No.

IN THE

Supreme Court of the United States

DYNEGY POWER MARKETING, INC., *ET AL.*,
Petitioners,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), this Court established what is now known as the *Mobile-Sierra* doctrine. Under that doctrine, the Federal Energy Regulatory Commission ("FERC") may not overturn an agreed-upon contract rate for electricity in interstate commerce unless that rate "conflict[s] with the public interest." 350 U.S. at 346. "[T]he regulatory system created by the Act," this Court later observed, "is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of those agreements only in circumstances of unequivocal public necessity." *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968). The questions presented in this case are:

1. Whether, as held by the Ninth Circuit but contrary to decisions of the First and D.C. Circuits (as well as *Mobile* and *Sierra*), the *Mobile-Sierra* public interest standard of review is inapplicable to contracts that FERC accepts for filing but does not expressly approve.

2. Whether, as held by the Ninth Circuit but contrary to decisions of the First Circuit, a complainant may avoid application of the *Mobile-Sierra* public interest standard of review by claiming that it had imperfect information about market conditions when the contract at issue was accepted for filing by the Commission.

3. Whether, as held by the Ninth Circuit but contrary to decisions of the First and D.C. Circuits, FERC must replace the *Mobile-Sierra* public interest standard for modification of fixed contract rates and use a more lenient "zone of reasonableness" standard whenever purchasers claim that contract rates are too high (as opposed to sellers claiming rates are too low).

LIST OF PARTIES AND PARTIES TO THE PROCEEDINGS BELOW

Petitioners Dynegy Power Marketing, Inc., Cabrillo Power I LLC, El Segundo Power LLC, and Long Beach Generation LLC were intervenors in the court of appeals and respondents before the Federal Energy Regulatory Commission.

The following were also intervenors in the court of appeals and respondents before the Federal Energy Regulatory Commission: Sempra Generation (formerly Sempra Energy Resources); Mirant Americas Energy Marketing, L.P.; Coral Power; PPM Energy, Inc.

Respondent Public Utilities Commission of the State of California was a petitioner in the court of appeals and a complainant before the Federal Energy Regulatory Commission.

Respondent California Electricity Oversight Board was also a petitioner in the court of appeals and a complainant before the Federal Energy Regulatory Commission.

The Federal Energy Regulatory Commission was respondent in the court of appeals.

The following were intervenors in the court of appeals: Pacific Gas and Electric Company; Nevada Power Company; Southern California Edison Company; the Department of Water and Power of the City of Los Angeles; the Public Service Department of the City of Burbank; the Public Service Department of the City of Glendale; the Water and Power Department of the City of Pasadena; and Public Utility District No. 1 of Snohomish County, Washington.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Dynegy Power Marketing, Inc., Cabrillo Power I LLC, El Segundo Power LLC, and Long Beach Generation LLC state the following:

Dynegy Power Marketing, Inc. is an indirect wholly owned subsidiary of Dynegy, Inc., a publicly held corporation. The only publicly held company that owns more than 10% of Dynegy, Inc.'s stock is Chevron U.S.A. Inc., which is an indirect wholly owned subsidiary of Chevron Corporation, a publicly held company. No publicly held company owns more than 10% of Chevron Corporation's stock. In addition, collectively, the following entities directly or indirectly own approximately 40% of Dynegy, Inc., but have no public shares outstanding: LS Associates; LSP Equity Partners; LSP Equity PIE; LSP Power Equity Partners, L.P.; LS Power Equity PIE I, L.P.; LS Power Gen Investors, L.P.; and LS Power Associates, L.P.

Cabrillo Power I LLC, El Segundo Power LLC, and Long Beach Generation LLC are each special purpose limited liability companies indirectly and wholly owned by NRG Energy, Inc., a publicly held corporation. No other publicly held company owns more than 10% of NRG Energy, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Dynegy Power Marketing, Inc., Cabrillo Power I LLC, El Segundo Power LLC, and Long Beach Generation LLC (collectively "Dynegy") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 474 F.3d 587. The order of the Federal Energy Regulatory Commission ("FERC") denying the complaint (Pet. App. 72a-204a) is reported at 103 FERC ¶ 61,354. FERC's order on rehearing (Pet. App. 17a-71a) is reported at 105 FERC ¶ 61,182.

JURISDICTION

The court of appeals entered its judgment on December 19, 2006. On March 6, 2007, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including May 3, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Power Act ("FPA"), Public Utility Act of 1935, tit. II, ch. 687, 49 Stat. 803, 838-63 (codified as amended at 16 U.S.C. §§ 791a-825r), are set forth at Pet. App. 306a-316a.

STATEMENT OF THE CASE

I. THE FEDERAL STATUTORY FRAMEWORK

A. The Federal Power Act

The FPA gives FERC "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 340 (1982); see 16 U.S.C. § 824. Section 205 of the Act requires that "[a]ll rates ... made, demanded, or received" by wholesale sellers of electricity be "just and reasonable," 16 U.S.C. § 824d(a), and bars discriminatory pricing, *id.* § 824d(b). Under § 205, sellers must file, "[u]nder such rules and regulations" and "within such time and in such form as [FERC] may designate," "schedules showing all rates and charges ... together with all contracts" for the sale of wholesale electricity in interstate commerce. *Id.* § 824d(c). Sellers must also notify FERC of proposed rate changes. See *id.* § 824d(d).

When a seller files a contract or a rate, it takes effect by operation of law absent action by FERC. See *id.* § 824d(e). FERC may, when accepting a proposed rate for filing, suspend it pending an investigation into lawfulness, and order refunds for sales that occur after the suspension ends but before it concludes its investigation. *Ibid.* FERC thus has a "passive and reactive role" under § 205. *City of Winnfield* v. *FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984) (Scalia, J.).

Section 206 defines FERC's authority to change rates. Under it, FERC can (on its own motion or on complaint) investigate the lawfulness of any existing rate. 16 U.S.C. § 824e(a). If FERC finds a rate "unjust, unreasonable, unduly discriminatory or preferential," it must "determine the just and reasonable rate ... to be thereafter observed and

... shall fix the same by order." *Ibid.* FERC may order refunds of any unjust and unreasonable charges made after the investigation or complaint is initiated. See *id.* § 824e(b).

B. The *Mobile-Sierra* Doctrine

The *Mobile-Sierra* doctrine at issue here arises from this Court's twin decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) ("*Mobile*"), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ("*Sierra*"). In those cases, sellers filed rate schedules and contracts with FERC's predecessor, the Federal Power Commission ("FPC"). In each case, the FPC accepted the contract for filing. *United Gas Pipe Line Co.*, 5 FPC 770 (1946); *Pac. Gas & Elec. Co.*, 7 FPC 832 (1948).

When market conditions changed, the sellers proposed new rate schedules to alter the contract rates. The FPC accepted the new rates for filing, but this Court overturned the orders. In *Mobile*, the Court declared that unilateral attempts to abrogate a previously-filed contract by submitting new rates for review are a "nullity." 350 U.S. at 339. The Court held that, even if the new rate would be just and reasonable, an existing contract rate may not be set aside unless it "conflict[s] with the public interest." *Id.* at 345.[1]

In *Sierra*, the Court held that the same standard applies *even if* the FPC, in accepting a new rate, finds that the prior contract rate would have been deemed unjust and unreasonable in a proceeding under FPA § 206. See 350 U.S. at 353-54. The Court explained that, if the rate is established by contract, the agency's authority is limited: "[A] contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility." *Id.* at 355. Instead, a contract rate is subject to abrogation as contrary to the "public interest" only if it "might impair

[1] While *Mobile* arose under the Natural Gas Act, key sections of that Act and the FPA are "substantially identical," 350 U.S. at 353, and the Court "cite[s] interchangeably decisions interpreting pertinent sections of the two," *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981).

the financial ability of a public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Ibid.* Because "[t]he regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies, it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity." *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968).

II. THE CONTRACTS AT ISSUE IN THIS CASE

A. California's Market Reforms and the Events of 2000 and 2001

In the 1990s, California legislators and regulators revised that State's electricity markets to move toward a competition-based structure. Investor-owned utilities ("IOUs") in California had previously met their customers' needs for power from various sources, such as using their own generation and buying under contract from other suppliers. California's new plan, however, generally required the IOUs to buy power from newly created "spot markets" involving hourly auctions administered by two new entities: the California Power Exchange ("PX") and California Independent System Operator ("ISO"). California's new regime thus required the IOUs to sell off most of their non-nuclear power plants, and largely prevented them from entering into long-term contracts with generators. California froze retail rates at then-current levels, minus 10 percent. Each IOU would exit the freeze once it recovered certain legacy costs associated with the restructured market design. See *San Diego Gas & Elec. Co.* v. *Sellers of Energy*, 93 FERC ¶ 61,121, at 61,351-52, 61,357 (2000) ("*SDG&E I*").

Because that market design restricted use of long-term power purchase contracts and divested the IOUs of much of their generation capacity, it left them "exposed . . . to the volatility of the spot market." *Id.* at 61,354. Even after price spikes in other spot markets exposed that vulner-

ability,[2] California continued to bar the IOUs from using significant longer-term contracts. *San Diego Gas & Elec. Co.* v. *Sellers of Energy*, 93 FERC ¶ 61,294, at 61,999-62,001 (2000) ("*SDG&E II*").

Between May 2000 and June 2001, the Western United States—particularly California—experienced a period of prolonged price spikes. The primary causes were increased demand throughout the West (which saw region-wide high temperatures) and supply constraints from reduced imports, outages at nuclear plants, and other factors. See *SDG&E I*, 93 FERC at 61,353, 61,357-60. Because California's restructuring plan largely foreclosed long-term contracts and erroneously assumed that spot market prices would remain stable, the IOUs subject to the rate freeze had no way to recover dramatically increased costs. See *id.* at 61,353. Thus, "[m]any of the market dysfunctions in California and exposure of California customers to high prices can be traced directly to an over reliance on spot markets" mandated by California. *Id.* at 61,359. As the IOUs' financial condition deteriorated, sellers became increasingly reluctant to sell into the spot markets because they feared that they would not be paid if the IOUs defaulted. See generally *Cal. Indep. Sys. Op. Corp.*, 94 FERC ¶ 61,132 (2001). In mid-December 2000, the U.S. Secretary of Energy responded by ordering suppliers to sell in shortage conditions. DOE Order Pursuant to Section 202(c) of the Federal Power Act (Dec. 14, 2000).

Throughout the period of price spikes, many entities—including respondents California Public Utilities Board ("CPUC") and the California Electricity Oversight Board ("CEOB")—filed complaints and other pleadings with

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[2] In 1998, Midwest spot market prices temporarily skyrocketed from an average of $25 to as high as $7,500 per megawatt-hour; there were similar price spikes in the Midwest the next year. See FERC Staff Report on the Causes of Wholesale Electric Pricing Abnormalities in the Midwest During June 1998 at vi (Sept. 22, 1998); Energy Information Administration, 1 Electric Power Annual 1999 at 3 (2000).

FERC contending that sellers were exercising market power or otherwise manipulating markets.[3]

B. FERC Seeks To Eliminate California's Excessive Reliance on Spot Markets

In December 2000, after taking comments on the mounting crisis, FERC issued an order that "strongly urge[d] the IOUs to move their load to long-term contracts of two years or more." *SDG&E II*, 93 FERC at 61,993. To that end, FERC eliminated the requirement that the IOUs buy exclusively from the PX spot market. *Id.* at 61,982.

FERC rejected the claim that "prices in the forward markets [would] be affected by" the prior "summer's spiraling spot prices and should therefore be deemed unreasonable." *Id.* at 61,994. FERC explained that suppliers had a strong incentive to avoid risk and lower prices to "benefit from the stable revenue stream of forward markets," and that FERC's reforms would reduce anticipated spot-market prices and thus any effect on forward markets. *Ibid.*

Turning to the spot market, FERC found that an imbalance in supply and demand played a "major role" in the price spikes. *Id.* at 61,984. FERC took several remedial steps, such as cost-based review of certain supplier bids. *Id.* at 61,983. FERC also found that, while sellers had an "opportunity" to exercise market power, *id.* at 61,984, there was "not sufficient evidence" to determine whether they actually had done so, *id.* at 61,998.

C. The Long-Term Contracts at Issue Here

In January 2001, California authorized its Department of Water Resources ("CDWR") to enter into long-term con-

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[3] On August 29, 2000, CEOB filed a complaint alleging market power and market manipulation; it later submitted expert reports and other evidence. See *SDG&E II*, 93 FERC at 61,986; CEOB Comments and Request for Rehearing, Dkt. Nos. EL00-95-004, *et al.*, at vii (Nov. 22, 2000). The CPUC filed similar materials. See Response and Request for Rehearing, Dkt. Nos. EL00-95-004, *et al.*, at 4 (Nov. 22, 2000).

tracts as a creditworthy purchaser on behalf of the IOUs.[4] CDWR—now effectively the sole purchaser of power for almost the entire State of California—solicited 213 offers from suppliers, including petitioner Dynegy, for long-term power contracts. Pet. App. 96a. In early March, Dynegy and CDWR entered into an almost four-year contract providing California with 1000 MW of capacity for the 2001 peak summer season, and up to 2100 MW of capacity for later periods—at prices well below prevailing spot levels. Prepared Direct Testimony of Lynn Lednicky, Dkt. Nos. EL02-60, *et al.*, at 21-24, 28-29 (Oct. 17, 2002).

Dynegy submitted its CDWR contract to FERC in early April 2001 under § 205 of the FPA, 16 U.S.C. § 824d(c).[5] Respondents CPUC and CEOB intervened but "rais[ed] no substantive issues." *Dynegy Power Mktg., Inc.*, 95 FERC ¶ 61,371, at 62,401 (2001). FERC accepted the contract for filing in June 2001, with an effective date of March 6, 2001. *Ibid.* No party sought rehearing or judicial review.

III. PROCEEDINGS BELOW

A. Proceedings at FERC

The crisis abated in mid-2001 as energy supplies rose and prices declined throughout the Western United States. Pet. App. 79a-80a. In 2002, the CPUC and CEOB filed

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[4] Proclamation, Cal. Gov. (Jan. 17, 2001). That decision followed meetings among the Secretaries of Treasury and Energy, the Chairman of the National Economic Council, the Chairman of FERC, California's Governor, California legislators and the Chairman of the CPUC, as well as executives from California utilities and large power generators, including Dynegy. The attendees sought ways for California to enter into long-term contracts, and sought a creditworthy buyer to replace the nearly insolvent IOUs. Prepared Direct Testimony of Lynn Lednicky, Dkt. Nos. EL02-60, *et al.*, at 7-9 (Oct. 17, 2002). Days later, the credit ratings of two of the IOUs were downgraded and they began defaulting on hundreds of millions of dollars owed for power purchases. *Cal. Indep. Sys. Op.*, 94 FERC at 61,507.

[5] During the relevant period, FERC did not require contracts to be filed. Instead, its market-based-rate program provided for periodic reporting and examinations of potential seller market power. Pet. App. 112a-115a.

complaints with FERC under FPA § 206 seeking to abrogate CDWR's long-term contracts, including the contract with Dynegy. Although CDWR had lauded those contracts as "fair, negotiated, hard-fought deals," *id.* at 97a—and Californians had benefited from the contracts' below spot-market prices during 2001—the CPUC and CEOB now condemned the contracts as unjust and unreasonable.

After an extensive hearing that included testimony by expert and fact witnesses, FERC denied the complaints. *Id.* at 73a-74a. FERC found that the contracts could be modified only under the "public interest" standard articulated in *Mobile-Sierra*. *Id.* at 74a. After examining the "totality of the circumstances"—including evidence from other investigations of the western energy crisis—FERC found "nothing in the record . . . to support a finding that there was market manipulation *specific to* the long-term contract negotiations," and "no evidence of unfairness, bad faith, or duress." *Id.* at 101a-102a. "[T]he contracts at issue were the result of choices voluntarily made by CDWR," *id.* at 101a, which (as the only creditworthy purchaser in the State) had "a great deal of bargaining power," *id.* at 98a.

FERC held that the CPUC and CEOB had not established any of the three public interest factors under *Mobile-Sierra* (see pp. 3-4, *supra*), or any other public interest consideration that justified relief. Pet. App. 46a-47a. After considering evidence regarding alleged manipulation and market power abuse, FERC found that any impact on forward prices from spot market dysfunctions was insufficient to warrant contract modification, particularly in light of California's failure "to demonstrate that the contracts were priced above long-run competitive prices." *Id.* at 93a. Although California argued that the contracts incorporated a "significant premium" due to the alleged influence of high spot-market prices, FERC found that "both buyers and sellers have an equal incentive to avoid the price risks innate to spot market sales and to obtain the security long-term contracts provide." *Id.* at 54a. Indeed, when the con-

tracts were negotiated, California had declared a goal of obtaining a contract portfolio with an average price of no more than $70 per megawatt-hour—a price that would not cause retail rate increases for consumers—and the contracts were consistent with that goal. *Id.* at 93a. Finally, FERC emphasized the importance of contract stability: "Competitive power markets simply cannot attract the capital needed to build adequate generating infrastructure without regulatory certainty." *Id.* at 45a. Accordingly, FERC held that the CPUC and CEOB had failed to make the public interest showing necessary to justify relief. *Id.* at 47a-48a.

B. Proceedings in the Ninth Circuit

The CPUC and CEOB petitioned for review and, more than two years after oral argument, the Ninth Circuit reversed in this case, Pet. App. 1a-16a, and a companion case decided the same day, *Public Utility District No. 1* v. *FERC*, 471 F.3d 1053 (2006) ("*PUD*") (Pet. App. 240a-305a).

1. The Ninth Circuit rejected FERC's conclusion that the *Mobile-Sierra* doctrine applies here. Instead, the Ninth Circuit imposed two new pre-conditions to that doctrine's application.[6] First, the Ninth Circuit stated that *Mobile-Sierra*'s demanding public interest test applies only if "the regulatory scheme in which the contracts are formed ... provide[s] FERC with an opportunity for effective, timely review of the contracted rates." Pet. App. 3a (quoting *PUD*, Pet. App. 250a). Second, the Ninth Circuit declared that "where ... 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." *Id.*

The Ninth Circuit ruled that those preconditions prohibited application of the *Mobile-Sierra* public interest "mode

[6] The parties to a contract can agree to a lesser standard in the contract itself. See *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103, 112-16 (1958) ("*Memphis*"). The contracts at issue here did not contain such language. Pet. App. 11a & n.8.

of review" to the market-rate contracts at issue that (unlike Dynegy's contract) had not been submitted for filing at FERC. FERC's market-based rate scheme, the court held, "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." Pet. App. 11a (quoting *PUD*, Pet. App. 294a).

The Ninth Circuit recognized that Dynegy's contract, unlike the others, had been submitted to FERC for filing, noticed for public comment, and accepted by FERC for filing. Pet. App. 11a (citing *Dynegy Power Mktg.*, 95 FERC at 62,401). But the Ninth Circuit held that *Mobile-Sierra* could not apply to the Dynegy contract, absent further inquiry, because FERC had merely *accepted* that contract for filing without *approving* the rate the parties had agreed upon. The court relied on FERC's statement that its order accepting the contract for filing "did not constitute approval" and was "without prejudice to any findings or orders which . . . may hereafter be made by the Commission." Pet. App. 11a-12a (quoting 95 FERC at 62,401). The Ninth Circuit also stated that the filing did not "permit consideration" of all relevant factors because "any challenge to the contract at the time FERC sought public comments would have been hampered by limited information: At the time Dynegy filed its contract, the full scale of market manipulation and forward market dysfunction was not nearly as fully known as it is today." *Id.* at 12a.

Finally, the Ninth Circuit held that, even if *Mobile-Sierra* applied, FERC had used "an erroneous standard for determining whether the challenged contracts affect the public interest." Pet. App. 13a (quoting *PUD*, Pet. App. 298a-299a). The Ninth Circuit noted that *Mobile* and *Sierra* had articulated a demanding standard, but distinguished those cases because they involved a seller complaining that the contract rates were too low. The concerns in cases where "the customer is complaining of a *high* rate," the

Ninth Circuit stated, "are not entirely parallel to those in a low-rate case." *PUD*, Pet. App. 301a. The "proper standard . . . in a high-rate challenge," the Ninth Circuit declared, "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." *Id.* at 303a. The Ninth Circuit thus granted the petition for review and remanded to FERC. Pet. App. 16a.

REASONS FOR GRANTING THE PETITION

For 50 years, the *Mobile-Sierra* doctrine has precluded FERC from invoking the FPA's "just and reasonable rate" requirement to abrogate interstate energy contracts to "relieve[]" a contracting party "of its improvident bargain." *Sierra*, 350 U.S. at 355. Instead, the statutory scheme "contemplates abrogation of these agreements only in circumstances of *unequivocal public necessity*." *Permian Basin*, 390 U.S. at 822 (emphasis added). The Ninth Circuit's decision eviscerates that bedrock principle and creates multiple divisions in circuit authority in the process.

First, the Ninth Circuit held that, even when FERC has accepted a contract for filing, the *Mobile-Sierra* doctrine is inapplicable if FERC has not *approved* the contract terms. By contrast, the First and D.C. Circuits have long recognized that *Mobile-Sierra* applies at least to all contracts accepted by FERC even absent approval. Indeed, the contracts at issue in *Mobile* and *Sierra* themselves—like Dynegy's contracts here—had been accepted by FERC but not approved. The Ninth Circuit thus held that the *Mobile-Sierra* doctrine would not apply even in the very decisions of this Court that established that doctrine. The Ninth Circuit also created a circuit conflict when it required FERC to disregard *Mobile-Sierra* because the "scale of spot market manipulation and . . . dysfunction" was not "as fully known" at the time of contract filing as it is today. Pet. App. 12a. A complainant's allegations of market dysfunction or manipu-

lation may be relevant when deciding whether the *Mobile-Sierra* public interest test has been satisfied. But such allegations do not prevent the *Mobile-Sierra* public interest test from applying in the first place.

Second, the Ninth Circuit radically altered the substance of "public interest" review under *Mobile* and *Sierra* by establishing separate tests for cases that challenge rates as too low and cases that challenge rates as too high. Pet. App. 14a. The First and D.C. Circuits have repeatedly rejected that approach, refusing to transform public interest review into a one-way street that favors buyers over sellers. Indeed, they have rejected the very standard the Ninth Circuit imposed here as contrary to *Mobile* and *Sierra*.

These issues are important and recurring. The Ninth Circuit's decision all but renders *Mobile-Sierra* a dead letter, destroying the certainty of contracts that the doctrine was designed to create. The result is new-found risk that will increase prices in the long run. The contracts at issue in this case alone are valued in billions of dollars. But the damage is far more pervasive. Only this Court can redress the disruption to the energy markets caused by the decisions below.

I. THE NINTH CIRCUIT'S RATIONALE FOR REJECTING *MOBILE-SIERRA*'S APPLICATION CREATES A CIRCUIT CONFLICT AND EVISCERATES *MOBILE-SIERRA*

When Congress enacted the FPA, it sought to accommodate the competing concerns of "contract stability on the one hand and public regulation on the other." *Mobile*, 350 U.S. at 344. In striking that balance, "Congress departed from the [traditional] scheme of purely tariff-based regulation" by permitting parties to set rates through privately negotiated contracts. *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 479 (2002); see *Mobile*, 350 U.S. at 338 (noting the "marked contrast" with earlier regulatory statutes). In wholesale electricity markets, contracting parties are "often sophisticated businesses enjoying presumptively equal bar-

gaining power, who c[an] be expected to negotiate a 'just and reasonable' rate as between the two of them." *Verizon*, 535 U.S. at 479. "[T]he regulatory system created by the Act" thus "is premised" on preserving "contractual agreements voluntarily devised by the regulated companies." *Permian Basin*, 390 U.S. at 822.

Correspondingly, the FPA limits FERC's authority to replace contract rates under the "just and reasonable" standard. Under the *Mobile-Sierra* doctrine, FERC cannot set aside a rate established by contract merely because FERC might believe a different rate is just and reasonable. *Sierra*, 350 U.S. at 355. Instead, FERC must find that the existing contract rate "conflict[s] with the public interest." *Mobile*, 350 U.S. at 345. That public interest standard is "much more restrictive" than the ordinary "just and reasonable" standard. *Atl. City Elec. Co.* v. *FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002); *Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667, 710 (D.C. Cir. 2000). Changing the rate must be an "unequivocal public necessity," *Permian Basin*, 390 U.S. at 822; the rate must "impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Sierra*, 350 U.S. at 355. "By preserving the integrity of contracts," the *Mobile-Sierra* doctrine—including its demanding public interest standard—"permits the stability of supply arrangements which all agree is essential to the health of the . . . industry." *Mobile*, 350 U.S. at 344.

The Ninth Circuit's decision in this case, however, declares that *Mobile-Sierra*'s public interest test does not protect filed contract rates unless FERC approves those rates, and conditions the doctrine's application on a prior determination that the contracts were "initially formed free from the influence of improper factors, such as market manipulation, the leverage of market power, or an otherwise dysfunctional market." Pet. App. 12a (quoting *PUD*, Pet. App. 296a). Those holdings conflict with decisions of the D.C.

and First Circuits; conflict with *Mobile* and *Sierra* themselves (both of which involved filed rates that were not approved); and effectively read *Mobile* and *Sierra* right out of the U.S. Reports.

A. The Ninth Circuit's Decision Refusing *Mobile-Sierra* Protection for Filed Contracts Conflicts With Decisions of the First and D.C. Circuits

Announcing a new precondition to protection of contract rates under the *Mobile-Sierra* doctrine, the Ninth Circuit held that FERC may not "apply the *Mobile-Sierra* 'public interest' mode of review" to a contract rate unless "the regulatory scheme in which the contracts are formed... provide[s] FERC with an opportunity for effective, timely review of the contracted rates." Pet. App. 10a (quoting *PUD*, Pet. App. 295a). Here, FERC (and all affected parties) had exactly such an opportunity. Dynegy filed its contract with FERC; FERC published it for public comment; respondents CPUC and CEOB intervened without raising any substantive issues; and FERC then accepted the contract for filing. See p. 7, *supra*.

The Ninth Circuit nonetheless refused to apply *Mobile-Sierra* because FERC accepted but did not "approve" the CDWR contract, citing FERC's statement that its acceptance did "not constitute *approval* of any ... rate." Pet. App. 11a-12a. While the distinction between "accepting" and "approving" a rate or contract can have significance in other contexts,[7] the First Circuit and D.C. Circuits have

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[7] In general, FERC "approves" a contract only at the close of *litigated* proceedings and "accepts" all other contracts (which constitute the vast majority of cases). FERC's regulations thus state that the "acceptance for filing of any tariff, contract or part thereof does not constitute approval . . . ." 18 C.F.R. § 154.6 (2006) (NGA); *accord id.* § 35.4 (FPA). That has been the rule since the FPA and NGA were enacted. Provisional Rules of Practice and Regulation Under the Natural Gas Act, Order No. 52, § 53.4F, 3 Fed. Reg. 1681, 1687 (July 12, 1938); Miscellaneous Amendments, Order No. 144, 13 Fed. Reg. 6,371, 6,373 (Oct. 30, 1948); Miscellaneous Amendments, Order No. 271, 28 Fed. Reg. 10,573,

held that *Mobile-Sierra* applies to contracts that are approved *or* accepted. Unless the parties have agreed otherwise by contract, once contract rates are "*accepted for filing*, FERC may subsequently order modification *only* upon finding that the modification is required by the 'public interest.'" *Me. Pub. Utils. Comm'n* v. *FERC*, 454 F.3d 278, 283-84 (D.C. Cir. 2006) (emphasis added). "[T]he *Mobile* and *Sierra* decisions," those courts recognize, "held that where the electrical utility (or natural gas company) and its customer have contracted for a particular rate, and the agency has *accepted the contract for filing*, . . . the agency's power under section 206 to alter the existing contract rate under the just and reasonable standard is . . . curtailed." *Boston Edison Co.* v. *FERC*, 233 F.3d 60, 65 (1st Cir. 2000) (citing *Sierra*, 350 U.S. at 352-55; *Mobile*, 350 U.S. at 347); see *id.* at 68 (rejecting FERC's attempt to impose new requirements "after contracts have been drafted, signed, *accepted for filing* by FERC, and implemented") (emphasis added). "[T]ackl[ing] head-on the question of *whether FERC's initial acceptance of the contract for filing* placed [the contract] within the sheltered lee of the filed rate and *Mobile-Sierra* doctrines," the First Circuit has clearly held that, under its "reading of the Federal Power Act, the applicable regulations, and the caselaw," acceptance has pre-

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10,574 (Oct. 2, 1963). FERC's clarification that acceptance is not approval ensures that contracting parties can renegotiate and file revised rates under FPA § 205. See, *e.g.*, *Mobile*, 350 U.S. at 342-43. And it ensures that the rule of *Arizona Grocery Co.* v. *Atchison, T & S.F. Ry. Co.*, 284 U.S. 370 (1932), does not prevent challenges to filed rates entirely. *Arizona Grocery* distinguished between "legal rates" that are "accepted for filing" in quasi-adjudicatory proceedings (which may be changed under certain circumstances), and "lawful rates" that are "approved" in quasi-legislative proceedings (which for the covered period cannot). See, *e.g.*, *Verizon Tel. Cos.* v. *FCC*, 269 F.3d 1098, 1108 (D.C. Cir. 2001) ("[T]he Court in *Arizona Grocery* made clear that there is an important distinction between rules resulting from quasi-adjudication and rules resulting from quasi-legislation. We are therefore bound to . . . apply this distinction.").

cisely that effect. *Boston Edison Co.* v. *FERC*, 856 F.2d 361, 371 (1st Cir. 1988) (emphasis added).

Those courts thus do not discriminate between "accepted" contracts and "approved" contracts, much less reserve *Mobile-Sierra* protection for the latter. See *id.* at 369 & n.6 (applying *Mobile-Sierra* to contract accepted for filing even though FERC regulations state that acceptance for filing "shall not constitute approval," and FERC's order expressly "reaffirmed that 'acceptance for filing does not constitute approval'"); *Potomac Elec. Power Co.* v. *FERC*, 210 F.3d 403, 409 (D.C. Cir. 2000) (describing contract subject to *Mobile-Sierra* as both "accepted" and "approved" where FERC's original order accepted contract for filing while noting that "acceptance" does not constitute "approval," see *Monongahela Power Co.*, 39 FERC ¶ 61,350, at 62,096 n.21 (1987)). That makes sense: As discussed below (pp. 17-18, *infra*), contracts take effect automatically once filed unless FERC takes affirmative action to suspend them. As a result, while courts sometimes use "accepted" and "approved" interchangeably, *e.g.*, *Me. Pub. Utils. Comm'n*, 454 F.3d at 283, most cases applying *Mobile-Sierra*—including *Mobile* and *Sierra* themselves—apply that doctrine to contracts that FERC has accepted but not approved.

Indeed, recognizing the critical role of private contracts under the FPA, the D.C. and Fifth Circuits have held that *Mobile-Sierra* applies even absent filing. See *Sam Rayburn Dam Elec. Coop.* v. *FPC*, 515 F.2d 998, 1008-1010 (D.C. Cir. 1975); *Borough of Lansdale* v. *FPC*, 494 F.2d 1104, 1113 (D.C. Cir. 1974); *Compania de Gas de Nuevo Laredo, S.A.* v. *FERC*, 606 F.2d 1024, 1028-29 (D.C. Cir. 1979); *Natural Gas Pipeline Co.* v. *Harrington*, 246 F.2d 915, 919 (5th Cir. 1957). For that reason, other parties have filed persuasive petitions for a writ of certiorari challenging the Ninth Circuit's holding that FERC's market-based rate program did not provide sufficient prior review to support *Mobile-Sierra*'s public interest standard. Dynegy supports those petitions. But given the Fifth and D.C. Circuits'

holdings that *Mobile-Sierra* applies even to *unfiled* contracts, it should follow *a fortiori* that *Mobile-Sierra* also applies to contracts that—like Dynegy's—are filed with FERC, noticed for comment, and accepted for filing.

B. The Ninth Circuit's "Approval" Rule Also Conflicts With—and Eviscerates—*Mobile* and *Sierra*

The Ninth Circuit's new "approval" requirement also conflicts with this Court's decisions in *Mobile* and *Sierra*. In those cases, the Commission orders accepting the contracts for filing included *virtually the same language* withholding approval that the Ninth Circuit invoked to preclude application of *Mobile* and *Sierra* here.[8] The Ninth Circuit's effort to confine *Mobile-Sierra* to contracts that FERC approves thus contradicts *Mobile* and *Sierra* themselves.

The Ninth Circuit's decision also defies the FPA. As this Court has held, the FPA "is premised" on preserving "contractual agreements voluntarily devised by the regulated companies." *Permian Basin*, 390 U.S. at 822. Hence, if FERC takes no action once a rate or contract is filed, the rate or contract takes effect by operation of law. See 18 U.S.C. § 824d(e). While FERC often accepts a rate or contract for filing, it need not do so. A new or changed rate is not "effected . . . by an order of the Commission but solely by virtue of the . . . company's own action." *Mobile*, 350

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[8] In this case, the Ninth Circuit relied on FERC's statement declaring that its acceptance of the Dynegy contract "does not constitute approval of any . . . rate; and such action is without prejudice to any findings or order which . . . may hereafter be made by the Commission." Pet. App. 11a-12a (quoting *Dynegy Power Mktg., Inc.*, 95 FERC ¶ 61,371 at 62,401). The agency orders this Court reviewed in *Mobile* and *Sierra* similarly provided: "Nothing contained in this order shall be construed as constituting approval by this Commission of any . . . rate . . . or . . . contract [and] is without prejudice to any findings or orders which . . . may hereafter be made by this Commission." *Pac. Gas & Elec. Co.*, 7 FPC 832 (1948); *United Gas Pipe Line Co.*, 5 FPC 770 (1946). The Ninth Circuit itself recognized that the contracts in *Mobile* and *Sierra* were "accepted" but not "approved." See *PUD*, Pet. App. 247a (noting that the contract in *Mobile* was "accepted . . . for filing").

U.S. at 342; see *Boston Edison Co.*, 856 F.2d at 369 ("As a rule, an initial rate filing takes effect automatically."); *Lansdale*, 494 F.2d at 1110 (similar). In no event, however, is FERC required to *approve* a rate or contract. As this Court explained in the related filed-rate context, "the right to a reasonable rate is the right" to the "filed rate, *whether fixed or merely accepted by the Commission*...." *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (emphasis added).

By conditioning application of the *Mobile-Sierra* public interest standard on FERC rate approval, the Ninth Circuit's decision sets the FPA's contract-based structure on its head. *Mobile-Sierra* is a limit on FERC's authority to alter private contracts. That protection has never depended on prior FERC approval (a process that would require extensive hearings and fact-finding for each of the myriad contracts within FERC's jurisdiction). For that reason, the D.C. Circuit and the Fifth Circuit have long held that *Mobile-Sierra* protects contracts even where there was an obligation to file them but the parties failed to do so. See *Sam Rayburn*, 515 F.2d at 1008-1010; *Lansdale*, 494 F.2d at 1113; *Harrington*, 246 F.2d at 919; p. 16, *supra*.

The Ninth Circuit fundamentally misconstrued FERC's caveat that acceptance is not approval. FERC does not have authority to (and has not attempted to) overrule *Mobile* and *Sierra* by adding caveats when accepting rates. FERC's caveat serves other purposes entirely—and appears in virtually every FERC rate order. See pp. 14-15 & n.7, *supra*. The Ninth Circuit's decision thus blinks the *Mobile-Sierra* doctrine out of existence almost entirely.[9]

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[9] It is no answer to suggest that FERC can simply begin "approving" contracts as required by the panel. FERC has sometimes been too quick to change contracts where the parties originally intended to preclude such action. See, *e.g.*, *Boston Edison Co.*, 233 F.3d at 68 (urging that, although FERC is "hostile to *Mobile-Sierra*," it should "stop trying to rewrite deals that the parties have already made"). *Mobile-Sierra* thus serves as a limit on FERC's authority. Giving

C. The Ninth Circuit Compounded Its Error and the Conflict By Requiring Relitigation Of The Contract As A *Precondition* To *Mobile-Sierra* Review

Having refused to apply *Mobile-Sierra* to a contract that FERC had accepted for filing, the Ninth Circuit then exacerbated that error by requiring fact-intensive litigation to determine whether *Mobile-Sierra*'s public interest test applies at all. The Ninth Circuit held that "*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." Pet. App. 12a (quoting *PUD*, Pet. App. 295a-296a) (emphasis added). That is true, the Ninth Circuit held, even absent "evidence of unfairness, bad faith, or duress," because it is "the *context*, not the conduct, of those negotiations" that matters. *PUD*, Pet. App. 297a (emphasis added). The court therefore held that Dynegy's contract was not entitled to *Mobile-Sierra* protection as a threshold matter because, "[a]t the time Dynegy filed its contract, the full scale of market manipulation and forward market dysfunction was not nearly as fully known as it is today." Pet. App. 12a.

Those holdings cannot be reconciled with *Northeast Utilities Service Co.* v. *FERC*, 993 F.2d 937 (1st Cir. 1993). In that case, the First Circuit held that FERC could not avoid *Mobile-Sierra* simply because the seller had market power:

> As for the seller's market power, reliance on this factor threatens to erode the *Mobile-Sierra* doctrine so substantially that a fuller explanation . . . is required . . . . [S]ome measure of market power could be

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FERC full control over election of the public interest standard therefore is antithetical to the doctrine. In any event, contract volume alone makes it unlikely that FERC could "approve" even a fraction of rates. And "approving" contracts might make it impossible to alter them without extensive proceedings. See pp. 14-15 & n.7, *supra*.

> present in a large number of contracts. A case-by-case inquiry into the presence and extent of market power would inject a new and potentially time-consuming element into the *Mobile-Sierra* analysis, and it is not entirely clear in any event why the Commission should protect a buyer who voluntarily enters into an agreement with a dominant seller.

Id. at 961; cf. *San Diego Gas & Elec. Co.* v. *FERC*, 904 F.2d 727, 730 (D.C. Cir. 1990) (upholding FERC's application of *Mobile-Sierra* where dramatic price changes created "buyer's remorse"; rejecting the claim that FERC "did not give enough weight to market changes between the execution of the agreement and the time for its performance").

The First Circuit thus has held that, because "a case-by-case inquiry into the presence and extent of market power would inject a new and potentially time-consuming element into the *Mobile-Sierra* analysis," and because it would "erode the *Mobile-Sierra* doctrine so substantially," FERC *cannot refuse* to apply *Sierra-Mobile* public interest review merely because the seller had market power. By contrast, in this case, the Ninth Circuit *required* FERC to *refuse* to apply *Mobile-Sierra* public interest review whenever the contract was "influence[d]" by any of a variety of factors, such as "market power" or "dysfunctional markets." Indeed, the Ninth Circuit held that mere imperfect information is sufficient to preclude *Mobile-Sierra* public interest review. A more clear-cut conflict is difficult to imagine.

The issues identified by the Ninth Circuit (market failure or manipulation) may be relevant to *whether* an effort to alter a contract rate *meets* the public interest standard under *Mobile-Sierra.* FERC could, for example, consider the impact of market manipulation as part of its public interest analysis. But such considerations are not relevant to whether the public interest test governs in the first place. To the contrary, as explained above (pp. 14-16, *supra*), the other courts of appeals have concluded that, at least once

FERC accepts a contract for filing, *any* subsequent challenge to the contract rate must proceed under the *Mobile-Sierra* public interest standard.

The Ninth Circuit's decision—to disregard *Mobile-Sierra* whenever additional information about market dysfunction and manipulation emerges after FERC accepts the rate—also contravenes settled contract and regulatory principles. For example, the filed rate doctrine bars belated attacks on the reasonableness of rates "fixed or merely accepted" by FERC under FPA § 205. *Montana-Dakota*, 341 U.S. at 251-52. Objections to a filed rate must be made on direct review "or not at all." *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, 336 (1958); see *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 578 (1981). The courts of appeals have held that even fraud by a *contractual counterparty* is insufficient to violate the sanctity of a rate filed with FERC.[10] Yet the Ninth Circuit's decision in this case would go so far as to refuse *Mobile-Sierra* protection based on alleged misconduct *by third parties*.

Here, the CPUC and CEOB had the opportunity to challenge Dynegy's contract when it was submitted to FERC. Indeed, they intervened in the FERC proceedings, but raised no substantive issues and never sought rehearing or judicial review. FERC's order accepting the Dynegy contract therefore became final and non-reviewable. See *City of Tacoma*, 357 U.S. at 336-37. The CPUC and CEOB cannot demand lower rates based "on speculation about what the Commission might have done had it been faced with [different] facts." *Ark. La.*, 453 U.S. at 578-79. Instead, they must show that the filed contract rate is inconsistent with the public interest under *Mobile-Sierra*.

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[10] Courts of appeals have "concluded that filed rate preemption applies even where the claim is that a rate was procured by fraud." *Transmission Agency of N. Cal.* v. *Sierra Pac. Power Co.*, 295 F.3d 918, 933 (9th Cir. 2002); see *Taffet* v. *S. Co.*, 967 F.2d 1483, 1494-95 (11th Cir. 1992); *S. Union Co.* v. *FERC*, 857 F.2d 812, 818 (D.C. Cir. 1988) (negligent misrepresentation).

The impact of market dysfunction or manipulation may be relevant to whether they can meet their burden. But it is not a precondition to applying *Mobile-Sierra*.

Ultimately, the Ninth Circuit's new rule is at war with the core principle of contract stability that undergirds *Mobile-Sierra* and the FPA. See pp. 12-13, *supra*. It can always be said that certain circumstances were not "nearly as fully known" in the past as they are today, but contracts would have little meaning if mere imperfect information were sufficient to defeat them.[11] Fixed-price contracts are all about allocating risks. See *Northern Ind. Pub. Serv. Co.* v. *Carbon Cty. Coal Co.*, 799 F.2d 265, 275-78 (7th Cir. 1986). The contract here was no exception. When that contract was negotiated, signed, and accepted by FERC, FERC had already found that the spot markets were dysfunctional; claims of market manipulation in those markets abounded; and California claimed that dysfunction in spot markets would affect prices in forward markets as well. See pp. 5-8, *supra*. CDWR chose, however, to hedge its risk by entering into a fixed-price contract with Dynegy nonetheless. In so doing, it successfully transferred the risk of further high prices—whether they were caused by dysfunction, scarcity, or other factors—to Dynegy, and locked in, for California, lower-than then-prevailing market prices for almost four years. The Ninth Circuit's decision undoes that allocation of risk, allowing CDWR to escape its bargain because the risks it transferred to Dynegy abated over time. That cannot be reconciled with established

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[11] As the Eighth Circuit has explained: "Contracting parties rarely, if ever, make their agreements with full knowledge of every relevant fact .... Instead, it is the office of the contract to allocate the risks of error between the parties." *Doe* v. *Nebraska*, 345 F.3d 593, 603-604 (8th Cir. 2003) (citing Rest. 2d Contracts § 154 (1981) ("[A] party bears the risk of a mistake when . . . he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient.")).

contract principles, much less the rigors of the *Mobile-Sierra* public interest test.

II. THE NINTH CIRCUIT'S RECONFIGURATION OF THE PUBLIC INTEREST TEST CONFLICTS WITH DECISIONS OF OTHER COURTS AND THIS COURT

The Ninth Circuit's decision also creates a circuit conflict on the nature of the "public interest" test under *Mobile* and *Sierra*. The Ninth Circuit held that the standards this Court articulated to govern the public interest inquiry apply only when a seller challenges rates as too low—and that a more lenient "zone of reasonableness" standard applies when a purchaser challenges a rate as too high. That holding conflicts with decisions of the First and D.C. Circuits as well as this Court's precedents.

A. The Ninth Circuit's Decision Conflicts with Decisions Of the First and D.C. Circuits

When *Mobile* and *Sierra* held that FERC may not set aside a contractually agreed-upon rate as "unjust or unreasonable" unless it "conflicts with the public interest," *Mobile*, 350 U.S. at 387, the Court identified three factors that should be considered in making that determination—whether the 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," *Sierra*, 350 U.S. at 355. Under that standard, FERC is not at liberty to relieve a contracting party "of its improvident bargain" or otherwise declare "a contract . . . to be either 'unjust' or 'unreasonable' simply because it is unprofitable . . . ." *Id.* Rather, the statute "contemplates abrogation" of contract rates "only in circumstances *of unequivocal public necessity*." *Permian Basin*, 390 U.S. at 822.

The First and D.C. Circuits have repeatedly recognized that *Mobile-Sierra*'s restrictive "public interest" standard applies to *all* efforts to alter the contract rate—whether the purchaser challenges the rate as too high or the seller challenges the rate as too low. In *Potomac Electric*, 210 F.3d at

409, for example, the D.C. Circuit affirmed FERC's application of *Mobile-Sierra* public interest review to reject a complaint that the contract rate was too high. There, the customer had "fail[ed] to provide any evidence of undue discrimination or excessive burden, other than the disparity in rates and a bald claim that [the customer's] ratepayers would derive benefit from a rate modification." *Ibid.* Conversely, in *Boston Edison*, 233 F.3d at 68, the First Circuit vacated FERC orders that applied ordinary just and reasonable review in an action challenging a contract rate as too high. The court explained that FERC must employ *Mobile-Sierra* public interest review even where, "[a]dmittedly, the rates are too high for the period in question to be just and reasonable." Thus, the "flip side of" *Mobile*'s proposition "that purchasers can make bargains which in hindsight prove improvident . . . seems logically inferable," and "such a rule brings a certain symmetry to the ratemaking process." *Boston Edison*, 856 F.2d at 372. Hence, "[e]xcept as the exigencies of the public interest demand[]," FERC is "no more at liberty to alter the . . . contract to the prejudice of the [sellers] than to do so in their favor." *Pub. Serv. Comm'n of N.Y.* v. *FPC*, 543 F.2d 757, 798 (D.C. Cir. 1974).

In this case, the Ninth Circuit adopted the opposite approach. That court impermissibly rejected FERC's reliance on the three public interest factors set forth in *Sierra*—including whether the rate would impose an "excessive burden" on consumers, 350 U.S. at 355—*and* FERC's holding that California had failed to establish any other relevant public interest factor. Pet. App. 14a. That public interest test, the Ninth Circuit held, applies only where sellers challenge rates as too low, and not to cases where purchasers challenge rates as too high. *Ibid.* (holding that FERC had "relied on the wrong legal standard" by "appl[ying] factors taken from the context of a *low-rate* challenge rather than those relevant to [a] *high-rate* challenge"). Further substituting its discretion for FERC's expertise, the Ninth Circuit then announced its own test for

so-called high-rate cases, holding that, in such cases, the interests of sellers and contract stability are subordinated, and "FERC must give *predominant weight* ... to the impact of a challenged wholesale contract on the rates paid by the consuming public." *PUD*, Pet. App. 299a (emphasis added). The Ninth Circuit thus stated that consumers need not suffer the "excessive burden" described in *Sierra*. Rather, "if a challenged contract imposes *any significant cost* on ultimate consumers because [the] wholesale rate is *too high to be within the zone of reasonableness*, that contract affects the public interest." Pet. App. 15a (quoting *PUD*, Pet. App. 301a-302a) (emphasis added).

The Ninth Circuit's new requirement that FERC apply asymmetric standards to buyers and sellers doubly conflicts with decisions of the First and D.C. Circuits. First, the First and D.C. Circuits have held that FERC is "no more at liberty to alter" contracts "to the prejudice of producers than to do so in their favor." *Pub. Serv. Comm'n of N.Y.*, 543 F.2d at 798; p. 24, *supra*. The Ninth Circuit now has established precisely the opposite rule. Second, the Ninth Circuit's new "zone of reasonableness" test imposes the very standard those courts have rejected. To say that a rate is outside "the zone of reasonableness" is simply another way of saying that it is unjust and unreasonable. Indeed, the Ninth Circuit made it clear that its standard for high-rate cases was intended to "mirror" the standard "for determination of a just and reasonable rate." *Ibid.* The First and D.C. Circuits, however, have repeatedly held that lower standard to be patently inadequate under *Mobile-Sierra*. As the First Circuit observed when overturning a FERC decision that applied just and reasonable review to abrogate a high-rate contract: "The distinction between the 'just and reasonable' and 'public interest' standards loses its meaning entirely if the Commission can modify a contract under the public interest standard where it finds the contract 'may be unjust [or] unreasonable.'" *Northeast*

Utils. Serv. Co., 993 F.2d at 961. The D.C. Circuit cases are to the same effect. See, *e.g.*, *Atl. City*, 295 F.3d at 14.[12]

B. The Ninth Circuit's Rationale Is Unpersuasive

The Ninth Circuit's rationale does not withstand scrutiny. The regulatory system administered by FERC "is premised on contractual agreements" that should be abrogated "only in circumstances of unequivocal public necessity." *Permian Basin*, 390 U.S. at 822. "[P]reserving the integrity of contracts" under that standard "permits the stability of supply arrangements which all agree is essential to the health of the . . . industry." *Mobile*, 350 U.S. at 344. The central purpose of a fixed-price contract in the energy industry is to allocate the risk of highly volatile market

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[12] The Ninth Circuit cited three cases to support its claim that *Mobile-Sierra* public interest review applies only in cases of sellers' but not buyers' remorse: *Permian Basin*, 390 U.S. at 783-84, *Northeast Utils. Serv. Co.* v. *FERC*, 55 F.3d 686, 691 (1st Cir. 1995) ("*NUSCO II*"); and *Town of Norwood* v. *FERC*, 587 F.2d 1306, 1310 (D.C. Cir. 1978). In *Permian Basin*, however, this Court approved FERC's application of the *Sierra* public interest formulation where FERC modified existing contracts to impose both maximum and minimum rates. 390 U.S. at 782-84, 820-22 & n.113. The Court thus applied the public interest test to high-rate and low-rate claims alike. *NUSCO II* nowhere undermines the First Circuit's holding that high-rate cases brought by unhappy purchasers are governed by the same test as the low-rate claims in *Sierra*. To the contrary, in a "high-rate" case it enforced the First Circuit's earlier decision holding that FERC may not "conflate[] the 'just and reasonable' and 'public interest' standards, thereby circumventing the *Mobile-Sierra* doctrine." *NUSCO II*, 55 F.3d at 688 (quoting *NUSCO*, 993 F.2d at 961). And in *Norwood*, a customer claimed that its contract rate was too high *compared* to the contract rates of other customers of the same utility. Because undue discrimination is prohibited by FPA § 205(b) and is the third public interest factor in *Sierra*, the question there was whether those tests were identical. Agreeing with the Seventh Circuit and its own decisions, the D.C. Circuit held that they are not: "It is possible," that court held, "to have undue discrimination that violates § 205(b) but does not dismantle the protection generally afforded to fixed-rate contracts under *Mobile-Sierra*." *Norwood*, 587 F.2d at 1314 n.21 (quoting *Pub. Serv. Co. of Ind., Inc.* v. *FERC*, 575 F.2d 1204, 1213 (7th Cir. 1978)).

prices. The Ninth Circuit's decision lowers the bar for buyers who bet wrong on a fixed price contract to abrogate that agreement midstream, while holding sellers to this Court's original, and exceptionally demanding, public interest standard for reforming contract prices. The Ninth Circuit nowhere attempted to reconcile its new, relaxed test for overturning contract rates claimed to be too high with the FPA's effort to achieve stability by preserving the integrity of contracts. That decision is particularly egregious here because FERC itself—the expert agency to which Congress delegated the FPA for administration—specifically invoked the need for market stability when refusing to overturn these very contracts: "[P]ower markets simply cannot attract the capital needed to build adequate generating infrastructure," FERC observed, without "regulatory certainty." Pet. App. 45a.

The Ninth Circuit's decision, moreover, rests on the unsubstantiated belief that buyers should be favored over sellers. But just two years after deciding *Mobile* and *Sierra*, this Court made it clear that the "public interest" encompasses the protection of sellers and buyers alike:

> Congress . . . was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices . . . , *but was also manifesting its concern for the legitimate interests of the . . . companies in whose financial stability the gas-consuming public has a vital stake. . . .* This concern was surely a proper one for Congress to take into account in framing the regulatory scheme . . . and we think that it did so . . . by preserving the "integrity" of private contractual arrangements . . . .

United Gas Pipe Line Co. v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113-14 (1958) (emphasis added). The Court reiterated this point in *Permian Basin*, stating that "the Commission is permitted to give weight to the consequences upon producers, and thereby upon supply" even

where "adjustments would increase the cost of natural gas to some groups of consumers." 390 U.S. at 822.[13]

This Court has previously rejected other Ninth Circuit efforts to gerrymander the Court's precedents to favor a set of claims it thought more deserving. This very Term, in *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007), the Court reviewed a Ninth Circuit decision holding that this Court's two-part test for evaluating predatory pricing claims applies only to "sell-side predatory pricing" involving seller pricing alleged to be predatorily *low*, but not to buyer bids alleged to be predatorily *high*. *Id.* at 1073-74; *Confederated Tribes of Siletz Indians of Or.* v. *Weyerhaeuser*, 411 F.3d 1030, 1037-1038 (9th Cir. 2005). There, as here, the Ninth Circuit urged that "the concerns" arising from cases involving "low prices" are different from those involving high prices. 411 F.3d at 1038; Pet. App. 14a-15a. There, this Court rejected the Ninth Circuit's effort to skew the law based on its subjective view that different standards would be more beneficial to a particular group (consumers). *Weyerhaeuser*, 127 S. Ct. at 1077-78. The Court should do likewise here.

III. THESE IMPORTANT AND RECURRING ISSUES WARRANT IMMEDIATE REVIEW

The Ninth Circuit's decision effectively abrogates a critical, bedrock doctrine that has governed the energy industry since this Court articulated it 50 years ago. The electric industry is fundamental to virtually all economic activity in this country. It also is one of the most capital-intensive industries, and is on the front end of a huge infrastructure investment cycle. Over the next 15 years, the industry will

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[13] The Ninth Circuit's decisions actually require FERC to focus on a *subset* of consumers: those consuming power purchased under the very contract at issue. Pet. App. 14a. That excludes future consumers in the same location, as well as other consumers in other locations—not to mention the interests of the seller, which may include not only its shareholders but other customers that may be adversely affected, and the industry as a whole.

need to invest an estimated $400 billion in new power plants and even more in other infrastructure. CERA, California Power Crisis Aftershock: The Potential Modification of Western Power Contracts, at 13-15 (2007), *available at* http://www2.cera.com/westernpowercontracts ("CERA Report"); Energy Policy Act of 2005, Pub. L. 109-58, § 1241, 119 Stat. 594, 961-62 (creating FPA § 219, 16 U.S.C. § 824s). If the Nation's need for power cannot be met, all economic activity will suffer.

Before the Ninth Circuit's decision, that massive investment could proceed solidly on the contractual certainty provided by the *Mobile-Sierra* doctrine. "By preserving the integrity of contracts," the doctrine "permits the stability of supply arrangements which all agree is essential to the health of the [energy] industry." *Mobile*, 350 U.S. at 344. With the advent of competitive bulk power markets, *Mobile-Sierra* has become even more critical. "The certainty and stability which stems from contract performance and enforcement is essential to an orderly bulk power market. If the integrity of contracts is undermined, business would be transacted without legally enforceable assurances and we believe that the market, the industry and ultimately the consumer would suffer." *San Diego Gas & Elec. Co.*, 904 F.2d at 730.

The impact of the Ninth Circuit's decision on *Mobile-Sierra*—and consequently on industry health—is enormous. The Ninth Circuit held that *Mobile-Sierra* does not apply to contracts that FERC accepts for filing because FERC has not approved them. But that is true of virtually every contract, including the contracts at issue in *Mobile* and *Sierra*. And the Ninth Circuit's "one way street" view of the public interest standard—under which purchasers can challenge rates more readily than sellers—threatens serious destabilizing effects. It creates additional risk for sellers and undermines the stability FERC itself invoked when refusing to upset the contract rates at issue here. In the

long run, that increased risk will cause increased prices. CERA Report at 22.

The disuniformity in Circuit law created by the Ninth Circuit's decision is particularly intolerable. FERC's orders may always be appealed to the D.C. Circuit, to the Circuit where the complainant resides, or to the Circuit in which the transaction occurred. 16 U.S.C. § 825*l*(b). As a result, the sharp conflict between the Ninth Circuit's approach on the one hand and that of the First and D.C. Circuits on the other will make it nearly impossible for FERC to gauge the proper standard. More important, it means that the outcome of any litigation will largely depend on the happenstance of where that challenge is brought or—in the case of challenges in multiple jurisdictions—where it ends up. See 28 U.S.C. § 2112(a)(3). The Court should grant the petition to restore uniformity to Circuit law and restore the certainty and predictability of contract enforcement in this important area of law.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court may wish to consider summary reversal.

Respectfully submitted.

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