Public appearance means any participation in a seminar, forum (including an interactive electronic forum), radio or television interview, or other public speaking activity in which a research analyst makes a specific recommendation or offers an opinion concerning a security or an issuer.

Research analyst means any natural person who is principally responsible for the analysis of any security or issuer included in a research report.

Research report means a written communication that includes an analysis of the securities of an issuer or issuers, provides information reasonably sufficient upon which to base an investment decision and includes a recommendation.

§ 242.501 Research reports.

A broker or dealer, or any person associated with a broker or dealer, that publishes, circulates, or provides, directly or indirectly, a research report prepared by a research analyst shall include in that research report a clear and prominent certification by the research analyst containing the following statements:

(a) A statement attesting that the views expressed in the research report accurately reflect the research analyst's personal views about any and all of the subject securities or issuers; and

(b)(1) A statement attesting that no part of the research analyst's compensation was, is, or will be, directly or indirectly, related to the specific recommendations or views expressed by the research analyst in the research report; or

(2) A statement:

(i) Attesting that part or all of the research analyst's compensation was, is, or will be, directly or indirectly, related to the specific recommendations or views expressed by the research analyst in the research report;

(ii) Identifying the source and amount of such compensation and the purpose therefor; and

(iii) Further disclosing that the compensation could influence the recommendations or views expressed in the research report.

§ 242.502 Public appearances.

(a) If a broker or dealer, or any person associated with a broker or dealer, publishes, circulates, or provides, directly or indirectly, a research report prepared by a research analyst, the broker or dealer must make a record within thirty days after each calendar quarter in which the research analyst has made a public appearance that includes a certification by the research analyst containing the following statements:

(1) A statement:

(i) Attesting that the views expressed by the research analyst in each public appearance accurately reflected the research analyst's personal views at that time about any and all of the subject securities or issuers; and

(ii) Attesting that no part of the research analyst's compensation was, is, or will be, directly or indirectly, related to the specific recommendations or views expressed by the research analyst in any public appearance; or

(2) A statement attesting that the research analyst is unable to provide the written certifications specified in paragraph (a)(1) of this section and the reasons therefor. The broker or dealer must also disclose in all research reports prepared by the research analyst for the next 120 days that the research analyst did not provide the certifications specified in paragraph (a)(1) of this section and the reasons therefor.

(b) A broker or dealer shall promptly provide copies of all statements prepared pursuant to paragraph (a)(2) of this section to its examining authority, designated pursuant to Section 17(d) of the Securities Exchange Act of 1934 (15 USC 78q(d)) and § 240.17d–2 of this chapter.

(c) A broker or dealer shall preserve the records specified in paragraph (a) of this section in accordance with § 240.17a–4(b)(4) of this chapter.

By the Commission.

Dated: August 2, 2002.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–20031 Filed 8–7–02; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 2

[Docket No. PL02–7–000]

Standard of Review for Proposed Changes to Market-Based Rate Contracts for Wholesale Sales of Electric Energy by Public Utilities

August 1, 2002.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of proposed policy statement.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is proposing to adopt a policy statement to announce a general policy regarding the standard of review that must be met to justify proposed changes to market-based rate contracts for wholesale sales of electric energy by public utilities. The intent of the proposed policy statement is to promote the sanctity of contracts, recognize the importance of providing certainty and stability in competitive electric energy markets, and provide adequate protection of electric energy customers. The Commission is inviting comments on the proposed policy statement.

DATES: Comments on the proposed policy statement are due September 23, 2002.

ADDRESSES: File written comments with the Office of Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT:

Shaheda Sultan,Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, Telephone: (202) 219–2685.

Jonathan First, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, Telephone: (202) 208–2142.

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

Proposed Policy Statement

I. Introduction

1. The Federal Energy Regulatory Commission is proposing to adopt a policy statement to announce a general policy regarding the standard of review that must be met to justify proposed changes to market-based rate contracts for wholesale sales of electric energy by public utilities. The specific prices, terms and conditions of service agreed to by willing sellers and buyers in such contracts are not required to be filed with the Commission when these contracts are entered into pursuant to generic market-based rate tariffs already approved by, and on file with, the Commission.[1] Because the generic tariffs are authorized only after the Commission has made findings that the sellers under such tariffs lack or have mitigated market power, the prices, terms and conditions of contracts pursuant to market-based tariffs are presumed to fall within a zone of

[1] *See* Order No. 2001, Revised Public Utility Filing Requirements, III FERC Stats. & Regs., Regulations Preambles ¶ 31,127 at 30,135–140 (April 25, 2002), *reh'g pending* (although contracts are not filed, detailed information about each transaction is reported to the Commission).

reasonableness.[2] In an electric utility industry increasingly dominated by such market-based rate contracts, and in light of recent uncertainties in the industry brought about by the market dysfunctions in California and the collapse of Enron Corp., the Commission believes it is critical to promote the stability of power supply contracts to meet future energy needs. One step toward this end is to clarify the standards under which such contracts may be modified. Accordingly, the purpose of this proposed policy statement is to recognize the sanctity of contracts and allow the parties to a market-based power sales contract to have greater certainty against contractual changes, by clarifying our application of the ''*Mobile-Sierra*'' doctrine.[3]

2. Recently, the Commission received complaints against numerous sellers, alleging that certain market-based rate contracts for electric energy contain excessive rates and should be reformed.[4] One of the contested issues in these cases was what standard of review to apply in determining whether changes are permitted to the contract, *i.e.,* whether to apply the ''just and reasonable'' standard of review or the ''public interest'' standard of review in determining whether to permit one of the parties to seek changes to the contract over the objections of the other party. In earlier cases, another contested issue was whether the Commission is bound by the same standard of review that the parties agreed to in the contract, when the Commission acts on the complaint of a third party or on its own motion under Section 206 of the Federal Power Act (FPA).[5]

3. The Commission believes that the proposed policy statement would serve to limit, as much as possible, such disputes in the future. The Commission is proposing precise language that parties would be required to include in their electric power sales contracts if they intend that the Commission apply the ''public interest'' standard of review to their contract. If the parties include in their contract the proposed language laid out below, they would be able to bind themselves and, if they choose, they would also be able to bind the Commission (acting *sua sponte* or on behalf of a third party) to a public interest standard of review. Under the proposed policy, if parties to a market-based power sales contract do not include this exact language in their contract, however, we would construe the omission as demonstrating the intent of the parties to allow a just and reasonable standard of review. In other words, the omission of, or any deviation from, the language quoted below would result in the use of a just and reasonable standard of review.

4. We note that the Commission is proposing to depart from past precedent by agreeing to be bound to a public interest standard of review for market-based power sales contracts where both parties to the contract agree to bind themselves, and also seek to bind the Commission, to this standard.[6] We propose this in order to promote the contract certainty necessary to support competitive wholesale power markets. Further, we emphasize that, even under a public interest standard of review for these types of contracts, we believe we would have adequate authority to protect non-parties to the contract.

II. Background

5. The FPA requires that rates must be just and reasonable and not unduly discriminatory or preferential.[7] The selling public utility can propose the rates and the Commission can approve them if it finds they meet the just and reasonable standard.[8] The Commission can also on its own motion or on the complaint of a third party investigate existing rates, and alter them prospectively, if it finds that such rates are no longer just and reasonable.[9] The FPA also provides that contracts between individual parties can be used to set rates.[10] In such contracts, selling utilities may agree to voluntarily restrict some or all of their freedom to change the contract rates, customers may agree to restrict their right to request the Commission to change the rate, and sometimes the parties to the contract may attempt to restrict not only themselves but also the Commission from changing the contract rate under the ''just and reasonable'' standard. Some courts have held that where the utility and the customer have contracted for a particular rate and not reserved their rights to propose contractual changes, the contract has been filed with the Commission, and the Commission has permitted the rate to become effective, the utility cannot over the objections of the customer file a new rate (under Section 205 of the FPA), and the customer and the Commission cannot (under Section 206 of the FPA) propose changing the existing contract rate under the ''just and reasonable'' standard of review.[11] Certain courts have instead required the Commission to use the ''public interest'' standard to effect a change to the contract rate. Although not clearly defined,[12] the ''public interest'' standard of review has been held to be higher or stricter than the ''just and reasonable'' standard of review.[13]

III. Discussion

6. A great deal of time and expense is incurred and much uncertainty is engendered when the parties involved in contract disputes and the Commission attempt to resolve the issues of whether the parties intended to invoke a public interest standard of review, and whether this standard binds only one party, both parties, third parties, and/or the Commission. In some cases there is the issue of whether the parties intended to include other language in the contract that invokes the just and reasonable standard of review for particular portions of the contract rate.[14] More time and resources are

[2] *See, e.g.,* State of California v. British Columbia Power Exchange Corporation, *et al.*, 99 FERC ¶ 61,247 (2002), *reh'g pending* (prior review consists of ''analysis to assure that the seller lacks or has mitigated market power so that its prices will fall within a zone of reasonableness'').

[3] United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); FPC v. Sierra Power Co., 350 U.S. 348 (1956) (*Mobile-Sierra*). Under the *Mobile-Sierra* doctrine, private contracts that set firm rates or establish a methodology for setting the rates for service, and deny either party the right to unilaterally change those rates, can be modified or abrogated by the Commission only if required by the public interest. Texaco Inc. v. FERC, 148 F.3d 1091, 1095 (D.C. Cir. 1998) (*Texaco*).

[4] *See, e.g.,* Pub. Utilities Comm'n of the State of California, *et al.,* v. Sellers of Long-Term Contracts to the California Dep't of Water Resources, *et al.,* 99 FERC ¶61,087 (2002), *reh'g pending;* Nevada Power Co. and Sierra Pacific Power Co. v. Duke Energy Trading and Mktg. L.P., *et al.,* 99 FERC ¶61,047 (2002), *reh'g pending.*

[5] 16 U.S.C. 824e.

[6] Northeast Utilities Service Co. v. FERC, 55 F.3d 686, 692 (1st Cir. 1995) (*Northeast Utilities*).

[7] 16 U.S.C. 824d.

[8] 16 U.S.C. 824d.

[9] 16 U.S.C. 824e.

[10] *See, e.g.,* 16 U.S.C. 824d(d) and 824e(a).

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

[12] *Northeast Utilities,* 55 F.3d at 690, describing the *Mobile-Sierra* standard of review: ''[N]owhere in the Supreme Court opinion is the term 'public interest' defined. Indeed, the Court seems to assume that the Commission decides what circumstances give rise to the public interest.''

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

[14] *See, e.g., Texaco;* Union Pacific Fuels, Inc. v. FERC, 129 F.3d 157 (D.C. Cir. 1997) (*Union Pacific*); *Northeast Utilities.* Section 35.1(d) of the Commission's regulations sought to reduce this uncertainty somewhat in the electric area, by specifying contractual language to be used by parties in certain circumstances, 18 CFR 35.1(d) (2002). However, this regulation applies only to contracts for the transmission or sale of firm power for resale to an all-requirements customer, and addresses the standard of review only when a *seller* proposes contractual changes. If a contract for services covered by this regulation contains the language specified in section 35.1(d)(3), we will continue to construe this language as requiring a

Continued

expended and the uncertainty is prolonged when these cases are appealed to the courts, but as acknowledged by at least one court: ''[t]he truth is that the cases, even within the D.C. Circuit itself, do not form a completely consistent pattern. Compare, *e.g., Texaco,* 148 F.3d at 1096 with *Union Pac. Fuels, Inc. v. FERC,* 327 U.S. App. D.C. 74, 129 F.3d 157, 161–162 (D.C. Circuit 1997).'' [15] The *Boston Edison* court also stated that these issues would remain in a state of confusion until the Commission ''squarely confronted the underlying issues,'' and if the Commission ''wanted to eliminate much of the existing uncertainly regarding the parties'' intent, it might prescribe prospectively the terms that parties would have to use to invoke Mobile-Sierra protection.'' [16]

7. The Commission is of the opinion that under the circumstances existing in today's electric power industry, it is necessary to eliminate as much uncertainty as possible and to prospectively prescribe the terms that parties must use to invoke a public interest standard of review to changes in their market-based power sales contracts. Accordingly, the Commission is hereby proposing to adopt a general policy to require parties to market-based power sales contracts to include specific language in their contract if they intend to invoke the public interest standard of review. (The proposed language is set forth at the end of this document.) Under the proposal, the Commission would apply the ''public interest'' standard of review only if this specific language is included in the contract. The parties could choose specific language that binds only the parties to the public interest standard or language that also binds the Commission when it acts on behalf of a non-party or on its own motion. Under the proposed policy, it is contemplated that if neither version of the specific language is included in the contract, the Commission would apply the ''just and reasonable'' standard of review to the contract regardless of whether it was to act on behalf of a party, a non-party, or on its own motion.

IV. Comment Procedure

8. The Commission invites interested persons to submit comments on this Notice of Proposed Policy Statement.

9. Comments may be filed on paper or electronically via the Internet and must be received by the Commission on or before September 23, 2002. The Commission strongly encourages electronic filings. Those filing electronically do not need to make a paper filing. For paper filings, the original and 14 copies of such comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 and should refer to Docket No. PL–0–7–000.

10. Comments filed via the Internet must be prepared in WordPerfect, MS Word, Portable Document Format, or ASCII format. To file the document, access the Commission's website at *http://www.ferc.gov* and click on ''e-Filing,'' and then follow the instructions on each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgment to the sender's e-mail address upon receipt of comments.

11. User assistance for electronic filing is available at 202–208–0258 or by e-mail to *efiling@ferc.gov.* Comments should not be submitted to the e-mail address. All comments will be placed in the Commission's public files and will be available for inspection in the Commission's Public Reference Room at 888 First Street, NE., Washington DC 20426, during regular business hours. Additionally, all comments may be viewed, printed, or downloaded remotely via the Internet through FERC's Homepage using the RIMS link. User assistance for RIMS is available at 202–208–2222, or by e-mail to *RimsMaster@ferc.gov.*

V. Document Availability

12. In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov/*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

13. From FERC's Home Page on the Internet, this information is available in the Federal Energy Regulatory Records Information System (FERRIS). The full text of this document is available on FERRIS in PDF and WordPerfect format for viewing, printing, and/or downloading. To access this document in FERRIS, type the docket number excluding the last three digits of this document in the docket number field.

14. User assistance is available for FERRIS and the FERC website during normal business hours from our Help line at (202) 208–2222 or the Public Reference Room at (202) 208–1371 Press 0, TTY (202) 208–1695. E-mail the Public Reference Room at *public.referenceroom@ferc.gov*.

List of Subjects in 18 CFR Part 2

Administrative practice and procedure; Electric power; Natural gas; Pipelines; Reporting and record keeping requirements.

By direction of the Commission. Commissioners Massey, Brownell, and Breathitt concurred with separate statements attached.

Magalie R. Salas,

Secretary.

The Commission proposes to amend part 2, Chapter I, Title 18 of the Code of Federal Regulations as follows:

PART 2—GENERAL POLICY AND INTERPRETATIONS

1. The authority citation for part 2 continues to read as follows:

Authority: 5 U.S.C. 601; 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 792–825y, 2601–2645; 42 U.S.C. 4321–4361, 7101–7352.

2. In part 2, § 2.27 is added to read as follows:

§ 2.27 Commission policy on standard of review for proposed changes to market-based power sales contracts.

(a) The Commission, by this policy statement, seeks to clarify the standard of review that will apply when reviewing proposed changes to market-based power sales contracts executed after [date that is 30 days after publication of the Final Rule in the **Federal Register**].

(b)(1) Market-based power sales contracts must contain the following provision when it is the intent of the contracting parties to bind only themselves to a ''public interest'' standard of review for that contract:

Absent the agreement of all parties to the proposed change, the standard of review for changes to [sections __ of] this contract proposed by a party to the contract shall be the ''public interest'' standard of review set forth in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332 (1956) and *Federal Power Commission* v. *Sierra Pacific Power Co.,* 350 U.S. 348 (1956) (the *''Mobile-Sierra''* doctrine).

(2) Market-based power sales contracts must contain the following provision when it is the intent of the contracting parties to bind themselves and the Commission (acting on behalf of a non-party or on its own motion) to a ''public interest'' standard of review for that contract:

Absent the agreement of all parties to the proposed change, the standard of review for

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public interest standard of review only when a *seller* proposes contractual changes.

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

[16] *Id.* at 68.

changes to [sections __ of] this contract proposed by a party, a non-party or the Federal Energy Regulatory Commission acting *sua sponte* shall be the ''public interest'' standard of review set forth in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332 (1956) and *Federal Power Commission* v. *Sierra Pacific Power Co.,* 350 U.S. 348 (1956) (the *''Mobile-Sierra''* doctrine).

(c) Any market-based power sales contract that does not contain either of the provisions in paragraph (b) of this section will be construed by the Commission as allowing a ''just and reasonable'' standard of review for any proposed changes to the contract.

Note: The following concurring commissioners' statements will not appear in the Code of Federal Regulations.

MASSEY, Commissioner, *concurring:*

I support this order's objective of clarifying standards under which contracts may be modified and allowing parties to market-based power sales contracts greater certainty in the application of the *Mobile-Sierra* doctrine. Nevertheless, I write separately because I believe the Proposed Policy Statement would have been stronger if it had recognized explicitly the potential use of market power to extract an agreement to a *Mobile-Sierra* clause in a contract. As recognized by the DC Circuit Court of Appeals in *Atlantic City Electric Company:*[1]

> As we have held, the purpose of the *Mobile-Sierra* doctrine is to preserve the benefits of the parties' bargain as reflected in the contract, assuming there was no reason to question what transpired at the contract formation stage. (Citing *Town of Norwood* v. *FERC*[2])

The *Mobile-Sierra* doctrine assumes that contracts are entered into voluntarily. Thus, a seller may not dictate, through the exercise of market power, the standard of review specified in a contract. I believe the Proposed Policy Statement should have explicitly addressed this concern. If a party to a contract would not have agreed to the insertion of the *Mobile-Sierra* clause absent the exercise of market power, then the Commission should allow that party to advocate the use of the just and reasonable standard.

With these thoughts in mind, I concur with today's order.

William L. Massey,

Commissioner.

BROWNELL, Commissioner, and BREATHITT, Commissioner, concurring:

1. We are voting in favor of this proposal for two reasons. First, we support providing the market with greater certainty concerning the Commission's review of market-based rate contracts. Second, we support changing the Commission's existing policy of not applying the *Mobile-Sierra* public interest standard when modifying market-based rate contracts on its own motion. However, we wonder if the proposal has gotten things backward on when the public interest standard is triggered.

2. Under the proposed policy, the Commission will not apply the *Mobile-Sierra* public interest standard when reviewing proposed changes to a market-based rate contract (regardless of whether the changes are sought by the seller, the buyer, a third party, or the Commission itself) unless explicit language dictating that standard is included in the contract. We would have preferred to propose a policy of applying the public interest standard unless there is explicit language in the contract that invites the Commission to apply a lower standard.

3. Competitive markets rely on investors to provide the capital needed to build generation. Investors will not participate in a market in which disgruntled buyers are allowed to break their contracts, at least not without charging a significant risk premium—a cost that will ultimately be borne by consumers. Therefore, as a policy matter, we think it might be preferable to hold everyone to the same high standard when seeking changes to market-based rate contracts, absent contract language indicating that the parties to the contract have agreed to a lower standard.

4. Moreover, we see nothing in the *Mobile-Sierra* case law that bars the Commission from adopting such a policy. Faced with balancing the sanctity of contracts against the Commission's statutory duty to review the justness and reasonableness of rates, the Supreme Court in *Mobile, Sierra,* and subsequent cases has ruled that, absent contractual language to the contrary, the Commission may not approve a seller's unilateral contract modification under § 205 of the Federal Power Act unless the modification is necessary for the public interest.[1] The case law on when the public interest standard applies in a § 206 proceeding, be it brought by the buyer, a third party, or by the Commission acting *sua sponte,* is much less clear. However, at least two courts have applied the public interest standard in § 206 proceedings notwithstanding the absence of contractual language specifying that standard.[2]

5. Therefore, we urge interested parties to comment on whether, as both a legal and a policy matter, the ''default'' in the policy statement should be reversed.

Nora Mead Brownell.

Linda Key Breathitt.

[FR Doc. 02–19915 Filed 8–7–02; 8:45 am]

BILLING CODE 6717–01–P

[1] Atlantic City Electric Company v. FERC, Docket No. 97–1097 (issued July 12, 2002), mimeo at 20.

[2] 587 F.2d 1306, 1312 (D.C. Cir. 1978).

[1] *See* United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power, 350 U.S. 348 (1956); and United Gas Pipeline Co. v. Memphis Light, Gas and Water Div., 358 U.S. 103 (1958).

[2] *See* Texaco Inc. v. FERC, 148 F.3d 1091, 1096 (D.C. Cir. 1998) (stating that prior decisions ''did not suggest that the parties' failure to explicitly foreclose the Commission's authority to replace rates [under § 206] would leave it intact. The law is quite clear: absent contractual language susceptible to the construction that the rate may be altered while the contract subsists, the *Mobile-Sierra* doctrine applies.''); Boston Edison Co. v. FERC, 233 F.3d 60, 67 (1st Cir. 2000) (''[T]he specification of a rate or formula by itself implicates *Mobile-Sierra* (unless the parties negate the implication).'').

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR parts 4 and 113

RIN 1515–AD11

Presentation of Vessel Cargo Declaration to Customs Before Cargo is Laden Aboard Vessel at Foreign Port for Transport to the United States

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to require the advance and accurate presentation of manifest information prior to lading at the foreign port and to encourage the electronic presentation of such information in advance. The document also proposes to allow a non-vessel operating common carrier (NVOCC) having an International Carrier Bond to electronically present this cargo manifest information to Customs. This information is required in advance and is urgently needed in order to enable Customs to evaluate the risk of smuggling before goods are loaded on vessels for importation into the United States, including the risk of smuggling of weapons of mass destruction through the use of oceangoing cargo containers, while, at the same time, enabling Customs to facilitate the prompt release of