NOS. 06-1457, 06-1462

In the
Supreme Court of the United States

MORGAN STANLEY CAPITAL GROUP INC.
v.
PUBLIC UTIL. DIST. NO. 1 OF SNOHOMISH COUNTY, WA, *et al.*

CALPINE ENERGY SERVICES, L.P., *et al.*
v.
PUBLIC UTIL. DIST. NO. 1 OF SNOHOMISH COUNTY, WA, *et al.*

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

BRIEF OF THE ELECTRIC POWER SUPPLY ASSOCIATION, COLORADO INDEPENDENT ENERGY ASSOCIATION, ELECTRIC POWER GENERATION ASSOCIATION, INDEPENDENT ENERGY PRODUCERS ASSOCIATION, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, INDEPENDENT POWER PRODUCERS OF NEW YORK, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, NATURAL GAS SUPPLY ASSOCIATION, NEW ENGLAND POWER GENERATORS ASSOCIATION, INC., NORTHEAST ENERGY AND COMMERCE ASSOCIATION, NORTHWEST & INTERMOUNTAIN POWER PRODUCERS COALITION, AND WESTERN POWER TRADING FORUM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Under the Federal Power Act, as interpreted by this Court in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), the Federal Energy Regulatory Commission may not modify the terms of valid wholesale power contracts except in circumstances of unequivocal public necessity. In conflict with decisions of this Court and every other Court of Appeals to consider the issue, the Ninth Circuit held that the Commission may nullify a wholesale power contract, even in the absence of public necessity, if the contract rates are not pre-approved by the Commission or if the contract is later deemed to have been formed during a period of market dysfunction.

The questions presented are:

1. Whether the Ninth Circuit erred in failing to abide by this Court's decisions precluding the Federal Energy Regulatory Commission from retroactively abrogating valid, bilaterally negotiated wholesale power contracts absent a showing that abrogation is required in the public interest.

2. Whether the Ninth Circuit erred in effectively determining that the *Mobile-Sierra* public-interest standard applies asymmetrically only to sellers (but not to buyers) that seek to escape the terms of freely negotiated wholesale power contracts.

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INTEREST OF *AMICI CURIAE*[1]

Amici represent a diverse array of participants in the Nation's electric and natural gas industries that are directly affected by the issues raised in these cases. *Amici* and their members have made long-term financial commitments, involving hundreds of billions of dollars, in reliance on this Court's settled authorities interpreting the Federal Power Act and parallel provisions of the Natural Gas Act as protecting the integrity of privately negotiated contracts. Because the Ninth Circuit's decision sets aside congressional policy and grants the Commission never-before-recognized authority to abrogate contracts, *amici* are concerned that the decision below will destabilize the Nation's energy markets, discourage much-needed investment, and ultimately result in higher costs for consumers.

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

Colorado Independent Energy Association **("CIEA")**. CIEA is a trade association of competitive independent power producers operating in Colorado. Its 30 members and 10 associated members are an integral part of Colorado's energy industry,

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[1] Petitioners and respondents 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 a party authored this brief in whole or in part, and that no counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

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 Energy Producers Association* ("IEP")**. IEP is a California non-profit mutual benefit corporation whose members collectively own and operate approximately one-third of California's installed generating capacity.

***Independent Petroleum Association of American* ("IPAA")**. IPAA is a national association representing thousands of independent oil and natural gas producers and service companies across the United States.

***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.

***Interstate Natural Gas Association of America* ("INGAA")**. INGAA is a trade association that represents virtually all of the interstate natural gas pipeline and interstate natural gas storage companies operating in the United States, as well as comparable companies in Canada and Mexico. Its members transport over 95 percent of the Nation's natural gas through a network of 180,000 miles of pipelines.

***Natural Gas Supply Association* (“NGSA”)**. NGSA 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 27 percent of the United States natural gas supply.

***New England Power Generators Association, Inc.* (“NEPGA”)**. NEPGA is a trade association representing electric generating companies in New England. Its member companies account for over 20,000 megawatts of generating capacity in the region.

***Northeast Energy and Commerce Association* (“NECA”)**. NECA is a trade association serving New England’s competitive electric power industry. Its 600 members include developers and owner/operators of competitive power projects, power marketers and traders, fuel and equipment suppliers, power consumers, and various service providers to the power industry.

***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 whose members actively participate in California’s restructured electricity markets. WPTF’s broad-based membership includes energy service providers, scheduling coordinators, generators, energy consultants, and public utilities.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than fifty years, this Court, the lower federal courts, and, with only a few notable exceptions, the Federal Energy Regulatory Commission have faithfully applied the Federal Power Act's statutory regime protecting the integrity of privately negotiated contractual arrangements. As this Court has recognized, the Act provides that wholesale rates may be "established initially by contract," *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 339 (1956), and that, once so established, the resulting rates may not be modified except in "extraordinary circumstances" when unequivocally "necessary in the public interest." *Id.* at 344; *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956). The stable regulatory regime established by the Act and this Court's precedents—including what heretofore have been almost unquestioned assurances that private agreements will be respected—has played a central role in the development of the Nation's energy markets. Most importantly, this regulatory stability has permitted buyers and sellers to lock in energy transactions at specific prices and quantities using negotiated arrangements tailored to their own particular needs.

Until the decision below, no federal court of appeals had ever questioned the fundamental premise that privately negotiated wholesale energy contracts are, without more, presumptively enforceable absent some showing of extraordinary circumstances. Instead, following *Mobile* and *Sierra*, courts had held that, notwithstanding the

Commission's broad authority to oversee wholesale energy markets and to modify contracts when necessary in the public interest, the Commission has no general or vagrant authority to reformulate private arrangements. Until the Ninth Circuit's decision, courts had consistently rejected the notion that contract modifications can be justified merely because, in retrospect, the agreed-on rates might be somewhat higher or lower than what one party or the other might, with the benefit of hindsight, prefer. By limiting the Commission's authority to undo private agreements, courts have responsibly implemented Congress's "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.

The Ninth Circuit's decision radically and self-consciously departs from these heretofore stable understandings. By reinterpreting the Federal Power Act to alter the balanced, even-handed public-interest standard on which thousands of wholesale power contracts are premised, the decision below unwisely intrudes on the Commission's regulatory prerogatives, subverts long-settled expectations of market participants, and threatens to destabilize the Nation's energy markets. If allowed to stand, the decision risks exposing consumers to the same types of high and volatile prices and supply shortages that prompted Congress and the Commission to discard past regulatory regimes in favor of more efficient, more competitive, and more reliable market-based measures.

Significantly, the decision below is not the offspring of any pre-existing uncertainty or judicial disagreement over the proper interpretation of the

Federal Power Act or this Court's precedents. Until now, courts have had no difficulty applying the statutory standards and abiding by this Court's decisions in *Mobile* and *Sierra*. The Ninth Circuit's doctrinal departures are instead the by-product of that court's misunderstanding of its proper judicial role. Departing from precedent and disregarding the Commission's expert determinations as to what the public interest requires—specifically, that sophisticated parties should not be permitted to escape their binding contractual commitments—the Ninth Circuit unnecessarily took sides in the dispute before it. While the Federal Power Act respects the integrity of contracts, the Ninth Circuit fashioned a new, more relaxed standard allowing contracts to be rescinded or reformulated. In particular, the Ninth Circuit purported to grant the Commission new authority to modify *any* privately negotiated arrangement the Commission has not previously pre-approved, as well as *any* contract that might later be deemed to have been formed during what the Ninth Circuit loosely termed a period of market "dysfunction." *Public Util. Dist. No. 1 of Snohomish County v. FERC*, 471 F.3d 1053, 1061, 1086 (9th Cir. 2006). The Ninth Circuit also reinterpreted the Federal Power Act as creating a one-way ratchet according to which buyer's remorse—but not seller's remorse—can supply a basis for invoking the public interest to abrogate voluntarily negotiated contract rates. *Id*. at 1087-89.

As described below, the Ninth Circuit's policy innovations cannot be reconciled with the plain terms of the Federal Power Act. Contrary to the Ninth Circuit's view, the statute contains no requirement that the Commission pre-approve contract rates. Instead, when two parties freely negotiate the price term of an energy contract, the resulting rates are presumed to satisfy statutory standards of reasonableness, because "sophisticated businesses enjoying presumptively equal bargaining power" are "expected to negotiate a 'just and reasonable' rate as between the two of them." *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 479 (2002). Nor does anything in the Federal Power Act suggest that Congress intended to create an asymmetrical test that applies differently to wholesale energy buyers as opposed to wholesale energy sellers.

Enforcing the Federal Power Act as written, including the respect it affords privately negotiated arrangements, is essential to the proper functioning of the Nation's energy markets. This Court should affirm its long-standing interpretation of the Federal Power Act and reverse the decision below.

ARGUMENT

I. The Federal Power Act Protects The Integrity Of Privately Negotiated Contracts.

The Federal Power Act preserves the integrity of private contracts by establishing a regime under which rates may be "established initially by contract." *Mobile*, 350 U.S. at 339. Hence, when energy contracts arise from free and fair negotiations, the resulting contract rates are presumptively just and reasonable, and the Commission may modify those rates only when necessary in the public interest.

A. The Federal Power Act Provides that Contract Rates Become Effective Without Prior Review Or Approval By The Commission.

Congress enacted Part II of the Federal Power Act in 1935, and the Natural Gas Act in 1938, to ensure a stable and sufficient supply of affordable energy. *See*, *e.g.*, *NAACP v. FPC*, 425 U.S. 662, 669-790 (1976). The statutory scheme is built on a "foundation of private contracts." *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 154 (1960). The Federal Power Act thus respects the integrity of privately negotiated agreements by granting the Federal Energy Regulatory Commission, the Federal Power Commission's successor, authority to modify such agreements only in circumstances of "unequivocal public necessity." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968).

To further these goals, "Congress rejected a pervasive regulatory scheme … in favor of voluntary commercial relationships." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973). Although the statute requires that "all rates and charges" in connection with the transmission or sale of electric energy be "just and reasonable," and declares "unlawful" any rate or charge that is not "just and reasonable," 16 U.S.C. § 824d(a), there is no provision mandating that contract rates be set, reviewed, or approved by the Commission. To the contrary, Congress provided that rates may be "established initially by contract." *Mobile*, 350 U.S. at 339. When two parties negotiate an agreement at arm's-length, the agreed-on rates are automatically effective and presumptively valid until and unless the Commission orders otherwise.

Section 205(c) of the Federal Power Act requires that, "[u]nder such rules and regulations as the Commission may prescribe," every public utility "shall file with the Commission" and "keep open in convenient form and place for public inspection" schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission." 16 U.S.C. § 824d(c); *see also* 18 C.F.R. § 35.1(a); *cf.* 18 C.F.R. § 35.1(g) (setting out circumstances where submission of contracts is not required). The statute directs that, "[*u*]*nless* the Commission otherwise orders," rates and charges become automatically effective. 16 U.S.C. § 824d(d) (emphasis added); *see also, e.g., Alabama Power Co. v. FERC*, 22 F.3d 270, 271 (11th Cir. 1994).

The Federal Power Act accordingly makes clear that, absent a particular reason for the Commission to further investigate, the Commission "accepts" rates filed in accordance with Commission regulations, and those rates are both effective and presumptively lawful. To be sure, section 205 provides that, whenever a new or changed rate is filed with the Commission, the Commission may suspend the effectiveness of the rate for up to five months pending a hearing "concerning the lawfulness" of the rate. 16 U.S.C. § 824d(e). In addition, section 206 grants the Commission authority to change rates "then in force" that are not in the public interest, and to "determine" a "just and reasonable" rate in cases where it has found an existing rate "unjust, unreasonable, unduly discriminatory or preferential." 16 U.S.C. § 824e(a). But even in those circumstances, Congress carefully cabined the Commission's authority so as not to cast doubt on the principle that rates become effective without the Commission's review or approval. For instance, the Commission may order refunds when a rate is unlawful, but only prospectively for sales occurring after the statutory "[r]efund effective date." *Id.*

In allowing contract rates to take effect without prior Commission approval or review, Congress recognized that "sophisticated businesses enjoying presumptively equal bargaining power could be expected to negotiate a 'just and reasonable' rate as between the two of them." *Verizon*, 535 U.S. at 479. Congress thus "departed from the scheme of purely tariff-based regulation" and "acknowledged that contracts between commercial buyers and sellers could be used in rate setting." *Id.* at 479.

In this regard, Congress expressly justified federal regulation as "necessary in the public interest" and made clear that the Commission's authority derived from its general obligation to protect the public interest. 16 U.S.C. § 824a. The statute's invocation of the "public interest" is significant because Congress was undoubtedly aware of judicial decisions holding that "laws … affecting utility companies" must be "confined to purposes reasonably connected with the public interest." *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936). As this Court recognized, although "the obligations of contracts must yield to a proper exercise of the police power," that power may be exercised only "for an end which is in fact public." *Id*. at 197; *see also Central Kan. Power Co. v. State Corp. Comm'n*, 181 Kan. 817, 827 (1957) (government's power to abrogate private rate contracts is "incident to its power to regulate public utilities, the exercise of which is conditioned on the public interest"). A party's dissatisfaction with an "improvident undertaking" has never been thought to justify the government stepping in and interfering with privately negotiated agreements: although the "power to fix rates, when exerted, is for the public welfare, to which private contracts must yield," it is "not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be." *Arkansas Natural Gas Co. v. Arkansas R.R. Comm'n*, 261 U.S. 379, 382-83 (1923) (it is the "intervention of the public interest" that "justifies" and "conditions" the exercise of authority).

In carefully cabining the Commission's authority and permitting rates to be set by private contract, the Federal Power Act is markedly different from "common carrier" statutes, such as the Interstate Commerce Act, that effectively displace private rate agreements by requiring "that the rates to all shippers be uniform." *Mobile*, 350 U.S. at 345. The

Federal Power Act also is unlike other statutes under which Congress has dictated that private contracts may not become effective unless and until they have been reviewed and pre-approved by the appropriate administrative agency. *See*, *e.g.*, 46 U.S.C. § 814 (1970) (repealed) (Shipping Act: "[a]ny agreement … not approved, or disapproved, by the" Federal Maritime Commission "shall be unlawful"); 16 U.S.C. § 825s (1944) (Flood Control Act: "rate schedules to become effective upon confirmation and approval by the Secretary of Energy"); 25 U.S.C. § 81(b) (2000) (providing that no "contract with an Indian tribe that encumbers Indian lands … shall be valid unless that … contract bears the approval of the Secretary of the Interior").

The general rate provisions of the Federal Power Act described above also stand in marked contrast to provisions of section 202 that provide more expansive powers to the Commission in limited circumstances not present here. Specifically, section 202(b) provides that when the Commission directs a public utility to connect "its transmission facilities with the facilities" of another entity, the Commission may "prescribe the terms and conditions of the arrangement," including "dictating the apportionment of cost … and the compensation or reimbursement reasonably due." 16 U.S.C. § 824a(b). Similarly, section 202(c) states that, during war or in an emergency, "the Commission" has authority to order "such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest." 16 U.S.C. § 824a(c); *see also* 42 U.S.C. §§ 7151(b), 7172(a) (transferring section 202(c) powers to the Secretary of Energy). In these narrow circumstances, if the "affected" parties cannot agree on the terms of an arrangement, "the Commission" may "prescribe … such terms as it finds to be just and reasonable, including the compensation or reimbursement" to be paid. 16 U.S.C. § 824a(c).

In contrast to these limited, express grants of authority, sections 205 and 206 of the Federal Power Act do not vest the Commission with exclusive, general, or vagrant rate-setting authority. *See, e.g.*, *Hamdan v. Rumsfeld,* 126 S.Ct. 2749, 2765-66 (2006) ("a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute"); *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 452-53 (2002). To the contrary, the Commission's authority is limited to disapproving after the fact privately negotiated rates that are initially established by contract.

B. This Court Has Consistently Interpreted The Federal Power Act As Protecting The Integrity Of Private Contracts.

Over a half-century ago, the Court interpreted the Federal Power Act and the Natural Gas Act, and held in two unanimous decisions that the statutes preserve the integrity of private contracts. The Court's decisions, referred to collectively as *Mobile-Sierra*, recognize that, because the Acts establish regulatory systems based on privately negotiated agreements, the Commission's authority to modify such agreements is limited. Unless the parties specifically agree otherwise, freely-negotiated rates may not be modified except in "extraordinary circumstances" of "unequivocal public necessity."

Permian, 390 U.S. at 822; *see also United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113 (1958) (the terms of a contract determine when and how contracting parties may seek to change contract rates).

In *Mobile*, the Court held that a party cannot unilaterally change a contract rate by utilizing the "'filed-rate' procedure" of the Natural Gas Act. *Mobile*, 350 U.S. at 340-41. Stressing that the Natural Gas Act, like the Federal Power Act, "expressly recognizes that rates to particular customers may be set by individual contracts," the Court held that the statute "evinces no purpose to abrogate" such "private rate contracts." *Id.* at 338. Accordingly, although "all rates are subject to being modified by the Commission upon a finding that they are unlawful," *id*. at 341, modification is appropriate only if "necessary in the public interest." *Id*. at 344. The Court emphasized that, by "preserving the integrity of contracts," the statute "permits the stability of supply arrangements" that "all agree" are "essential to the health" of an industry that requires "substantial investments" and "long-term commitments." *Id*.

The Court reiterated similar points in *Sierra*, holding that the Federal Power Act's mandate that rates be "just and reasonable" must be construed in light of the Commission's overarching obligation to protect the "public interest." *Sierra*, 350 U.S. at 354-55; *see also Deal v. United States*, 508 U.S. 129, 132-34 (1993) (the meaning of words must be drawn from the context in which they are used). The Court emphasized that the Commission lacks authority to protect a contracting party's purely private interests in being "relieved of [an] improvident bargain."

Sierra, 350 U.S. at 354-55 (citing *Arkansas Natural Gas*, 261 U.S. at 882-83). Although the Commission had found that the contract rates at issue were unreasonable, the *Sierra* Court ruled that the Commission lacked authority to interfere with the parties' private agreement. *See id*. at 354. It declared that the Commission may modify energy contracts only where it has determined that an agreed-on rate "adversely affect[s] the public interest"—as where it might "impair the financial ability of the public utility to continue its service," or "cast upon other consumers an excessive burden," or "be unduly discriminatory." *Id*.

The Court's *Mobile-Sierra* decisions have since become towering landmarks in the jurisprudence governing regulated energy markets. *See*, *e.g.*, *Boston Edison Co. v. FERC*, 233 F.3d 60, 66 (1st Cir. 2000) (*Mobile* and *Sierra* are two of the "best-known public utility decisions by the Supreme Court in this century"). Relying on those decisions, investors and market participants have made enormous investments in vital energy infrastructure. Although the *Mobile-Sierra* decisions, and the respect for settled expectations they demand, may appear as lofty abstractions to the uninitiated, to participants in the Nation's energy markets the decisions are foundational. A search of the Westlaw legal database that collects Commission decisions shows that of the approximately 5,000 administrative decisions rendered by the Commission since 2000, over 600 (approximately one in eight) mention *Mobile-Sierra*. With market participants having "bargain[ed] in the shadow" of *Mobile-Sierra* for more than five decades, *id*. at 66, it may be only a slight exaggeration, if it is an exaggeration at all, to say that *Mobile-Sierra* is to energy transactions what *Miranda* is to the law of criminal arrests. *Cf. Dickerson v. United States*, 530 U.S. 428, 443-44 (2000).

The continuing vitality of *Mobile-Sierra* has been confirmed by this Court and assumed by lower courts in an enduringly long—and consistent—line of cases. *See, e.g.*, *Verizon*, 535 U.S. at 479; *Permian*, 390 U.S. at 820-22; *Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239, 271 (D.C. Cir. 2007); *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 14-15 (D.C. Cir. 2002); *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 960 (1st Cir. 1993). These decisions have reaffirmed that enforcing contractual rights is in the public interest because it protects the "legitimate interests" of energy suppliers "in whose financial stability the [energy]-consuming public has a vital stake." *Memphis*, 358 U.S. at 113. Until the Ninth Circuit's policy innovations below, the rule was clear: absent duress or bad faith at the time a contract is negotiated, parties must "live with their bargains as time passes and various projections about the future are proved correct or incorrect." *Town of Norwood v. FERC*, 587 F.2d 1306, 1312 (D.C. Cir. 1978).

Significantly, although Congress on numerous occasions has amended the Federal Power Act, as well as other aspects of the federal energy laws, including making extensive revisions to the statute in 1992 and 2005, *see* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594 (2005); Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992), it has declined to change the public-interest standard or to expand the Commission's authority to modify private agreements. *See, e.g.*, *Reno v. Bossier Parish Sch.*

Bd., 520 U.S. 471, 483-84 (1997) (it is significant when Congress fails to modify a statute in the face of a long-standing judicial interpretation). Given this Court's long-standing interpretation of the Federal Power Act, the legislative decision to leave the relevant statutory provisions "intact" strongly suggests that Congress has "ratified" this Court's interpretation. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 486-87 (1989) (Stevens, J., dissenting) (it tips the "balance between judicial and legislative authority" to depart from earlier decisions giving "a statutory provision concrete meaning, which Congress elects not to amend during the ensuing 3 1/2 decades").

II. The Decision Below Misapplies The Statutory Requirements And Cannot Be Squared With Settled Precedent.

Applying settled understandings of the Federal Power Act, the Commission in the proceedings below rejected attempts by buyers of wholesale electricity to escape contracts they had voluntarily entered. In reversing the Commission, the Ninth Circuit invented a new test for determining whether *Mobile-Sierra*'s public-interest standard applies to contracts that incorporate market-based rates. The Ninth Circuit also devised an entirely new legal standard that favors granting relief in cases of buyer's—as opposed to seller's—remorse. The Ninth Circuit's improper judicial policymaking exceeds the bounds of its lawful authority and fundamentally misunderstands the statutory requirements.

A. The Ninth Circuit Has Overstepped The Bounds Of Its Proper Judicial Role.

The Ninth Circuit's failure to respect this Court's prior decisions cannot be squared with its role as one of twelve federal courts of appeals responsible for faithfully reviewing the Commission's administrative orders in light of the Federal Power Act and the Court's precedents. Unlike the Commission's delegated authority to oversee the Nation's wholesale energy markets, the Ninth Circuit is not a primary interpreter of the federal energy laws, nor has Congress granted it any special or exclusive authority to review the Commission's administrative interpretations and applications of those laws. *Cf*. 42 U.S.C. § 7607(b) (granting the D.C. Circuit certain special, exclusive authority to review administrative determinations applying the Clean Air Act).

Nonetheless, the Ninth Circuit presumed to fashion what is essentially a restatement of the law of energy contracts. In the process, the Ninth Circuit unabashedly revisited the historical antecedents of energy law and reinterpreted otherwise unquestioned understandings of *Mobile-Sierra*. Rather than faithfully applying the Act and binding precedent, the Ninth Circuit recast *Mobile-Sierra* as a narrow "mode of review" that applies only in "certain limited circumstances." *Snohomish*, 471 F.3d at 1061, 1074. According to the Ninth Circuit, although "regulatory evolution" has not rendered *Mobile-Sierra* a complete "dead letter," lower courts are nonetheless justified in delineating new "prerequisites" for *Mobile-Sierra*'s "application in the present environment." *Id*. at 1061.

The Ninth Circuit's approach is irreconcilable with its position in the Nation's judicial hierarchy. In particular, the Ninth Circuit appears to have overlooked that our Constitution establishes only "one Supreme Court." U.S. Const., art. I, § 1. As this Court has taken pains to explain, given the Court's constitutional status as the Nation's highest tribunal, lower courts should not take it upon themselves to "conclude" that the Court's "more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Rather, "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.*; *see also Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). Here, far from being undermined by later decisions, *Mobile-Sierra* was, until the decision below, in the ruddiest and most unquestioned of jurisprudential health.

Instead of inventing false distinctions with this Court's *Mobile-Sierra* precedent, the Ninth Circuit should have recognized that, even if this Court were to reexamine *Mobile-Sierra*, it would itself confront the fact that stare decisis carries maximum force in contexts where, as here, "a unanimous interpretation of a statute has been accepted as settled law for several decades." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 32 (2005). Accordingly, as "longstanding and well-entrenched decisions" interpreting statutes that "underlie" a "complex regulatory regime," *California v. FERC*, 495 U.S. 490, 499 (1990), *Mobile-Sierra* remains solid, binding precedent worthy of this

Court's adherence and the Ninth Circuit's respectful application. In sum, the Ninth Circuit had no warrant to go looking for ways to rework the Court's precedents instead of applying them.

B. The Decision Below Misunderstands The Regulatory Scheme.

Apart from its unwarranted break from precedent, the decision below also should be reversed because the Ninth Circuit's newly-fashioned test rests on at least three fundamental misconceptions of the Federal Power Act's requirements.

1. The Federal Power Act Does Not Require That Contract Rates Be Reviewed Or Formally Approved.

According to the Ninth Circuit, *Mobile-Sierra* established mere "presumptions" that are irrelevant unless the Commission has had an opportunity to complete a timely, effective review of the contract rates. *Snohomish*, 471 F.3d at 1076-77, 1085-86. Manufactured from whole cloth, this limitation on *Mobile-Sierra* cannot be squared with the statutory scheme.

The Federal Power Act does not condition the lawfulness of rates on prior Commission review and approval. To the contrary, as demonstrated above, the statute makes clear that rates fixed by private contract are deemed valid and enforceable "unless" and until they are "otherwise" declared unlawful by the Commission. 16 U.S.C. § 824d(d). Congress contemplated that, "except as specifically limited" by statute, the rate-making powers of energy companies "were to be no different from those they would possess in the absence" of the statute: "to establish ex parte, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer." *Mobile*, 350 U.S. at 343. Unless "it has undertaken by contract not to do so," a public utility, "like the seller of any unregulated commodity, has the right ... to change its rates ... [at] will." *Memphis*, 358 U.S. at 113.

Moreover, even if the Commission were to review rates on a contract-by-contract basis, it is not required to make affirmative findings that the rates are just and reasonable. *See*, *e.g.*, *Boston Edison v. FERC*, 856 F.2d 361, 368 (1st Cir. 1998) ("the legality of rates … is not conditioned upon the Commission's approval") (quoting *Montana-Dakota Utils. Co v. Northwest Pub. Serv. Co.*, 341 U.S. 246, 255-56 (1951) (Frankfurter, J., dissenting)). The Ninth Circuit takes a very different—and utterly erroneous—view. In its companion decision to this case, the Ninth Circuit held that the Commission's individual review and acceptance of one of the challenged contracts was inadequate because the Commission stated that its acceptance "did 'not constitute approval of any … rate.'" *Public Utils. Comm'n of Calif. v. FERC*, 474 F.3d 587, 595 (9th Cir. 2006). But that statement employs virtually the same language as the language included in the orders accepting the very contracts that were at issue in *Mobile* and in *Sierra*. *See United Gas Pipe Line Co.*, 5 FPC 770 (1946) (accepting contract with caveat that "[n]othing contained in this order … shall be construed as … constituting approval by this Commission … of any rate"); *Pacific Gas & Elec. Co.*, 7 FPC 832 (1948) (same). As the Commission's regulations make clear, the "fact that the

Commission permits a rate schedule or any part thereof … to become effective shall not constitute approval by the Commission of such rate schedule or part thereof." 18 C.F.R. § 35.4. The Commission thus often plays "an essentially passive and reactive role" under section 205 of the Federal Power Act. *City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984) (Scalia, J.).

The notion that the Commission must pre-review and pre-approve contracts before *Mobile-Sierra* applies stands the Federal Power Act "on its head." *Borough of Lansdale v. FPC*, 494 F.2d 1104, 1113 (D.C. Cir. 1974); *Sam Rayburn Elec. Coop. v. FPC*, 515 F.2d 998, 1008 (D.C. Cir. 1975) (rejecting the "conten[tion] that the *Sierra-Mobile* doctrine applies only to contracts previously accepted as lawful by the Commission"). Contracts govern the "legality of filings … because the regulatory statutes permit the relations between the parties to be established initially by contract." *Lansdale*, 494 F.2d at 1113 (citing *Mobile*, 350 U.S. at 339). Under this regime, the public interest is fully protected by the Commission's supervisory authority to prescribe rules and procedures for filing rates. *See* 18 C.F.R. § 35.1. Indeed, a failure to comply with the Commission's filing procedures, while potentially subjecting the violator to hefty fines and penalties, *see* 16 U.S.C. § 825o (criminal penalties); 16 U.S.C. § 825o-1 (civil penalties), does not invalidate the privately negotiated agreement. As courts have recognized, the "regulatory force of a contract arises before, and survives in the absence of the physical filing of the document with the Commission." *Lansdale*, 494 F.2d at 1113-14; *see also Natural Gas*

Pipeline Co. of Am. v. Harrington, 246 F.2d 915, 919 (5th Cir. 1957).

2. The Meaning Of The Federal Power Act Has Not Changed Merely Because Congress And The Commission Have Moved In The Direction Of Market-Based Rate Regulation.

The Ninth Circuit also concluded that this Court's interpretation of the Federal Power Act is no longer relevant because the "regulatory regime" has "evolved" into a "market-based rate-setting system." *Snohomish*, 471 F.3d at 1060-61. According to the Ninth Circuit, if the Commission authorizes an energy supplier to sell electricity at market-based rates, contracts to which the supplier is a party can be modified even if modification is not required in the public interest.

Under the market-based rate system, the Commission will authorize a utility to sell electricity at "market-based" rates only if the utility "and its affiliates do not have, or adequately have mitigated, market power in the generation and transmission" of electricity. *Louisiana*, 141 F.3d at 365. The Commission then continues to exercise its "general oversight" authority to ensure that market-based pricing is producing rates consistent with a competitive market. *See*, *e.g.*, *Interstate Natural Gas Ass'n v. FERC*, 285 F.3d 18, 31, 34 (D.C. Cir. 2002); *see also* FERC Br. 7-8, 30-32 (describing the market-based rate regime). Hence, even if the Commission were required to pre-review contract rates before they become effective, its grant of market-based rate authority would satisfy that requirement. *See Nevada Power Co. v. Enron Power*, 103 FERC ¶ 61,353, at ¶ 37 (2003). The market-oriented regulatory regime complies with the statute because, "[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable" and in the public interest. *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990).

Contrary to the Ninth Circuit's view that market-based regulation requires a radical reinterpretation of the Act to grant the Commission new authority, Congress has taken a different approach. Rather than calling for administratively determined energy rates, Congress has moved steadily in the opposite direction, recognizing that competitive markets offer substantial long-term benefits to consumers. As the Commission's Chairman recently observed, the Energy Policy Act of 2005 represents the "third major federal law enacted in the last 25 years to embrace wholesale competition." Joseph T. Kelliher, *Opening Remarks at the Competition in Wholesale Power Markets Conference*, FERC Docket No. AD07-7-000 (Feb. 27, 2007). According to Chairman Kelliher, whether "competition is the correct national policy" is not an open question. *Id.*; *see also* FERC Br. 29-30 (describing specific provisions of the Energy Policy Act predicated on the Commission's continued implementation of a market-based rate regime).

Following Congress's lead, the Commission has implemented initiatives designed to correct inefficiencies inherent in the command-and-control model of regulation favored by the Ninth Circuit. *See* Stephen G. Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives,* *and Reform*, 92 Harv. L. Rev. 549, 562-65 (1979) (noting the inefficiencies of traditional cost-of-service ratemaking). These pro-consumer initiatives have yielded significant benefits. One study suggests that consumers saved an estimated $34 billion in electricity costs between 1989 and 1996 as a result of Commission policies favoring market-based rates. *See* CERA Advisory Services, *California Power Crisis Aftershock: The Potential Modification of Western Power Contracts*, at 5 (Apr. 2007) ("*Aftershock*"). Most importantly, the Commission's balanced, market-based regime has facilitated investment in energy infrastructure and broader participation in energy markets. As of April 1, 2006, the Commission had granted market-based rate authority to approximately 1,170 diverse entities, including 390 independent power marketers, 100 power marketers affiliated with traditional utilities, 180 independent power producers, 400 power producers affiliated with traditional utilities, and 30 financial institutions. *See* The Electric Energy Market Competition Task Force, *Report to Congress on Competition in Wholesale and Retail Markets for Electric Energy*, at 35 (Apr. 2007) ("*Competition Report*").

The emergence of this new and more flexible power industry, including power marketers and financial institutions, has "improved the industry's ability to address credit issues, increased the ability of companies to buy and sell energy, and increased market liquidity." FERC, Office of Markets Oversight and Investigations, *2004 State of the Markets Report*, at 64 (June 2005) ("*Markets Rep. A*"). The Commission's balanced, pro-competitive policies have also facilitated the development of organized, bid-based markets that have "created significant savings for electricity buyers." ISO/RTO Councel, *The Value of Independent Reg'l Grid Operators*, at 25 (Nov. 2005); *see also* ISO/RTO Council, *The Progress of Organized Wholesale Electricity Markets in N. Am.*, at 11 (Oct. 16, 2007); *Competition Report*, at 31; Scott M. Harvey, *et al.*, LECG, LLC, *Analysis of the Impact of Coordinated Elec. Mkts. on Consumer Elec. Charges*, at 1 (Nov. 20, 2006).

The Ninth Circuit's decision threatens these accomplishments. In particular, by failing to preserve the integrity of contracts, the Ninth Circuit's approach leads to the perverse result of affording less protection to contracts negotiated by sellers expressly found to lack market power than to contracts negotiated by presumed monopolists under a traditional cost-based rate regime. It also effectively renders the Commission's market-based rate authorization "a pointless exercise of no value to anyone." *Nevada Power Co.*, 103 FERC ¶ 61,353, at ¶ 27. The market-based regime cannot function effectively if freely and fairly negotiated contracts remain open to challenge and revision in costly litigation. By undercutting the Commission's market-based rate regime, the Ninth Circuit has intruded on the Commission's prerogatives, violating the settled rules that the Commission enjoys "wide discretion" to decide how to ensure rates are just and reasonable, *FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 518 (1979), and that courts "may not impose methods of regulation upon the discretion of the Commission." *Permian*, 390 U.S. at 775; *see also* M. Gergen, *et al.*, *Market-Based Ratemaking and the Western Energy Crisis of 2000 and 2001*, 24 Energy L.J. 321, 322-31 (2003) (describing the breadth of the

Commission's ratemaking discretion and the legal basis for its market-based rate approach).

More fundamentally, the Ninth Circuit's suggestion that the meaning of statutory language must change as the underlying regulatory regime evolves is contrary to elemental principles of statutory construction. *See Bankamerica Corp. v. United States*, 462 U.S. 122, 133 (1983) (new approaches "must be implemented by Congress, and not by a crabbed interpretation of the words of a statute which so many in authority have interpreted in accordance with its plain meaning for so long"); *United States v. National Broiler Mktg. Ass'n*, 550 F.2d 1380, 1390 (11th Cir. 1977), *aff'd*, 436 U.S. 816 (1978) (notion that a statute "should be brought up to date to take account of the complex structure of modern agriculture rests on fundamental misconceptions … of the role of the judiciary in a democratic society"). In particular, the decisions below rest on the Ninth Circuit's misguided view that applying the statutory public-interest standard in a market-based rate system impairs the Commission's ability to ensure that rates are just and reasonable. *See* D. Tewksbury & S. Lim, *Applying the Mobile-Sierra Doctrine to Market-Based Rate Contracts*, 26 Energy L.J. 437, 456 (2005) ("distinctions between market-based rate contracts and cost-based rate contracts" are largely irrelevant "in terms of whether and how one applies the *Mobile-Sierra* doctrine"). This view is directly contrary to this Court's recognition that a public-interest standard "in no way impairs the regulatory powers of the Commission, for [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. And it is inconsistent with a long line of decisions upholding the Commission's authority to rely on "market-based prices in lieu of cost-of-service regulation[s] to assure a 'just and reasonable' result." *Consumers Energy Co. v. FERC*, 367 F.3d 915, 922-23 (D.C. Cir. 2004) (Roberts, J.); *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998).

In fact, as the Commission has expressly recognized, the regulatory evolution toward more competitive, market-based rate regulation means that the "[p]reservation of contacts has, if anything, become even more critical." *Nevada Power Co. v. Duke Energy Trading*, 99 FERC ¶ 61,047, at 61,190 (2002); *see also* FERC Br. 18. Today, more than ever, preserving the integrity of contracts is vital to promoting capital investment in the energy industry. In a competitive, market-based regime, "[p]otential entrants to generation markets must be able to convince capital markets that generation is a viable profitable undertaking" and, hence, the "availability of long-term contracts ... is critical to the ability of non-utility generators to secure capital for new investment." *Competition Report*, at 4.

3. The Federal Power Act Does Not Permit An Asymmetrical Standard.

Even as it narrowed its field of application, the Ninth Circuit transformed *Mobile-Sierra* into a new asymmetrical standard that favors buyers who become dissatisfied with their long-term agreements. In the Ninth Circuit's view, the public-interest standard differs depending on whether it is a seller or a buyer that is challenging a contract: When relief is sought from a *seller's* improvident bargain (a so-called "low rate" case), the Commission may not modify the parties' agreement unless the agreement imposes an "excessive burden" on consumers; in contrast, when relief is sought from a *buyer's* improvident bargain (a so-called "high rate" case), the Commission must abrogate the parties' agreement whenever "consumers' electricity bills have been affected" and the challenged rates fall outside a "zone of reasonableness" because they exceed marginal costs and are not "part of a general trend toward rates that do reflect cost." *Snohomish*, 471 F.3d at 1089.

The transformation of an even-handed public interest standard into a one-way ratchet that makes buyer's (but not seller's) remorse a basis for escaping contracts finds no support in the statute. As this Court has recognized, the Federal Power Act establishes a regulatory regime that, among other things, "preserve[s] the 'integrity' of private contractual arrangements." *Memphis*, 358 U.S. at 113-14. In enacting the statute, Congress "was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices" but also "manifesting its concern[s] for the legitimate interests of the … companies in whose financial stability the … consuming public has a vital stake." *Id.* The contract-focused rate-making process under the Act therefore "involves a balancing of [] investor and consumer interests." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *see also Grand Council of Crees v. FERC,* 198 F.3d 950, 956 (D.C. Cir. 2000). Buyers, like sellers, "can make bargains which in hindsight prove improvident," *Boston Edison*, 856 F.2d at 372—and when they do, "[e]xcept as the exigencies of the public interest" demand, the Commission is "no more at liberty to alter the … contract to the prejudice of the producers than to do so in their favor." *Public Serv. Comm'n v. FPC*, 543 F.2d 757, 798 (D.C. Cir. 1974).

Contrary to the Ninth Circuit's assertions, whether a contract adversely affects the public interest is an inquiry that does not depend on which party's private interests would be served by Commission intervention. *See Sierra*, 350 U.S. at 354-55; *see also San Diego Gas & Elec. Co. v. FERC*, 904 F.2d 727, 730 (D.C. Cir. 1990) (*Mobile-Sierra* demands "deference to freely arrived at contract prices"). Nor does the Ninth Circuit's view of a reasonable rate—vaguely defined as a rate that "results from normal market forces and is part of a general trend toward rates that do reflect cost"—have any basis in any relevant statute, regulation, or persuasive precedent. *Snohomish*, 471 F.3d at 1089. This made-up test, with its vague references to indeterminate concepts, such as "normal market forces" and "general trends," is patently impractical. More troublingly, the test overlooks the critical signaling function played by freely negotiated rates. Consumers and society as a whole—not just suppliers—benefit when from time to time prices rise above or trend away from short-term marginal costs, precisely because such elevated prices signal scarcity and provide returns to the providers of fixed capital, thus creating powerful financial incentives for the further investment needed to relieve the underlying condition of scarcity. *See Wisconsin*, 493 F.3d at 259-60 (upholding Commission's determination that a rate with a "fixed cost adder" was "just and reasonable" because it "is designed to ensure that suppliers earn enough money … to recover fixed costs”).

The Ninth Circuit’s short-term focus and blithe assumption that the public interest is always served by lower near-term prices violates basic principles of economics. More importantly, the Ninth Circuit’s view overlooks Congress’s considered judgment that, over the longer term, consumers are better off, enjoying both lower costs and more reliable energy supplies, under a regime that respects the integrity of private contracts.

III. Reversing The Judgment Below And Reaffirming *Mobile-Sierra* Will Further The Public Interest.

The Ninth Circuit’s foray into judicial policymaking was not only unwarranted but unwise. Its extra-statutory decision, if not corrected, threatens to expose consumers to the very types of high and volatile prices and frequent supply shortages the Federal Power Act was designed to prevent. The Court should reaffirm its *Mobile-Sierra* decisions to ensure stability in the Nation’s energy markets and to protect against arbitrary agency decisionmaking.

A. Reversing The Judgment Below Will Restore Certainty To The Nation’s Wholesale Energy Markets.

It is hard to overstate the importance of regulatory certainty and contractual integrity to the efficient working of the energy industry. *See, e.g., Competition Report*, at 74, 76-77; *see also Local 926, Int’l Union of Operating Eng’rs, AFL-CIO v. Jones*, 460 U.S. 669, 687 n.4 (1983) (“[t]here can be no doubt that safeguarding the integrity of contractual relations is an interest of paramount importance in an economy such as ours"). As commentators have noted, because power markets are susceptible to periods of inelastic demand and supply, the industry often faces large, sudden shifts in price. *See Aftershock*, at 5. These price dynamics mean that cash flows for spot markets are cyclical, unpredictable, and often insufficient to cover the full cost of power plant investments. At the same time, the capital requirements of the electric generation sector are enormous. In the next 15 years, the power sector must grow by an estimated 35 percent to keep pace with projected demand. *See id.* at 14. This expansion will require at least "$400 billion in investment in new and existing power plants." *Id.* at 15-16.

Against this backdrop, fixed-price, long-term contracts are essential for encouraging investment in infrastructure. As this Court has recognized, energy facilities "may frequently require substantial investments" that would not be made absent "long-term commitments." *Sierra*, 350 U.S. at 344. Energy suppliers, like other market participants, "require clear signals regarding national policies and confidence that those policies will be sustained over time in order to undertake the substantial investment needed to support expected increases in consumption." Statement of Jim Wells, Director Nat'l Res. & Env't, GAO, Meeting Energy Demand in the 21st Century, GAO-05-414T, at 7-8 (Mar. 16, 2005). These important supply signals will be scrambled if prices are to be set from time to time according to a heavy and unpredictable regulatory hand.

If the Ninth Circuit's decision is not reversed, investors will need to discount the value of long-term contracts to account for the heightened, unquantifiable risk that the Commission may later abrogate contracts when buyers complain that rates are too high. Concerns about respect for contract integrity arising out of the decision below will hinder the ability of independent power producers "to compete for generation in the future" and will put "into question attractively priced contracts." *IPPs seen entering 'sweet spot' of power cycle: Calyon*, Electric Power Daily (Aug. 22, 2007). Sophisticated investors "will not participate in a market in which disgruntled buyers are allowed to discard their contracts, at least not without charging a significant risk premium—a cost that will ultimately be borne by consumers." *Standard of Review for Proposed Changes to Market-Based Rate Contracts for Wholesale Sales of Elec. Energy by Pub. Utils.*, Proposed Policy Statement, 100 FERC ¶ 61,145 at 61,545 (2002) (Brownell and Breathitt, Comm'rs, concurring). Notwithstanding the Ninth Circuit's purported concerns for consumer welfare, its decisions threaten to harm consumers by destabilizing competitive markets and adding potentially "billions of dollars per year to the costs of the power business." *Aftershock*, at i.

The Ninth Circuit's short-sighted judicial policymaking also may hinder conservation efforts. Although vital to investment in all types of generation, reliable, enforceable contracts may well be most essential to ongoing efforts to promote renewable energy sources. Numerous state-approved competitive contract solicitations require utilities to enter long-term contracts obligating them to purchase energy from power plants that rely on alternative, renewable energy sources. *See Aftershock*, at 19. Similarly, investment opportunities in conservation and energy-efficient technologies are especially likely to rely on long-term contracts. *See id.*; *Markets Report*, at 232 (describing difficulties faced by wind developers in markets where long-term contracts are unavailable). Investors will be loath to risk capital on such projects if the underlying contracts are subject to modification by the Commission based on buyers' remorse and market solutions are further jeopardized by unpredictable court-imposed, command-and-control regulation. In fact, under the Ninth Circuit's asymmetrical rules, contracts to buy power generated from renewable sources are especially susceptible to abrogation because "technological advances are likely to dramatically reduce" the cost of such power, which could well "push the previous, existing renewable power as well as conservation and efficiency contracts" out of the "zone of reasonableness." *Aftershock*, at 19.

Finally, if the decision below is not corrected, its new, asymmetrical rules will likely exacerbate future crises. Sensible regulatory policies encourage market participants to hedge against market fluctuations by negotiating fixed-price, long-term contracts. Such contracts are especially important when spot market prices are volatile and unpredictable. By undermining the stability of long-term contracts, however, the decision below encourages market participants to put increased reliance on the type of volatile spot market purchases that formed one of the underlying causes of the California energy crisis. In fact, by requiring the Commission to invalidate contracts whenever market conditions meet some undefinable standard of "dysfunction," the Ninth Circuit has greatly complicated the negotiation of long-term contracts in circumstances of spot market volatility—the very circumstances in which long-term arrangements are most urgently needed. *See id.* at 20.

B. The Federal Power Act Imposes A Crucial Constraint On Agency Decisionmaking.

As the Commission notes in its brief, the Ninth Circuit improperly failed to give appropriate deference to the agency's application of the "statutory provisions in the particular circumstances of this case." FERC Br. 19. But this Court should also recognize that, contrary to the Commission's suggestions, the statutory requirements are not ambiguous—at least insofar as the Federal Power Act's protections for the integrity of privately negotiated agreements are concerned. As noted above, the Court's *Mobile-Sierra* decisions articulate a clear and proper interpretation of what unambiguous statutory language demands. *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984-85 (2005); *cf. Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75 (1986) (an "agency may not … expand its power in the face of a congressional limitation on its jurisdiction"). Because this Court has determined the Federal Power Act's clear meaning, it need not "reach any issue of deference" to the Commission. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992).

The Federal Power Act imposes important and unambiguous constraints on arbitrary agency decisionmaking. For decades, the statute has framed the boundaries of permissible Commission action, ensuring that the public interest is adequately protected, while imposing carefully prescribed limits on the Commission's authority to abrogate privately negotiated agreements. *See*, *e.g.*, *Public Serv.*, 543 F.2d at 797. Courts have not hesitated to affirm the Commission when it has determined that modifying a contract is required in the public interest, especially when such modifications are needed to effectuate broad changes in regulatory policies. *See*, *e.g.*, *Arizona Corp. Comm'n v. FERC*, 397 F.3d 952 (D.C. Cir. 2005); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 709-12 (D.C. Cir. 2000); *Northeast Utils. Serv. Co. v. FERC*, 55 F.3d 686 (1st Cir. 1995). Similarly, until now, courts have stood ready to affirm the Commission in cases withholding relief on grounds that contract modification was not in the public interest. *See*, *e.g.*, *Permian*, 390 U.S. at 820-22; *Wisconsin*, 493 F.3d at 273-75; *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 407-12 (D.C. Cir. 2000).

Equally important, however, courts have traditionally served an essential role in ensuring that the Commission's interference with private contractual arrangements is strictly limited to circumstances where intervention is necessary to fulfill its statutory mission. Courts have thus stood ready to rebuff the Commission's occasional attempts to circumvent limits on its authority. *See Public Serv. Comm'n v. FERC*, 866 F.2d 487, 488-89 (D.C. Cir. 1989) (the D.C. Circuit has repeatedly "repelled" the Commission's "gambit" to "compromise [the] limits … on its power to revise rates"); *Atlantic City*, 295 F.3d at 10 (citing cases). The importance of this judicial role should not be underestimated.

Undoubtedly, the Commission has its own institutional interest in being liberated from the statutory constraints that *Mobile-Sierra* recognizes. *See*, *e.g.*, David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 Geo. L.J. 97, 113 (2000) ("when an agency must make decisions about the reach of its own jurisdiction, self-interest propels the agency toward ever more expansive interpretations of the law"). Until now *Mobile-Sierra* has stood as a bulwark preventing the Commission from overstepping these statutory bounds.

Moreover, it is all but inevitable that from time to time the Commission will be subjected, as it has been in this case, to political pressure to abrogate private contracts that, in retrospect, have proven uneconomic and politically controversial. *See*, *e.g.,* Ltr. to FERC Chairman Joseph T. Kelliher from U.S. Sen Barbara Boxer, FERC Docket No. EL02-60 (Mar. 28, 2007) (urging "FERC to inform the Solicitor General that it accepts the Ninth Circuit's decisions" and advising FERC to "reject any efforts to appeal"). If empowered or required to look beyond the public interest to purely private interests, the Commission will inevitably come under greater pressure to exercise its power in the service of private agendas filtered through the political process. The risk that market participants will be unnecessarily subject to the whim of some uncertain, politically driven set of future Commission policies poses an undeniable further threat to the stability of the Nation's energy markets—one that can and should be defused by reversing the judgments below.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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