Supreme Court, U.S.
FILED
DEC 22 2008
OFFICE OF THE CLERK

No. 08-674

In the Supreme Court of the United States

NRG POWER MARKETING, LLC, ET AL.,
PETITIONERS,

v.

MAINE PUBLIC UTILITIES COMMISSION, ET AL.,
RESPONDENTS.

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

BRIEF OF THE ELECTRIC POWER SUPPLY ASSOCIATION, COLORADO INDEPENDENT ENERGY ASSOCIATION, ELECTRIC POWER GENERATION ASSOCIATION, INDEPENDENT POWER PRODUCERS OF NEW YORK, NATURAL GAS SUPPLY ASSOCIATION, NEW ENGLAND POWER GENERATORS ASSOCIATION, INC., NORTHWEST & INTERMOUNTAIN POWER PRODUCERS COALITION, AND WESTERN POWER TRADING FORUM AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

DAVID G. TEWKSBURY
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

ASHLEY C. PARRISH
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Counsel for the Electric Power Supply Association

December 22, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Additional counsel:

NICHOLAS G. MULLER
Executive Director, Attorney
COLORADO
INDEPENDENT
ENERGY ASSOCIATION
475 17th Street, Ste. 940
Denver, CO 90202
(303) 297-1970

Counsel for the Colorado Independent Energy Association

TERRANCE J. FITZPATRICK
General Counsel
ELECTRIC
POWER GENERATION
ASSOCIATION
800 N. Third Street, Ste. 303
Harrisburg, PA 17102
(717) 909-3742

Counsel for the Electric Power Generation Association

CHRISTOPHER P. SHERMAN
General Counsel
NEW ENGLAND
POWER GENERATORS
ASSOCIATION, INC.
141 Tremont Street,
Sixth Floor
Boston, MA 02111
(617) 902-2354

Counsel for the New England Power Generators Association, Inc.

DAVID B. JOHNSON
READ & LANIADO, LLP
25 Eagle Street
Albany, NY 12207
(518) 465-9313

Counsel for the Independent Power Producers of New York

DAVID G. TEWKSBURY
KING & SPALDING LLP
1700 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 737-0500

Counsel for the Natural Gas Supply Association

DAVID G. TEWKSBURY
KING & SPALDING LLP
1700 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 737-0500

Counsel for the Northwest & Intermountain Power Producers Coalition

DANIEL W. DOUGLASS
DOUGLASS & LIDDELL
21700 Oxnard Street
Woodland Hill, CA 91367
(818) 961-3001

Counsel for the Western Power Trading Forum

QUESTION PRESENTED

This Court's decision last Term in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733 (2008) reaffirmed that, under the *Mobile-Sierra* doctrine, the Federal Energy Regulatory Commission "must presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement imposed by law," and that the "presumption may be overcome only if" the Commission "concludes that the contract seriously harms the public interest." *Id.* at 2737. In conflict with *Morgan Stanley* and decisions of other courts of appeals, the D.C. Circuit below held that "when a rate challenge is brought by a non-contracting third party, the *Mobile-Sierra* doctrine simply does not apply." Pet. App. 22a.

The question presented is:

Whether the Commission's authority to abrogate freely negotiated wholesale power contracts is constrained by the *Mobile-Sierra* doctrine when a contract rate is challenged by a non-contracting third party.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION 4

REASONS FOR GRANTING THE WRIT 5

A. The Court Should Grant Review For The Same Reasons It Granted Review In *Morgan Stanley* 5

B. The Decision Below Conflicts With *Morgan Stanley*. 12

C. The Decision Below Conflicts With Decisions From Other Courts Of Appeals. 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Boston Edison Co. v. FERC,
233 F.3d 60 (1st Cir. 2000) 19

California v. FERC,
495 U.S. 490 (1990) 17

EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002) 12

Federal Power Comm'n v. Sierra Pac. Power Co.,
350 U.S. 348 (1956) .... passim

In re Permian Basin Area Rate Cases,
390 U.S. 747 (1968) 6, 7, 19

Local 926 Int'l Union of Operating Eng'rs, AFL-CIO v. Jones,
460 U.S. 669 (1983) 11

Miree v. DeKalb County, Ga.,
433 U.S. 25 (1977) 8

Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County,
128 S. Ct. 2733 (2008) .... passim

Northeast Utils. Serv. Co. v. FERC,
55 F.3d 686 (1st Cir. 1995) 17, 18

Northeast Utils. Serv. Co. v. FERC,
993 F.2d 937 (1st Cir. 1993) 17

United Gas Pipe Line Co. v. Memphis Light, Gas & Elec. Div.,
358 U.S. 103 (1958) 14

United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956) .... passim

Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467 (2002) 13

Administrative Cases

Devon Power LLC, 115 FERC ¶ 61,340 (2006) 16

Duke Energy Carolinas, LLC, 123 FERC ¶ 61,201 (2008) 19

Nevada Power Co. v. Duke Energy Trading & Mktg., LLC, 99 FERC ¶ 61,047 (2002) 5

Northeast Utils. Serv. Co., 50 FERC ¶ 61,266 (1990) 18

Panhandle Complainants v. Southwest Gas Storage Co., 117 FERC ¶ 61,318 (2006) 9

Statutes and Regulations

16 U.S.C. § 825e..8

18 C.F.R. § 385.206..9

Other Authorities

Bress, Richard P., et al., *A Deal Is Still A Deal: Morgan Stanley Capital Group v. Public Util. Dist. No. 1*, 2008 Cato Supreme Court Review 285..............11

CERA Advisory Services,
California Power Crisis Aftershock: The Potential Modification of Western Power Contracts, (Apr. 2007), available at http://www2.cera.com/westernpowercontracts 7, 11

The Brattle Group,
Transforming America's Power Industry: The Investment Challenge, (Apr. 21, 2008), available at http://www.edisonfoundation.net 11

The Electric Energy Market Competition Task Force,
Report to Congress on Competition in Wholesale and Retail Markets for Electric Energy (Apr. 2007) 8

INTEREST OF *AMICI CURIAE*[1]

Amici and their members represent a diverse array of participants in the Nation's electric and natural gas industries that are directly affected by the issues raised in this case. *Amici*'s members have made long-term financial commitments, involving hundreds of billions of dollars, in reliance on this Court's settled authorities protecting the integrity of privately negotiated wholesale power contracts. Because the D.C. Circuit's decision undoes much of this Court's work in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733 (2008), and purports to grant the Federal Energy Regulatory Commission never-before-recognized authority to abrogate contracts challenged by non-contracting third parties, *amici* are concerned that, if left standing, the decision below will destabilize the Nation's power markets, discourage much-needed investment, and ultimately lead to higher costs for consumers.

***The Electric Power Supply Association* ("EPSA").** EPSA is a national trade association representing competitive electric power suppliers, including independent power producers, merchant

---

[1] The parties have consented to the filing of this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. More than ten days prior to the due date, *amici* provided counsel of record for all parties with notice of their intent to file this brief.

generators, and power marketers. EPSA's mission is to promote legislative and regulatory policies encouraging a competitive market for electricity.

***Colorado Independent Energy Association* ("CIEA").** CIEA is a trade association of competitive independent power producers operating in Colorado. Its 34 members and 12 associate members are an integral part of Colorado's energy industry, producing electricity with clean, efficient natural gas-fired cogeneration and renewable technologies.

***Electric Power Generation Association* ("EPGA").** EPGA is a regional trade association of major electric generating companies that supply wholesale power in Pennsylvania and surrounding states. Its member companies collectively own and operate more than 141,000 megawatts of generating capacity, approximately half of which is located in the mid-Atlantic region.

***Independent Power Producers of New York* ("IPPNY").** IPPNY is a not for profit trade association representing more than 100 independent power producers involved in the development of generation, marketing, and sale of electric power and natural gas in the state of New York.

***Natural Gas Supply Association* ("NGSA").** NGSA is a trade association that represents U.S.-based producers and marketers of natural gas on issues that broadly affect the natural gas industry. NGSA is the voice of suppliers who find, sell, transport, and deliver approximately 30 percent of the United States' natural gas supply. Established

in 1965, NGSA encourages the use of natural gas within a balanced national energy policy and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. consumers.

New England Power Generators Association, Inc. **("NEPGA").** NEPGA is a trade association representing electric generating companies in New England. Its member companies account for approximately 26,000 megawatts of generating capacity in the region.

Northwest & Intermountain Power Producers Coalition **("NIPPC").** NIPPC represents developers, owners, and operators of non utility power plants in the Pacific Northwest and Intermountain region.

Western Power Trading Forum **("WPTF").** WPTF is a California non-profit, mutual benefit corporation. It is a broadly based membership organization dedicated to enhancing competition in Western electric markets in order to reduce the cost of electricity to consumers throughout the region while maintaining the current high level of system reliability. WPTF's actions are focused on supporting development of competitive electricity markets throughout the region and developing uniform operating rules to facilitate transactions among market participants.

INTRODUCTION

This Court has long recognized, and re-affirmed just last summer, that the Commission has no authority to modify voluntarily negotiated, fixed-price bulk energy contracts, except in "extraordinary circumstances" where revising contract terms is "necessary in the public interest." *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956); *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 128 S. Ct. 2733, 2737 (2008). This constraint on Commission authority serves a "reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other." *Mobile*, 350 U.S. at 344. It also promotes a flexible, stable, and reliable regulatory regime.

Regulatory certainty, including the assurance that contracts for Commission-jurisdictional services are protected from modification, has played a central role in the development of the Nation's bulk power markets. The ability to enter into long-term contracts has provided market participants with an essential tool for hedging against future market fluctuations. In the Commission's expert judgment, "[c]ompetitive power markets simply cannot attract the capital needed to build adequate generating infrastructure without regulatory certainty, including certainty that the Commission will not modify market-based contracts unless there are extraordinary circumstances." *Nevada Power Co. v. Duke Energy*

Trading & Mktg., LLC, 99 FERC ¶ 61,047, at 61,190 (2002).

The D.C. Circuit's decision below—which fashions a new test for modifying contracts challenged by non-contracting third parties—threatens to upend the balance struck by Congress in the Federal Power Act and affirmed by this Court in *Morgan Stanley*. If allowed to stand, the decision below risks destabilizing the Nation's wholesale energy markets and infecting those markets with legal uncertainty at a particularly critical juncture.

REASONS FOR GRANTING THE WRIT

The Court should grant review for the same reasons it granted review in *Morgan Stanley*. This Court's intervention is also needed to preserve the practical impact of its judgment in *Morgan Stanley*; to correct the D.C. Circuit's unwise judicial policymaking in an industry of central national importance; and to resolve the gap between the D.C. Circuit's decision and decisions of other courts of appeals. If not corrected, the decision below threatens to unsettle contract stability and inhibit much-needed investment in the Nation's bulk power markets.

A. The Court Should Grant Review For The Same Reasons It Granted Review In *Morgan Stanley*.

Over a half-century ago, in two unanimous decisions referred to collectively as *Mobile-Sierra*, this Court held that the Federal Power Act preserves the integrity of private contracts. *See*

United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 344 (1956); *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956). The decisions recognize that when parties freely negotiate a wholesale energy contract, the agreed-on rates are presumptively "just and reasonable," as required under the Federal Power Act, and the contract may not be abrogated except in "extraordinary circumstances" of "unequivocal public necessity." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968).

Last Term, this Court affirmed the *Mobile-Sierra* doctrine's continuing vitality in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733 (2008). Reversing Ninth Circuit decisions that threatened "disfigurement of the venerable" doctrine, *id.* at 2747, the Court reiterated that a "rate set out in a freely negotiated wholesale-energy contract" is presumed to satisfy "the 'just and reasonable' requirement imposed by law." *Id.* at 2737. Holding that the Commission "may abrogate a valid contract only if it harms the public interest," *id.* at 2747, the Court emphasized that contract stability "ultimately benefits" the broader public because "uncertainties regarding rate stability and contract sanctity can have a chilling effect on investment and a seller's willingness to enter into long-term contracts," which "in the long run" will "harm consumers." *Id.* at 2749 (quotation and citation omitted). Accordingly, because "[t]he regulatory system created" by the Federal Power 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." *Id.* at 2739 (quoting *Permian*, 350 U.S. at 822).

Morgan Stanley should have prompted the D.C. Circuit to revisit its decision carving out a substantial new exception to the *Mobile-Sierra* doctrine. Instead, the court of appeals held that *Mobile-Sierra* is designed merely to "preserve the terms of the bargain as between the contracting parties" and "simply does *not* apply" when a "rate challenge is brought by a non-contracting third party." Pet. App. 22a (emphasis added). In the D.C. Circuit's view, *Mobile-Sierra* serves the limited purpose of "mak[ing] it more difficult for either party to shirk its contractual obligations," but has no application when a contract is challenged by a non-party. *Id.* (emphasis in original).

If left uncorrected, the D.C. Circuit's decision will have dramatic, far-reaching consequences for the Nation's energy markets. Like the Ninth Circuit decisions in *Morgan Stanley*, the decision below threatens contract stability and will inhibit much-needed investment in energy infrastructure. In the energy industry, contract stability is crucial because investors are loath to invest in highly volatile, hard-to-predict power markets unless they can rely on the sanctity of long-term, fixed-price contracts. *See* CERA Advisory Services, *California Power Crisis Aftershock: The Potential Modification of Western Power Contracts*, at 5-6 (Apr. 2007) ("*Aftershock*"), available at http://www2.cera.com/westernpowercontracts; The Electric Energy Market Competition Task Force, *Report to Congress*

on Competition in Wholesale and Retail Markets for Electric Energy, at 4 (Apr. 2007) (long-term contracts are "critical in obtaining financing for new generation and ensuring adequate supplies for retail loads at predictable prices"). From an investor's perspective, it makes no difference whether a contract is subject to challenge by a disgruntled contracting party or by a "non-contracting third party." Pet. App. 22a. The D.C. Circuit's newly fashioned exception to *Mobile-Sierra* thus casts a pall of uncertainty over future investments in the Nation's bulk power markets, calling into question the very rules and practices governing energy transactions that *Morgan Stanley* reaffirmed.

It bears emphasis that, in contrast to standing requirements that might apply to disputes involving ordinary commercial contracts, *cf. Miree v. DeKalb County, Ga.*, 433 U.S. 25 (1977) (state law applies to determine whether third party beneficiaries enjoy standing), the Federal Power Act's permissive standing requirements allow virtually anyone to file a complaint with the Commission challenging an energy contract as unjust, unreasonable, or unduly discriminatory. *See* 16 U.S.C. § 825e (2000 & Supp. V 2005) ("[a]ny person ... complaining of anything done ... by any ... public utility ... may apply to the Commission by petition"). As the Commission's regulations state, "*[a]ny person* may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any alleged wrong over

which the Commission may have jurisdiction." 18 C.F.R. § 385.206(a) (2008) (emphasis added); *see also Panhandle Complainants v. Southwest Gas Storage Co.*, 117 FERC ¶ 61,318 at ¶ 21 & n.22 (2006) (rejecting challenges to parties' standing). Those permissive rules reflect the reality that the regulatory regime simply does not admit of the strict dichotomy between contracting and non-contracting parties assumed by the court below.

The upshot is that third parties routinely file complaints with the Commission seeking to re-write energy contracts on grounds that the contract rates are either too high or too low and, therefore, not "just and reasonable." For example, last year, a consumer group filed complaints challenging a series of freely negotiated contracts between utilities and energy suppliers in California. *See* Section 206 Compl., FERC Dkt. No. EL07-50-000 (Mar. 26, 2007) (challenging contract between Southern California Edison Co. and Blythe Energy, LLC); Section 206 Compl., FERC Dkt. No. EL7-40-000 (Mar. 2, 2007) (challenging contract between Pacific Gas & Electric Co. and Metcalf Energy Center and Los Medanos Energy Center, LLC); Section 206 Compl., FERC Dkt. No. EL07-37-000 (Feb. 22, 2007), available at http://elibrary.ferc.gov. Similarly, the Illinois Attorney General filed a complaint seeking to abrogate freely negotiated contracts between Illinois utilities and 16 wholesale suppliers that she alleged would lead to excessive charges on Illinois consumers. *See Amended Compl. by the People of the State of Illinois, Ex Rel. Illinois Attorney General Lisa Madigan*, Docket No.

EL07-47-000 (Mar. 16, 2007), available at http://elibrary.ferc.gov.

Because long-term wholesale energy contracts affect (either directly or indirectly) not only the sophisticated parties who negotiate them but also numerous third parties, there is no shortage of state regulators, consumer advocacy groups, retail consumers, industrial buyers, upstream suppliers, and other interested stakeholders available to take advantage of the Commission's permissive rules for challenging contract rates. *See* Pet. 21. Indeed, in *Morgan Stanley* itself, a long line of third parties stood ready to challenge the parties' contracts as imposing an "excessive burden." *Morgan Stanley*, 128 S. Ct. at 2747 (rejecting the Ninth Circuit's "excessive burden" exception to *Mobile-Sierra*). (As Petitioners note, one of the respondents in *Morgan Stanley*, the Office of the Nevada Attorney General, was not a party to the underlying contracts. *See* Pet. 21.) Allowing those suits to proceed would just as surely undermine "contract stability as between the contracting parties," Pet. App. 24a, as would permitting a party to complain about contract rates to which it voluntarily agreed. *Morgan Stanley*, 128 S. Ct. at 2747. In either instance, changing the contract rate, absent a compelling public interest, would "threaten to inject more volatility into the electricity market by undermining a key source of stability." *Id.* at 2749.

The timing of the D.C. Circuit's assault on *Mobile-Sierra* could not be more inauspicious. The power sector requires hundreds of billions of dollars in investment in order to meet growing demand and to address environmental concerns. *See* The

Brattle Group, *Transforming America's Power Industry: The Investment Challenge*, at 4 (Apr. 21, 2008) (estimating that, even with substantial efficiency improvements, the U.S. power sector will require 150,000 MW of new and replacement generation plants at an approximate cost of $560 billion), available at http://www.Edisonfoundation.net; *Aftershock*, at 16 (increasing demand will require at least "$400 billion in investment in new and existing power plants"). At the same time, well-documented turmoil in capital and credit markets has increased the cost and difficulty of attracting investment. It is precisely in these circumstances where "the integrity of contractual relations is an interest of paramount importance." *Local 926 Int'l Union of Operating Eng'rs, AFL-CIO v. Jones*, 460 U.S. 669, 687 n.4 (1983). As economists have long recognized, contract stability is important in promoting economic development, "especially with respect to economic regulation of capital-intensive industries, such as the electric and natural gas industries." Richard P. Bress, et al., *A Deal Is Still A Deal: Morgan Stanley Capital Group v. Public Util. Dist. No. 1*, 2008 Cato Supreme Court Review 285, 285-86 n.2.

At bottom, then, this Court's review is needed for the same reasons it was needed in *Morgan Stanley*—to prevent lasting damage to the Nation's wholesale energy markets. If not corrected, the D.C. Circuit's new exception will gut *Morgan Stanley*, effectively consigning that decision and the *Mobile-Sierra* doctrine to a footnote in the regulation of the energy industry. It also will upend the stability of long-term contracts on which

this Nation's energy markets depend. The lower court's disruptive decision should not be allowed to stand.

B. The Decision Below Conflicts With *Morgan Stanley.*

The decision below merits this Court's review for all the same reasons review was appropriate in *Morgan Stanley,* plus one additional, new reason: the Court should grant *certiorari* to vindicate its *Morgan Stanley* decision. As Petitioners' explain in more detail, the lower court's decision cannot be reconciled with *Morgan Stanley* and the foundational energy law principles it recognizes.

The decision below rests on the D.C. Circuit's view that *Mobile-Sierra* is a narrow "exception" to the statutory requirement that rates be "just and reasonable." The court of appeals thus reasoned that *Mobile-Sierra* "carves out an exception" to the rule that contract rates must satisfy the "'just and reasonable' standard" required under the Federal Power Act. Pet. App. 20a. The D.C. Circuit concluded that *Mobile-Sierra* does not apply when a contract rate is challenged by a non-contracting third party, because applying *Mobile-Sierra* would deprive that party of its "statutory right to have rate challenges adjudicated under the 'just and reasonable' standard." *Id.* 22a. Relying on a case interpreting the Federal Arbitration Act, the D.C. Circuit noted that "'[i]t goes without saying that a contract cannot bind a nonparty.'" *Id.* (quoting *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002)).

That reasoning is deeply flawed. A contractually negotiated rate is not just an ordinary contract. Precisely because the contract rate remains a "rate," third parties have standing to challenge it under a much more permissive standard than would apply in an ordinary contract action.

Significantly, the Court in *Morgan Stanley* rejected the notion that contractually negotiated rates were a deviation from just-and-reasonable rate principles, giving no weight to "the obviously indefensible proposition that a standard different from the statutory just-and-reasonable standard applies to contract rates." *Morgan Stanley*, 128 S. Ct. at 2740. To the contrary, because wholesale energy contracts are typically negotiated between sophisticated entities enjoying equal bargaining power, the negotiated rate is expected to be, and by definition constitutes, a "just and reasonable" rate. *Id.* at 2746 (citing *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 479 (2002)). The *Mobile-Sierra* doctrine is not, as the D.C. Circuit assumed, an "exception" to the just-and-reasonable standard; instead, it is a "definition of what it means for a rate to satisfy" that standard in the contract context. *Id.* In short, *Mobile-Sierra*'s "'public interest standard' refers to the differing *application*" of the "just-and-reasonable standard to contract rates." *Id.* (emphasis in original)

Moreover, applying the *Mobile-Sierra* doctrine to contract rates, regardless of who may challenge them, does *not* deprive any party of their statutory rights. The Federal Power Act's "just and reasonable" standard is properly viewed not as a

right granted to parties, but as a constraint on the Commission's authority, framing the boundaries of Commission action. The Court has thus recognized that the Federal Power Act ensures that when a contract is freely negotiated between sophisticated parties, the contract rate is presumed to satisfy the statutory standard, except in "extraordinary circumstances where the public will be severely harmed." *Morgan Stanley*, 128 S. Ct. at 2749. Contrary to the conclusions reached by the court below, a just and reasonable contract rate does not lose that quality merely because it is challenged by a non-contracting third party.

In addition to taking an approach at odds with *Morgan Stanley*, the D.C. Circuit's decision cannot be reconciled with the Federal Power Act's settled policies favoring freedom of contract. As *Morgan Stanley* recognized, contracting parties are free to select by contract the standard of review to be applied by the Commission. Absent any indication to the contrary, *Mobile-Sierra*'s "default rule" will apply, ensuring the agreed-on contract rate is protected unless it "seriously harms the consuming public." *Id.* at 2746. Alternatively, however, the contracting parties may opt out of the *Mobile-Sierra* presumption by including in their contracts what is known as a *Memphis* clause, after this Court's decision in *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958). *See Morgan Stanley*, 128 S. Ct. at 2739. Finally, as a third alternative, the contracting parties may agree on a "middle option" in the form of a contract "that does not allow the seller to supersede the contract rate by filing a new rate,"

but does "permit the Commission to set aside the contract rate if it results in an unfair rate of return, not just if it violates the public interest." *Id.*

This menu of regulatory options makes no sense if, as the D.C. Circuit held, the *Mobile-Sierra* doctrine "does not apply" when a contract rate is challenged by a "non-contracting third party." Pet. App. 22a. To the contrary, under the D.C. Circuit's approach, the "*Mobile-Sierra* presumption" will cease to be the "default rule." *Morgan Stanley*, 128 S. Ct. at 2746. Instead, as a practical matter, because non-contracting third parties can be expected to challenge virtually any contract under the Federal Power Act, every contract would become presumptively subject to the Commission's ongoing authority to order modifications whenever a rate of return is arguably too high or too low. Nor would there be any reason for a seller to negotiate for the "middle option" if review under the ordinary just and reasonable standard could be obtained through the simple expedient of finding a non-contracting third party to challenge the contract rate. In the end, then, if allowed to stand, the D.C. Circuit's decision will strip contracting parties' of their heretofore "broad authority" to structure their agreements as they see fit, nullifying the freedom of contract promoted by "decisions of this Court and the Courts of Appeals" for "the past 50 years." *Morgan Stanley*, 128 S. Ct. at 2739.

C. The Decision Below Conflicts With Decisions From Other Courts Of Appeals.

By inventing a new test that creates a gaping exception to *Mobile-Sierra* whenever a non-contracting third party challenges a contract, the D.C. Circuit's decision has opened a conflict with decisions of other courts of appeals. The Court should grant review to close this conflict and restore the settled understandings of the Federal Power Act by which market participants, like *amici*'s members, have negotiated contracts and ordered their affairs.

In the proceedings below, the Commission correctly observed that "there is no Commission or court precedent that supports a finding that a non-signatory may unilaterally seek changes to a *Mobile-Sierra* 'public interest' contract" under a different, broader notion of "the 'just and reasonable' standard of review." Pet. App. 23a (citing *Devon Power LLC,* 115 FERC ¶ 61,340 at 62,335 (2006)). Brushing aside this precedent, the D.C. Circuit criticized the Commission for applying an "illegal standard." *Id.* According to the D.C. Circuit, "it could just as easily be said that there is no 'court precedent' that supports altering third parties' statutory rights based on a contract that they refuse to sign." *Id.* That blithe assertion misses the point.

The Commission has consistently held that the *Mobile-Sierra* doctrine applies equally to party and non-party challenges to contract rates. *See* Pet. App. 23a (acknowledging that the Commission's

policy in this regard has been consistent since 2002). Although these decisions have not been tested on review, the Commission's consistent approach is powerful evidence of what had been thought to be settled rules and understandings governing wholesale power transactions. *See California v. FERC*, 495 U.S. 490, 499 (1990) (recognizing the respect "this Court must accord to longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes"). The fact that no court has expressly addressed the precise issue does not mean the D.C. Circuit was painting on a blank canvas when it considered *Mobile-Sierra*'s applicability to non-contracting third parties.

The decision below is at odds with the First Circuit's decisions in two cases concerning Commission-ordered modifications to a power contract between a supplier and its prospective affiliate. *See Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937 (1st Cir. 1993) ("*NUSCO I*"); *Northeast Utils. Serv. Co. v. FERC*, 55 F.3d 686 (1st Cir. 1995) ("*NUSCO II*"). In *NUSCO I*, the First Circuit held that the Commission improperly "circumvent[ed] the *Mobile-Sierra* doctrine," because it ordered contract modifications without first determining whether the modifications were compelled by the public interest. *NUSCO I*, 993 F.2d at 961. Given the relationship between the two parties, whose interests were aligned, the Commission was not resolving a challenge brought by one of the parties to the contract, but instead responding to a protest filed by a non-contracting third party. *See Northeast Utils. Serv. Co.*, 50

FERC ¶ 61,266 at 61,831-32 (1990) (noting the protest filed by the Massachusetts Wholesale Electric Company). In *NUSCO II*, the First Circuit affirmed the Commission's order on remand, holding that in further proceedings the Commission had properly applied the *Mobile-Sierra* doctrine.

Although the Commission in the *NUSCO* proceedings ordered the contract modified on its own initiative, without relying on arguments pressed by the third party, the fact remains that the First Circuit recognized that *Mobile-Sierra* served principally as a constraint on the *Commission*'s authority to modify contract rates. The statutory standard was not a "right" to be granted to, or waived by, the non-contracting party, but a limit on the agency's ability to interfere with contracts. *Cf.* Pet. App. 23a n.9 (holding that Commission oversight "does not justify the derogation of the statutory right to 'just and reasonable' review of rates"). The First Circuit's *NUSCO* decisions are thus squarely in conflict with the D.C. Circuit's decision below.

The *NUSCO* decisions also spotlight how badly the D.C. Circuit has misapprehended *Mobile-Sierra*'s effect on the Commission's ability to protect the interests of third parties. In *NUSCO*, the Commission required contract modifications because the "negotiated" rates, set by parties whose interests were closely aligned, would inure to the detriment of "non-parties to the contract." *NUSCO II*, 55 F.3d at 692. Nothing prevented the Commission from taking appropriate action to order the contract modified. As this Court recognized over fifty years ago, the *Mobile-Sierra*

presumption "in no way impairs the regulatory powers of the Commission" because jurisdictional "contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest." *Mobile*, 350 U.S. at 344. The Commission has "plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests." *Permian*, 390 U.S. at 784.

Finally, as Petitioners emphasize, in addition to creating a split among the Circuits, the decision below has "created disarray" in the industry, with the Commission adopting a new, nationwide policy that contracts subject to *Mobile-Sierra* will impose on "non-contracting third parties the most stringent standard permissible under applicable law." Pet. 22 (citing *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201, at 62,290 n.10 (2008)). Any change in legal regimes that acts, as does the D.C. Circuit's decision, to replace settled rules with this kind of vague administrative directive necessarily opens the door to arbitrary agency decisionmaking.

Having now "bargain[ed] in the shadow" of *Mobile-Sierra* for more than five decades, *Boston Edison Co. v. FERC*, 233 F.3d 60, 66 (1st Cir. 2000), energy market participants have ordered their affairs on the assumption that the Commission will modify contracts only in accordance with *Mobile-Sierra*'s well-defined understanding of "extraordinary circumstances" of "unequivocal public necessity." *Permian*, 390 U.S. at 820-22. Upsetting those expectations not only engenders uncertainty, it invites an interlude of impossible-to-predict agency reaction. The risk

that market participants will be unnecessarily subject to uncertain Commission policies poses an undeniable further threat to the stability of our Nation's energy markets at the worst possible juncture. That threat can and should be defused by this Court's review of the decision below.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of *certiorari*.

Respectfully submitted,

ASHLEY C. PARRISH
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

DAVID G. TEWKSBURY
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20005
(202) 737-0500

Counsel for the Electric Power Supply Association

December 22, 2008