

***SUPREME COURT TO CONSIDER ROLE OF MOBILE-SIERRA
IN MODIFYING MARKET-BASED RATE CONTRACTS ENTERED DURING
THE WESTERN ENERGY CRISIS***

By Jared S. des Rosiers and Deborah L. Shaw*

The ripple effects of the 2000-2001 energy crisis that hit the western United States with rolling blackouts and soaring spot market prices continue to be felt in the courts, as energy buyers battle to recoup some of the exorbitant costs of the power purchases they made during the crisis. One of those battles, between buyers and sellers¹ of long-term contracts executed during the crisis, has now reached the U.S. Supreme Court. In December 2006, the Ninth Circuit issued two related decisions² holding that the Federal Energy Regulatory Commission (“FERC” or “the Commission”) erred in its application of the Supreme Court’s *Mobile-Sierra* doctrine³ to refuse to modify or abrogate power contracts entered into during the energy crisis. The sellers’ appeal from one of these decisions presents the Court with its first opportunity to address the interplay

* Jared S. des Rosiers is a partner of Pierce Atwood in Portland, Maine. He is a member of the firm’s Litigation and Energy practice groups and specializes in energy litigation matters. Deborah L. Shaw is also a partner of Pierce Atwood and a member of the firm’s Energy practice group. Together with several colleagues at the firm, Jared and Deborah have represented the California Electricity Oversight Board (“CEOB”) since 2002 in the State of California’s challenge to the long-term contracts that the California Department of Water Resources (“CDWR”) entered during the California energy crisis under emergency legislation when California’s investor owned utilities were no longer able to purchase electricity due to their insolvency.

¹ For convenience, this article uses the generic terms “buyers” and “sellers” to refer to the parties at FERC, before the Ninth Circuit, and at the Supreme Court, as the Ninth Circuit decisions were the products of several FERC proceedings involving numerous buyers and sellers in the western markets. The non-intervenor parties to the particular cases granted certiorari are Morgan Stanley Capital Group, Calpine Energy Services, American Electric Power Corp., and Allegheny Energy Supply Co. (sellers) and Public Utility Dist. No. 1 of Snohomish, Nevada Power Company, Sierra Pacific Power Company, Golden State Water Company (f/k/a Southern California Water Company) and the Office of the Nevada Attorney General, Bureau of Consumer Protection (buyers). See 128 S. Ct. 30 (Sept. 25, 2007) (Docket Nos. 06-1457, 06-1462).

² *Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash. v. FERC*, 471 F.3d 1053 (9th Cir. 2006) (“*Snohomish*”); *Pub. Utils. Comm’n of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006). The decision being reviewed by the Supreme Court is the *Snohomish* decision. See note 9, *infra*.

³ Based on the companion Supreme Court decisions *United Gas Pipe Line Company v. Mobile Gas Services Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

between FERC's responsibility to review and fix rates under the Federal Power Act ("FPA"), FERC's current market-based rate regulatory scheme, and the Supreme Court's *Mobile-Sierra* standard for contract modification.⁴

This article does not address the causes of the 2000-2001 energy crisis or FERC's actions to mitigate the crisis. It focuses instead on the broader question of the role of market-based rate contracts in the rate filing system envisioned by the FPA, and how the somewhat convoluted history of *Mobile-Sierra* helped the Ninth Circuit define that role. It begins with a review of the FERC and the Ninth Circuit decisions applying *Mobile-Sierra* to the market-based rate contracts entered into during the energy crisis, and the ensuing questions presented to the Supreme Court. From there, it argues that the Ninth Circuit did not, as some suggest, eviscerate *Mobile-Sierra* or upend FERC's market-based rate regime,⁵ but instead extended the principles of *Mobile-Sierra* to market-based rate contracts in a way that respects both the dictates of the FPA and reasonable contractual expectations.

I. The Proceedings Below.

A. The FERC Decisions.

The cases now before the Court commenced in late 2001 with the filing of separate complaints by Nevada Power Company, Sierra Pacific Power Company, the Public Utility District No. 1 of Snohomish, and Southern California Water Company against various sellers of power in the western market, challenging the lawfulness under the FPA of the long-term bilateral

⁴ As sellers had argued in response to the initial complaints, "this is the first time the Commission has ordered a hearing under Section 206 of the FPA of a complaint against a market-based rate resulting from freely-negotiated, bilateral contracts." *Nevada Power Co.*, 101 FERC ¶ 63,031 at ¶ 16 (Dec. 19, 2002) (ALJ decision describing arguments).

contracts they entered during the energy crisis when the California ISO and PX spot markets were “dysfunctional” as previously found by FERC. The crux of the complaints was that the challenged contracts were executed in a long-term market that was substantially infected by the dysfunctional spot market and were the result of the sellers’ exercise of market power and market abuse. Accordingly, the contract rates that far exceeded those that would result from a workably competitive market were unjust and unreasonable under the FPA and should be modified.

In response, the sellers argued that FERC could not modify the contracts unless it found, as required by the Supreme Court’s *Mobile* and *Sierra* cases, that the “public interest” demanded it, which the sellers maintained meant that the three-part *Sierra* test was met: *i.e.*, if the rate “might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.” *Sierra*, 350 U.S. at 355. Accordingly, the limited question FERC set for hearing was: “(1) whether the challenged contracts should be reviewed under the “just and reasonable” standard or the more stringent “public interest” standard of review; and (2) whether the dysfunctional California ISO and PX spot markets adversely affected Western long-term bilateral markets, and if so, whether contract modification is warranted.”⁶ *Nevada Power Co. et al. v. Duke Energy Trading Co., et al.*, 99 FERC ¶ 61,047 at 61,191 (Apr. 11, 2002) (hereinafter “*Nevada Power*”). And the burden was on

⁵ See Brief of Petitioner Morgan Stanley Capital Group, Inc., at 44, 49, *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.* (No. 06-1457); Brief of Calpine Energy Services, *et al.*, at 36-39, 55, *Calpine Energy Servs. v. Pub. Utils. Dist. No. 1 of Snohomish Cnty.* (No. 06-1462).

⁶ In February 2002, the California Public Utilities Commission and the CEOB filed separate complaints against the sellers of the CDWR long-term contracts, raising similar issues. The Commission later consolidated these two State agency complaints and set the matter for hearing on the same questions as the *Nevada Power* proceeding. See *Cal. PUC v. Sellers of Long-term Contracts*, 99 FERC ¶ 61,087 at 61,384 (Apr. 25, 2002). The *Nevada Power* proceeding and the *California PUC* proceeding moved on separate tracks before different Administrative Law Judges.

the buyers as challengers to the “lawful rates” of the contracts to make this showing. *See Cent. Iowa Power Co-op v. FERC*, 606 F.2d 1156 (1979) (burden on party attacking filed rate to show initial rate unlawful).

After extensive and even tortuous litigation (including the exclusion of all evidence of market power and market manipulation as irrelevant and the abrupt introduction of related discovery in other proceedings *after* the close of hearings),⁷ FERC determined in both the long-term cases that the buyers had failed to meet their burden, and in particular had not shown that the “*Sierra* factors” were met:

[W]e conclude that the Complainants have failed to meet their burden of proof under the “public interest” standard, as defined in past cases. We find that the challenged contracts are not contrary to the public interest because the Complainants have failed to demonstrate that the contracts in question caused financial distress for the Complainants so as to threaten their ability to continue service, that the contracts cast an excessive burden on their customers, that the contracts were unduly discriminatory to the detriment of other customers that are not parties to this proceeding, or that any other factors on this record demonstrate that the contracts are contrary to the public interest.

Nevada Power Co., 103 FERC ¶ 61,353 at ¶ 9 (June 26, 2003); *see also Cal. PUC v. Sellers of Long-term Contracts*, 103 FERC ¶ 65,354 at ¶ 8 (June 26, 2003).

In response to challenges that the three *Sierra* factors were not and could not be the exclusive considerations of the public interest standard, FERC, both on rehearing and appeal to the Ninth Circuit, pointed to its findings that buyers had failed to demonstrate “any other factors” – however, nowhere did FERC specify any other factor that it considered besides the three *Sierra* factors. In terms of evidence, FERC expressly stated it did consider the Staff’s “Final Report on Price Manipulation in Western Markets” in rendering its decisions – however, although that

⁷ *See San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 102 FERC ¶61,164 at ¶6 (Feb. 10, 2003) (directing parties to provide index of discovered documents “for each other pending or proposed proceeding for which the filer claims its submission is relevant”).

report found that the dysfunctional spot market had influenced the forward long-term contract market and inflated forward prices, *Nevada Power Co.*, 103 FERC at ¶ 61,353 at ¶ 94, FERC found this fact irrelevant under the public interest standard of review. *Id.*

The buyers in both the *Nevada Power* and *California PUC* proceedings petitioned for judicial review of FERC's decisions.

B. The Ninth Circuit Decisions.

On appeal, the Ninth Circuit summarized the petitioners' claims of error as whether FERC misapplied "the *Mobile-Sierra* 'public interest' mode of review to contracts that were (1) not subject to meaningful initial review or approval, and (2) formed during one of the most erratic and bizarre periods of activity for the western energy market." *Snohomish*, 471 F.3d at 1057. In so framing the issues, and in its ensuing discussion of the historical underpinnings of the *Mobile-Sierra* doctrine, the court set up the distinction between the "traditional" cost-based regulatory scheme and FERC's new market-based rate regulation. In this new rate context, the court held that FERC erred "both in its procedural reliance on *Mobile-Sierra* and in the substantive standard it used in determining that the contracts at issue did not affect the public interest." *Id.*

The Circuit Court started with the recognition that a primary purpose of the FPA is the protection of consumers. *Id.* at 1058 (citing *Pa. Water & Power Co. v. FPC*, 343 U.S. 414 (1952) and *Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378 (1959)). It is to further this purpose that FPA Sections 205 and 206 provide the means by which FERC reviews rates – Section 205 allows FERC to investigate a newly filed rate before it takes effect; Section 206 allows it to investigate existing rates. *Id.* Under this "well developed model," *id.* (quoting *Boston Edison*

Co. v. FERC, 233 F.3d 60, 64 (1st Cir. 2000)), utilities are free to establish initial rates by privately negotiated contracts, “balanced by FERC’s obligation to ensure that those contracts rates, like unilaterally filed rates, are ‘just and reasonable.’” *Id.* at 1059.

The Ninth Circuit then reviewed the circumstances and holdings of the *Mobile* and *Sierra* cases, notably the fact that both involved attempts by sellers to unilaterally file a higher rate than agreed to in a private contract. *Id.* Neither case, the court noted, had abandoned the just and reasonable standard; rather, the cases establish a presumption that privately negotiated contracts are just and reasonable – a presumption that can be rebutted by establishing that the contract adversely affects the public interest, “that is, the consuming public that the FPA protects.” *Id.* at 1060.

The court next described how FERC’s market-based rate scheme “shifted [FERC’s] inquiry” under Section 205 from a review of cost-based rates that are initially filed, to a “determination of a seller’s market power.” *Id.* This shift alters the “well-developed model” by which FERC fulfills its statutory duty to ensure that rates are just and reasonable, because it changes both the timing and the substance of the Commission’s review. *Id.* at 1061. “In other words, since *Mobile* and *Sierra* were decided, both the questions that FERC asks in its initial review of rates and when it asks them have changed.” *Id.* For this reason, the Ninth Circuit found that FERC’s “procedural reliance” on *Mobile-Sierra* was in error: because in the market-based rate framework, the “circumstances that trigger the *Mobile-Sierra* presumption” are not present absent the following conditions:

- (1) the contract by its own terms must not preclude the limited *Mobile-Sierra* review;
- (2) the regulatory scheme in which the contracts are formed must provide FERC with an *opportunity* for effective, timely review of the contracted rates; and

(3) where, as here, FERC is relying on a market-based ratesetting system to produce just and reasonable rates, this review must permit consideration of all factors relevant to the propriety of the contract's formation.

Id. (emphasis added). The court then explained that the origins for these conditions could be found in the evolution of rate regulation under the FPA, from the Interstate Commerce Commission model designed to curb utility monopoly power abuse, to the difference in focus between state and federal regulation,⁸ to the regulatory reforms in the 1990s that turned to competitive forces to keep wholesale prices low, *id.* at 1061-64, ultimately benefiting retail customers by giving them “the opportunity to purchase power from a wide variety of producers at relatively low rates.” *Id.* at 1064-65. The Ninth Circuit rightly observed that California too had aggressively moved to competitive markets to “challenge[] the monopoly power of utilities,” so that by 1991 nearly a third of its energy came from independent (non-monopoly) power producers. *Id.* at 1066.

Part of FERC's reform initiative to facilitate competitive markets was to authorize sellers to charge market-based rates if they “proved that [they] lacked, or had adequately mitigated, any ability to significantly affect market prices,” *id.* at 1065 – which largely meant if they sold power over open access transmission grids. *Id.* Once granted market-based rate authorization, sellers could transact freely without filing individual contracts for review under Section 205. Instead, market-based sellers submitted individual agreements to the Commission as “informational” filings so that the Commission could “monitor” market power. *See Enron Power Mktg., Inc.*, 65 FERC ¶ 61,305 at 62,406 (1993). These filings were not treated as Section 205 filings and third parties could not intervene and challenge the justness and

⁸ “State and local governments, therefore, generally focused on rates ‘as between businesses and the public,’ while the federal government regulated rates ‘as between businesses.’” *Snohomish*, 471 F.3d at 1062.

reasonableness of the rates. *See GWF Energy LLC*, 97 FERC ¶61,297 at 62,390-91 (2001) (“the filing of such agreements does not serve as a vehicle to challenge the justness and reasonableness of either the agreements themselves or the underlying market-based rate authority”).

Against this backdrop, the Ninth Circuit concluded that in order to comply with the “one statutory standard addressing the lawfulness of wholesale electricity rates,” *id.* at 1074, the *Mobile-Sierra* public interest standard could not shield market-based contracts that had never received Section 205 review unless the three prerequisites were met.

The first prerequisite – the contract must not by its terms preclude the more limited *Mobile-Sierra* review – simply recognizes established precedent. *See id.* (citing Supreme Court, D.C. Circuit, and First Circuit cases). The second and third prerequisites ensure that the structure of the FPA so carefully described in the *Mobile* decision continues to be honored in the market-based rate world. To address the shift in timing and substance of FERC’s rate review process, the Court holding simply requires that before *Mobile-Sierra* can be used to prevent modification of market-based rate contracts, the opportunity for a meaningful initial just and reasonable review must be *available* (as opposed to *must occur*). *Id.* at 1077. FERC itself conceded that the FPA requires such an initial review opportunity. *Id.*

Finally, although the Court found that FERC should not have applied *Mobile-Sierra* at all to the contracts before it, and thus could have remanded the case on that basis alone, it also concluded that FERC misapplied the *Mobile-Sierra* public interest standard by looking only at factors “taken from the context of a *low-rate* challenge rather than the *high-rate* challenge present in this case.” *Id.* at 1087. The public interest in a low-rate challenge primarily focuses on the financial health of the utility, or on protecting against discriminatory prices or cross-subsidization. *Id.* at 1088. “In contrast, the key ‘public interest’ in a high rate challenge ... is

assuring that the consuming public pays fair rates....” *Id.* at 1089. The court followed D.C. Circuit precedent in adopting a “zone of reasonableness” test for consumer impact, recognizing that even in functioning markets prices can spike due to normal market forces. *Id.* (citing *Interstate Natural Gas Assoc. v. FERC*, 285 F.3d 18, 31 (D.C. Cir. 2002)).

The sellers in both the *Snohomish (Nevada Power)* and *California PUC* decisions petitioned the Supreme Court for writs of certiorari.

C. Issues Facing the Supreme Court

The petitions granted certiorari⁹ raised the following questions for determination:

Whether the Ninth Circuit erred by failing to abide by this Court’s decisions in [*Mobile*] and [*Sierra*], which preclude the Federal Energy regulatory commission from retroactively undoing valid, bilaterally negotiated, arms-length wholesale energy contracts that have, at most, a minimal impact on retail rates.

Whether the Ninth Circuit misapplied this Court’s holdings in *Mobile* and *Sierra* and created conflicts with the D.C. and First Circuits when it reversed FERC’s decision to uphold valid wholesale energy contracts absent any showing that the public interest required their abrogation.

Whether the Ninth Circuit misapplied the *Mobile-Sierra* doctrine by determining that the *Mobile-Sierra* public interest criteria apply only to sellers, but not to buyers, under wholesale power contracts, in direct conflict with *Mobile*, *Sierra*, and the decisions of other circuits.

As of this writing, the briefs of the petitioners have just been filed. These briefs paint a picture of the Ninth Circuit “revising” *Mobile-Sierra*¹⁰ and imposing an asymmetrical public interest standard that favors buyers (“The standard ... reflects an irrational preference for buyers

⁹ It is perhaps significant that the Supreme Court granted certiorari to the petitions involving more traditional contracting parties (utility buyers and sellers), and did not act on the petitions involving the California state agencies (California Public Utilities Commission and California Electricity Oversight Board). The state agencies clearly were not parties to the contracts but represent the interests of third parties (the consuming public), a critical factor in *Mobile-Sierra* jurisprudence. See *Northeast Utils. Servs. Co. v. FERC*, 55 F.3d 686, 691 (1st Cir. 1995) (most attractive case for *Mobile-Sierra* public interest protection is when contract burdens third party).

¹⁰ Brief of Petitioner Morgan Stanley, *supra* note 5, at 47.

over sellers”).¹¹ The briefs also raise alarms about the adverse impacts of the Ninth Circuit’s decision on competitive markets, claiming it would “discourage the formation of long-term contracts, ... harm consumers by increasing market volatility, ... undermine the incentives to produce additional electric power, ... [and cause] litigation and transaction costs [to] rise substantially.”¹² The buyers’ opposing briefs are due in January 2008 and a decision is expected in Spring 2008.

II. Commentary (Admittedly from the perspective of counsel for the consuming public of California).

What seems to be lost in the rhetoric following issuance of the Ninth Circuit’s *Snohomish* and *California PUC* decisions is that the tension between the filing requirements of the FPA and traditional principles of contract sanctity is not a new one. For over fifty years, since the Supreme Court decisions in *Mobile* and *Sierra*, the Commission and courts have wrestled with the question of when the *Mobile-Sierra* “public interest” standard demands modification or abrogation of privately negotiated contracts. Often, this exercise has seemed result-driven: in the 1990s, FERC was “hostile” toward *Mobile-Sierra*¹³; in this decade, FERC has consistently used “contract sanctity” as a shield against any challenges to existing contract rates.¹⁴ Parties seeking to retain the benefits of lucrative contracts have held up the *Mobile* and *Sierra* decisions for the principle that FERC’s abrogation or modification of a power contract, even if the rates therein

¹¹ Brief of Calpine Energy Services, *supra* note 5, at 54.

¹² *Id.* at 49-52; *see also* Brief of Morgan Stanley, *supra* note 5, at 47.

¹³ At one point, the First Circuit chided FERC for its seemingly ad hoc determinations of when *Mobile-Sierra* should preclude contract modification. *Boston Edison Co. v. FERC*, 233 F.3d 60,68 (1st Cir. 2000) (“Whether and when *Mobile-Sierra* applies in varying contexts is going to remain in confusion unless and until FERC makes up its mind and squarely confronts the underlying issues.”).

¹⁴ *See Pacificorp v. Reliant Energy Services, Inc.*, 99 FERC ¶ 61,381 at ¶25 (2002).

are unjust and unreasonable, can only be done in “extraordinary circumstances.”¹⁵ In the aftermath of the California crisis, FERC repeatedly erected this “extraordinary circumstances” barrier to refuse to modify the long-term market-based contracts executed during the energy crisis, going so far as to find the justness and reasonableness of the challenged rates, which are unquestionably borne by the consuming public, irrelevant.¹⁶

Nothing in *Mobile* or *Sierra* suggested that contracts were untouchable, as many of the sellers’ arguments suggest. Indeed, in a completely unregulated context, contracts can be modified or abrogated based on circumstances existing at contract formation, so it is hardly remarkable that the Commission in the exercise of its statutory powers could look at whether a market-based rate energy contract was actually the product of a competitive market and modify it if not. Post-*Snohomish*, the Commission still must respect the integrity of power contracts, challengers to such contracts still need to show more than that the contracts “have become” unjust and unreasonable, and sellers still are able to engage in transactions without prefiling the contract with the Commission.

The logic behind the Ninth Circuit’s holding – that the granting of market-based rate authority without an adequate oversight mechanism is not sufficient to ensure that the rates are in

¹⁵ Numerous court cases have added this gloss to the *Mobile Sierra* public interest standard of review. See, e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747, 820-22 (1968). But as the Supreme Court recognized in *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 582 (1981), “those cases stand only for the proposition that the Commission itself lacks affirmative authority, absent extraordinary circumstances, to ‘abrogate existing contractual arrangements.’ That rule does not affect the supremacy of the Act itself”

¹⁶ See, e.g., *California Public Utils. Comm’n v. Sellers of Long-Term Contracts*, 99 FERC ¶ 61,087 at 61,383 (2002) (Commission has only deviated from policy of preserving contracts in “extreme circumstances” and noting need for market certainty that Commission will not modify contracts “unless there are extraordinary circumstances”).

fact just and reasonable¹⁷ – applies equally to the analysis of *Mobile-Sierra* in the market-based context. Namely, the Supreme Court’s holding in *Mobile-Sierra* that FERC’s review of a private contract was guided by the public interest standard and not the just and reasonable standard was premised on its consideration of the underlying structure of the FPA, which provides FERC the authority to remedy unjust and unreasonable, or excessive, rates on a “going forward” basis, by “fixing” the just and reasonable rate to be “thereafter” observed. 16 U.S.C. § 824e. At bottom, the Ninth Circuit decisions only recognized that the Commission’s choice to use a tool such as the competitive market to ensure that rates are just and reasonable does not relieve it of its continuing responsibilities under the FPA.

Moreover, the Ninth Circuit did not plow new ground in establishing the three prerequisites or in clarifying the standard in a high rate case. It relied on *Mobile-Sierra* precedent demonstrating that the public interest includes more than the examples used in *Sierra*. See, e.g., *Northeast Utilities Service Co. v. FERC*, 55 F.3d 686, 692 (1st Cir. 1995); *Town of Norwood v. FERC*, 587 F.2d 1306, 1312 (D.C. Cir. 1978); *Texaco v. FERC*, 148 F.3d 1091, 1097 (D.C. Cir. 1998). Its three prerequisites were grounded in established precedent as well, in particular the concept that the FPA and thus *Mobile-Sierra* require that the Commission have a meaningful opportunity to review the initial rates. According to the D.C. Circuit, the “purpose of the *Mobile-Sierra* doctrine is to preserve the benefits of the parties bargain, assuming that there was no reason to question what transpired at the contract formation stage.” *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002) (citing *Town of Norwood v. FERC*, 587 F.2d 1306, 1312 (D.C. Cir. 1978)). A lack of a truly competitive market, due to sellers’ manipulation of

¹⁷ *California ex rel. Lockyer v. FERC*, 383 F.3d 13119, 13140 (9th Cir. 2004) (“FERC’s initial determination with respect to a seller’s market power ... may bear little or no relation to the realities of subsequent circumstances.”)

supply or other illicit acts, as FERC Staff's Report found occurred in California, would clearly be a reason to question what happened at the time a contract for sale of electricity was executed. Circuit Courts have upheld FERC's use of market-based rates for wholesale sales of both electricity and natural gas, "conditioned on the existence of a competitive market," at the time the contract was made. *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012 (9th Cir. 2004), *cert. denied* 127 S. Ct. 2972 (2007); *see also, Louisiana Energy & Power Auth'y v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998). FERC must, however, "retain some oversight over the system, to see if competition in fact drives rates into the zone of reasonableness or to check rates if it does not." *Interstate Natural Gas Assoc. v. FERC*, 285 F.3d 18, 31 (D.C. Cir. 2002). Unfortunately, such oversight was sorely lacking during the energy crisis. *See, e.g., Lockyer*, 383 F.3d at 1015-16 ("With FERC abdicating its regulatory responsibility," "the California energy market was subjected to artificial manipulation on a massive scale.").

Finally, the Ninth Circuit decisions herald neither the end of competitive wholesale markets nor the drying of needed energy supply as the sellers have suggested in their Supreme Court briefs. Aside from the unprecedented situation in which these contracts arose (and which the decisions are designed to prevent from happening again), the Ninth Circuit's formulation of the public interest standard for market-based contracts limits its successful application for future contracts. The emphasis on the impact on consumers' retail rates significantly confines the number of transactions to which the Ninth Circuit's public interest standard could apply, as many transactions do not affect retail rates charged consumers. Transactions truly involving only the private interests of two utilities will enjoy the same respect as traditionally accorded by *Mobile-Sierra*.

In sum, if *Mobile-Sierra* were to block FERC's modification of rates that have been determined to have been set in a flawed market, the Commission would be prevented from ensuring that market-based rates are just and reasonable at all. This would be contrary to the public interest protected by the FPA and envisioned in *Mobile* and *Sierra*.