energy and Natural Resources, Nov. 1989 (analyzing proposed amendment to PUHCA).

United State House of Representatives

Subcommittees on Energy and Power and Telecommunications and Finance, Commerce Committee, Oct. 1995 (regulation of public utility holding companies).

Subcommittee on Energy and Power, Energy and Commerce Committee, July 1994 (analyzing future of the electric industry).

Subcommittee on Energy and Power, Energy and Commerce Committee, May 1991 (analyzing proposed amendment to PUHCA).

Subcommittee on Environment, Energy and Natural Resources, Government Operations Committee, Oct. 1990 (assessing electric utility policies of FERC).

Appropriations Subcommittee on Commerce, Justice, State and the Judiciary, Apr. 1989 (discussing proposals to increase staff administering PUHCA).

Subcommittee on Energy and Power, Sept. 1988 (discussing "independent power producers" and PUHCA).

State Legislatures

Committee on Energy and Public Utilities, California Senate (December 1989) (discussing relationships between electric utilities and their non-regulated affiliates).

Interim Committee on Electric Restructuring, Nevada Legislature (1995-97) (discussing options for structuring the electric industry).

Committees on General Affairs, Finance, Vermont Senate (February-March 1997) (discussing options for structuring the electric industry).

Task Force to Study Retail Electric Competition, Maryland General Assembly (1997).

Electricity Restructuring Task Force, Virginia General Assembly (1999).

Judiciary Committee, South Carolina Senate (Fall 2000).

Publications

A Corporate Structure Events Involving Regulated Utilities: The Need for a Multidisciplinary, Multijurisdictional Approach, @ *The Electricity Journal* (Aug./Sept. 2006).

"Reassessing Retail Competition: A Chance to Modify the Mix," *The Electricity Journal* (Jan./Feb. 2002).

The Renewables Portfolio Standard: A Practical Guide, National Association of Regulatory Utility Commissioners (Feb. 2001) (with N. Rader).

Promoting Competitive Electricity Markets Through Community Purchasing: The Role of Municipal Aggregation, American Public Power Association (Jan. 2000) (with N. Rader).

Is Competition Here? An Evaluation of Defects in the Market for Generation (National Independent Energy Producers, Jan. 1995) (co-author).

The Regulatory Treatment of Embedded Costs Exceeding Market Prices: Transition to a Competitive Electric Generation Market (Nov. 1994) (with K. Rose and R. Burns).

"Depolarizing the Debate: Can Retail Wheeling Coexist with Integrated Resource Planning?" *The Electricity Journal* (Apr. 1994).

Reducing Ratepayer Risk: State Regulation of Electric Utility Expansion (American Association of Retired Persons 1993).

"'Incentives' for Purchased Power: Compensation for Risk or Reward for Inefficiency?" *The Electricity Journal* (Sept. 1993).

"Making Competition Work," *The Electricity Journal* (June 1993).

"Confusing 'Competitors' With 'Competition,'" *Public Utilities Fortnightly* (March 15, 1991).

"The Retail Ratepayer's Stake in Wholesale Transmission Access," *Public Utilities Fortnightly* (July 19, 1990).

"Preserving Fair Competition: The Case for the Public Utility Holding Company Act," *The Electricity Journal* (Jan./Feb. 1990).

"Opportunity Cost Pricing," *Wheeling and Transmission Monthly* (Oct. 1989).

"Corporate Restructuring and Consumer Risk: Is the SEC Enforcing the Public Utility Holding Company Act?" *The Electricity Journal* (July 1988).

"The Legal Standard of 'Prudent Utility Practices' in the Context of Joint Construction Projects," *NRECA/APPAA Newsletter Legal Reporting Service* (Dec. 1984/Jan. 1985) (co-author).

Other Activities

Lecturer

Regulatory Studies Program, sponsored by the Institute of Public Utilities at Michigan State University in association with NARUC (1988-present).

India's Central Electricity Regulatory Commission (2001).

Member

Research Advisory Committee, National Regulatory Research Institute (1994-1999).

Roster of Experts, U.S. Dept. of Energy National Electricity Forum (1994).

Editorial Advisory Board, *The Electricity Journal*.

Conference Speaker

American Antitrust Institute, American Association of Retired Persons, American Bar Association, American Power Conference, American Public Power Association, American Wind

Energy Association, Chicago Bar Association (Energy Section), Electric Power Research Institute, *Electric Utility Week*, Electricity Consumers Resource Council, *Energy Daily*, Executive Enterprises, Exnet, Federal Energy Bar Association, Harvard Electricity Policy Group, Infocast, Management Exchange, National Conference of Regulatory Attorneys, Midamerica Association of Regulatory Commissioners, National Association of Regulatory Utility Commissioners, National Association of State Utility Consumer Advocates, National Independent Energy Producers, New England Conference of Public Utility Commissioners, New England Public Power Association, Southeastern Association of Regulatory Utility Commissioners, World Regulatory Forum, U.S. Department of Energy Forum on Electricity Issues.