State of California
State Energy Resources and Conservation Division

In the matter of:	)	01-AFC-4C
	)	
East Altamont energy Center	)	Objection of Rob Simpson
	)	on Extension Request

OBJECTION TO STAFF DETERMINATION THAT MODIFICATION MEETS CRITERIA

IN TITLE 20 CALIFORNIA CODE OF REGULATIONS 1769

1769(A)(3)

"if a person objects to a staff determination that a modification does meet the criteria in subsection (a)(2), the petition must be processed as a formal amendment."

While the above should be sufficient to require a "formal amendment" the following information is offered in support of the position.

Staffs recommendation to extend the construction date has exceeded the authority vested in (Title 20, California Code of Regulations, Section 1769) The cart is before the horse. An amendment is required prior to the extension.

Staff seems to be alluding to 1769(A)(2) in the following statement but has not proved the required determination.

"should any external circumstances require changes to the conditions of certification, the Project Owner will file a petition to amend the license prior to the commencement of construction. Implementation of the above measures will ensure the project remains in compliance with applicable laws, ordinances, regulations, and standards. and that the proposed extension to the start of construction deadline will not result in a significant adverse direct or cumulative impact to the environment (Title 20, California Code of Regulations, Section 1769)."

1769(A)(2)
Where staff determines that there is ***no*** possibility that the modifications may have a significant effect on the environment, (emphasis added)

"The project owner intends to participate in the most recent Pacific Gas and Electric Company (PG&E) 2008 All Source Long-Term Request for Offers Solicitation. PG&E is seeking to procure 800-1200 MW of new resources, with a preference to obtain new dispatchable, operationally flexible resources with on-line dates no later than May 2015. The project owner believes that they are uniquely qualified to meet the terms of PG&E's current solicitation and to meet the growing power needs of municipal utilities in the region."

June 23, 2008 Donna Stone, Compliance Project Manager

The CEC should not be a part of allowing our energy market to be manipulated by secret power purchase agreements that are not in the public interest. This gapping hole in the environmental review process was created by the manipulation of the energy market by Enron and Calpine that led California to believe that it was in an energy crisis at the turn of the century. The fallacy of the underlying basis has been exposed but the resulting policy has not been adjusted. It is relegating the CEC from a position of protecting our energy future to that of a tool for polluters and profiteers to subvert CEQA and fiscal responsibility.

The 2007 integrated Energy Policy Report states:

"While these plans loosely conform to general requirements specified by Assembly Bill 57 (Wright), Chapter 835, Statutes of 2002, and CPUC orders, they vary greatly in their methodologies and assumptions. Each investor-owned utility has developed its individual methods to calculate and weigh the criteria, including resource or market value, portfolio fit, credit, viability, transmission impact, debt equivalence, and non-price terms and conditions. Consequently, the criteria are not universally transparent and require a high degree of subjective interpretation and judgment...."

"investor-owned utility gas costs are normally passed along to ratepayers; under current regulatory rules unexpectedly high prices do not unduly burden shareholders. The corrosive influence of "moral hazard," where decisions are made by entities that are financially insulated from the consequences of those decisions, should be obvious."
IEPR 62 (underline added)

The project as licensed is not "qualified to meet the terms of PG&E's current solicitation It is not licensed to be operationally flexible.

STAFF REPEATEDLY IDENTIFIES THE NEED FOR AN AMENDMENT

"regardless of the construction date, the following outstanding issues would need to addressed by the project owner prior to project construction and operation, and as a condition of sale of the permit."
Staff Analysis of Air Quality Tuan Ngo, P.E. page 4

"It is staff's contention that if the Project Owner does enter into a power purchase agreement and moves forward with the project an amendment will be required..."

"the Project Owner will need to reevaluate the potential risk associated with anhydrous ammonia use prior to moving forward with the project."
Staff Analysis of Hazardous Materials Management Rick Tyler page 2

the Energy Commission will require zero liquid discharge technologies unless such technologies are shown to be "environmentally undesirable" or "economically unsound". Staff will evaluate the project in light of this new policy at such time that a petition to amend is submitted to allow start of construction of the project."

"Staff recommends the analysis of the economics requiring use of recycled water be revisited prior to approval of construction."
Staff Analysis of Soil and Water Paul Marshall CEG, CHg. Page 2

Incidentally EXECUTIVE ORDER S-06-08 supports this position.
"Governor Schwarzenegger Proclaims Drought and Orders Immediate Action to Address Situation "

"regardless of the construction date, the Project Owner will need to provide any updated transmission studies."
Staff analysis of Transmission System Engineering Mark Hesters pg. 1

There has been no disclosure of the status of the Federal PSD permit. I reserve comment until such time as the PSD permit is properly noticed.

Many of the other objections to this extension are consistent with the objections of Robert Sarvey on Extension Request.
to Russell City Energy Center extension made by myself, the County of Alameda, Chabot College and others (incorporated herein) . It is requested that the CEC take administrative notice of the Russell City Energy Center Proceedings.

Attachments:
County of Alameda Objection
Pacific Environment Objection
Simpson Objection To Russell City Energy Center

Respectfully submitted on July 18, 2008 by

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STATE OF CALIFORNIA
State Energy Resources
Conservation And Development Commission

In the Matter of: **RUSSELL CITY ENERGY CENTER,**	Docket No.: **01-AFC-7C** County of Alameda's Comments on Russell City Energy Company LLC's Petition for Extension of Deadline for Commencement of Construction for the Russell City Energy Center

DATED: June 30, 2008

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In the Matter of: **RUSSELL CITY ENERGY CENTER,**	Docket No.: **01-AFC-7C** County of Alameda's Comments on Russell City Energy Company LLC's Petition for Extension of Deadline for Commencement of Construction for the Russell City Energy Center

On June 18, 2008, the County of Alameda ("the County") received from the California Energy Commission ("the Commission") a Notice of Receipt of the Petition to Extend Construction Deadline for the Russell City Energy Center Project (01-AFC-7C) dated June 13, 2008 ("Notice of Receipt"). The Notice of Receipt invites any member of the public to provide, no later than July 1, 2008, oral or written comments on Russell City Energy Company LLC's Petition for Extension of Deadline for Commencement of Construction for the Russell City Energy Center ("the Petition"), filed May 30, 2008. The following constitutes the County's comments on said Petition.

PROCEDURAL HISTORY

On September 11, 2002, the Commission certified 01-AFC-7, allowing the Calpine Corporation to construct the Russell City Energy Center ("RCEC"). The RCEC license provided Calpine with five years to commence (as opposed to complete) construction. The deadline for commencement of construction was September 11, 2007. Due to a lack of financing, Calpine Corporation never commenced construction of the RCEC. In November, 2006, Calpine filed a petition to amend the RCEC license to move it to a different location and make some other modifications. On April 23, 2007, Calpine filed a petition to change ownership of RCEC to the Russell City Energy Company, LLC ("the applicant"), a joint venture between Calpine and Aircraft Services Corporation, a wholly owned indirect subsidiary of General Electric Company. On August 1, 2007, the Commission approved the transfer of ownership.

On July 25, 2007, Calpine filed a Petition to Extend the Deadline to Commence Construction of RCEC. In the petition, Calpine requested an additional year to commence construction of the RCEC. At that time neither the change of ownership petition nor the amendment petition had been approved. On August 29, 2007, the Commission approved the petition to extend the deadline to commence construction by the one year requested. The original September 11, 2007 deadline was extended to September 11, 2008. To date, the applicant has not commenced construction of the RCEC.

On May 30, 2008, the applicant filed a second petition to extend the deadline to commence construction of the RCEC. The petition cites four factors that caused delay in the construction of the RCEC: (1) three groups, including the County, filed petitions for reconsideration; (2) three groups, including the County, filed writ of mandate petitions with the California Supreme Court; (3) Hayward resident Rob Simpson appealed the Bay Area Air Quality Management District's ("BAAQMD") issuance of an Authority to Construct permit with BAAQMD Hearing Board; and (4) Mr. Simpson also appealed BAAQMD's issuance of a PSD permit with the Environmental Appeals Board ("EAB") of the U.S. Environmental Protection Agency ("EPA"), which awaits resolution. The applicant also indicated that it still lacked financing for the RCEC.

STANDARD OF REVIEW

Title 20, C.C.R. § 1720.3 provides that

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> [u]nless a shorter deadline is established pursuant to [Public Resources Code] § 25534, the deadline for the commencement of construction shall be five years after the effective date of the decision. Prior to the deadline, the applicant may request, and the commission may order, an extension of the deadline for good cause.

Section 1720.3 does not provide for the procedure by which the Commission should review petitions filed pursuant to its provisions, nor the criteria by which applicants may establish good cause for an extension.

It is also noteworthy that applicants rarely file § 1720.3 petitions.[1] During the past decade, most applicants promptly began construction of certified projects, often within one day of Commission approval.[2] The infrequency of § 1720.3 petitions may explain the disparate treatment in different AFC proceedings. For example, in SEPCO (92-AFC-2C), the Commission conducted a full evidentiary hearing on the issue of good cause, whereas the first RCEC petition was approved at a Commission Business Meeting without significant discussion.

The County believes the Commission should consider every §1720.3 petition under the same standard of review and in accordance with the same procedure. In that regard, the Commission should adhere to its own precedent, set in the SEPCO AFC (92-AFC-2C) and discussed in detail below, for consideration of this § 1720.3 petition.

A. The Commission Must Follow the *SEPCO* Precedent

The Commission first adopted § 1720.3 in 1993, but did not receive its first petition under the new section until 1999 in the SEPCO AFC (92-AFC-2C). (Committee Order, Feb. 7, 2000.) Unsure of the applicable procedure and standard of review for considering the SEPCO § 1720.3

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[1] Indeed, the County's review of past Commission siting cases indicates that applicants in only four AFC proceedings have applicants ever filed petitions for extensions of the deadline to commence construction under § 1720.3: Sacramento Ethanol and Power Cogeneration Project ("SEPCO") (92-AFC-2C), Salton Sea Geothermal Power Plant Project (02-AFC-02), East Altamont Energy Center Project (01-AFC-4C), and RCEC (01-AFC-7C).

[2] *See* "California Energy Commission - Energy Facility Status, Projects Since 1997," *at* http://www.energy.ca.gov/sitingcases/all_projects.html (last updated 6/20/08).

petition, the Commission conducted a "committee procedural conference" to determine how the Commission should proceed. (*See generally* Transcript of Committee Procedural Conference, SEPCO Compliance Proceeding, 92-AFC-2C, July 1, 1999 (hereinafter "CPC Transcript").)

The SEPCO compliance proceeding on the § 1720.3 petition resulted in an important and thoroughly considered precedent that should serve as the basis for consideration of all future § 1720.3 petitions. Indeed, that appears to have been the purpose of considering the matter at length. Then-Commissioner Laurie noted: "This is a matter of first impression for the Commission. And I want to make sure that any precedent set is a rational one." (Transcript of Hearing on SEPCO Petition to Extend Deadline to Commence Construction, SEPCO Compliance Proceeding, 92-AFC-2C, January 24, 2000 (hereinafter "Merits Transcript"); Committee Order, Feb. 7, 2000 ("Therefore, the Committee desires to establish a rational process by which such petitions may be judged.").) The SEPCO compliance proceedings established three important precedents, discussed in detail below.

1. <u>The Commission Must Make Good Cause Findings Under the § 1769(a) Standard</u>

The SEPCO committee accepted Staff's argument that § 1720.3 petitions must be considered procedurally in the same manner as amendment petitions under § 1769(a). (CPC Transcript, at 7-15[3]; Commission Order Re: Petition to Extend Start of Construction, Order No. 99-0526-02 (May 26, 1999).) Section 1769(a) otherwise provides the procedure and standard of review for the consideration of petitions to amend the conditions of certification.

This conclusion has two implications. First, § 1720.3 petitions would be subject to the same procedural handling as § 1769 amendment proceedings, including required notices and comment periods. Second, the showing of good cause required under § 1720.3 would need to satisfy the factors listed in § 1769(a)(1)(A) – (G)[4] that are necessary to support the findings

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[3] The CPC Transcript lacks line numbers; therefore, citations are to the page numbers only. The Merits Transcript does have line numbers.

[4] Those factors are as follows:

(A) A complete description of the proposed modifications, including new language for any conditions that will be affected;

required for the Commission to approve a license amendment under § 1769(a). (CPC Transcript, at 7-15.)

2. The Commission Must Hold an Evidentiary Hearing on Good Cause Issue

To demonstrate the applicant had satisfied each element of subparts (A) – (G) of § 1769(a)(1), the committee found it necessary to create an administrative record, including sworn testimony under oath and subject to cross-examination. (CPC Transcript, at 17-19.) The Hearing Officer explained that the testimony had "to be under oath, subject to cross-examination. That's the evidentiary basis on which you can base a finding in a quasi-judicial hearing." (Id., at 19.) The Hearing Officer went on to explain that while the hearing need not be "elaborate," "the fact that the matter may not be in dispute is probably not sufficient for the Committee to make its finding of good cause." (Id., at 18.) The Committee ultimately adopted the Hearing Officer's recommendation, as evidenced in the conduct of the subsequent hearing on the merits. (*See generally* Merits Transcript.)

3. The Commission Must Conduct CEQA Review

In a May 26, 1999 order, the Commission held that "[t]he granting of an extension to start construction of the power plant is a discretionary decision that is subject to CEQA." (Order No. 99-0526-02, at 2.) Procedurally, CEQA review is the second step of a two-part analysis. At the SEPCO hearing on the merits, the Hearing Officer explained that "[i]f the Committee finds good cause for the extension we are directed to carry out the required environmental analysis under CEQA." (Merits Transcript, at 6:7-9.) In the SEPCO proceedings, the Committee adopted a

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(B) A discussion of the necessity for the proposed modifications;
(C) If the modification is based on information that was known by the petitioner during the certification proceeding, an explanation why the issue was not raised at that time;
(D) If the modification is based on new information that changes or undermines the assumptions, rationale, findings, or other bases of the final decision, an explanation of why the change should be permitted;
(E) An analysis of the impacts the modification may have on the environment and proposed measures to mitigate any significant adverse impacts;
(F) A discussion of the impact of the modification on the facility's ability to comply with applicable laws, ordinances, regulations, and standards;
(G) A discussion of how the modification affects the public;
(§ 1769(a)(1).)

recommendation to conduct a scoping session to identify the topic areas where new information or changed LORS would apply.

DISCUSSION

I. Section 1720.3 Does Not Provide for the Grant of Multiple Petitions

The applicant's second petition to extend the deadline to commence construction presents an issue of first impression of its own: it is the first time the Commission has been asked to grant two § 1720.3 petitions in a single AFC proceeding. The Commission may be faced with this issue for the first time because the language of § 1720.3 does not provide for the granting of multiple petitions. Instead, the regulatory language indicates that "the applicant may request, and the commission may order, *an* extension of the deadline for good cause." (§ 1720.3)(emphasis added).

When interpreting the language of § 1720.3, the Commission should follow the basic principle of statutory construction that the written language should be given its plain and ordinary meaning. Thus "[i]f the words of the statute are clear, the [reviewing body] should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*People v. Morris* 46 Cal. 3d 1, 15 (1988), disapproved on other grounds in *In re Sassounian* 9 Cal. 4th 535, 543-544, fn. 5 (1995) (internal citations removed).) The language of § 1720.3 is clearly and unambiguously written in the singular. Therefore, it only provides for the granting of a single petition for an extension of time to commence construction. As the Commission already granted such a petition for the RCEC on August 29, 2007, the second petition should be denied.

II. THE APPLICANT HAS NOT DEMONSTRATED GOOD CAUSE

Under the standard of review outlined above, the applicant has not demonstrated good cause for an unprecedented second extension of the deadline to commence construction of the RCEC. The reasons the applicant identifies in its petition do not demonstrate good cause, and fail to satisfy the elements of § 1769(a)(1). Furthermore, the applicant should be required to demonstrate that it has a reasonable likelihood of obtaining financing, given its continued inability to date to do so.

A. Subsequent Litigation Not a Valid Basis for Showing of Good Cause

The applicant relies primarily on a series of appeals as the basis for granting its second petition. Subsequent litigation alone cannot form the basis of good cause, especially since it satisfies none of the § 1769(a)(1) factors. Moreover, the applicant should have anticipated the possibility of litigation when it made its first request to extend the deadline to commence construction. The RCEC amendment petition was very controversial and provoked considerable public upset in the local community. It was therefore unreasonable to expect to be able to commence construction under the license within the time frame that RCEC previously thought. This error in judgment does not constitute good cause.

B. Lack of Financing Cannot Constitute Good Cause

If lack of financing alone can support a finding of good cause, then nothing would prevent applicants from receiving an endless series of extensions of the deadline to commence construction.[5] Moreover, if lack of financing alone became the standard for a showing of good cause, applicants would lose the incentive to find financing in advance of seeking Commission certification for a thermal power plant project. Applicants without financing could seek Commission certification with no intention of ever constructing the facility, but instead simply pocket the license to sell at a profit in the future. Commission licenses are intended as a means to the construction of electric power facilities necessary to the health, safety and welfare of the people of California, not some sort of commodity in and of themselves.

At a recent Commission Business Meeting, Chairwoman Pfannenstiel indicated that the Commission has grown wary of applicants that simply want to "pocket the license for some future value." (Transcript of the April 16, 2008 Commission Business Meeting, at 66:15-16.) The Commission should conduct an evidentiary hearing to get assurances from the applicant that it has a realistic likelihood of obtaining financing and does not intend simply to make a profit from the sale of the license.

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[5] Except that § 1720.3 does not appear to provide for multiple extensions of the deadline to commence construction (*see infra*).

C. If Lack of Financing Constitutes Good Cause, the Applicant Must Explain Why It Currently Lacks Financing and When It Will Obtain Financing

If in the alternative the Commission accepts the applicant's lack of financing as a basis for a finding of good cause, then the Commission must conduct an evidentiary hearing to determine why the applicant lacks financing and when the applicant is likely to obtain financing to ensure that multiple delays will not cause the applicant to proceed on a stale license. In SEPCO, the committee evidenced a very serious policy concern that the applicant would be proceeding on a stale license. In its February 7, 2000 Committee Order, the committee noted that the SEPCO petition was merely the first step of the applicant's plan to file a petition to amend the license, and then a possible petition for change in ownership. (Committee Order, Feb. 7, 2000.) The order went on to state that "[t]hese factors create confusion for the Commission staff which must analyze the project, for the members of the Commission who must consider [the applicant's] petition, and, most significantly, for the members of the public who wish to understand the nature of this project." (Id.) The ongoing uncertainty surrounding SEPCO's license ultimately lead the Commission to deny the petition to extend the deadline to commence construction and terminate the SEPCO AFC. (*See* Commission Order, April 6, 2000.)

Lack of financing has plagued the RCEC since the original approval of the AFC in September of 2002, and prevented the original applicant, Calpine, from commencing construction. Presumably Calpine formed a joint venture with a subsidiary of General Electric to shore up the financing for the project. Yet the second Petition once again indicates that the applicant does not have the financing to commence construction.

Under the second Petition, the applicant would not be required to even *commence* construction, much less complete it, before 2010, a full eight years after the original approval. Given the enormous changes in the energy market and regulatory landscape since 2002, what may have been acceptable then may be outdated by the time construction is completed some time after 2010.

D. The Applicant Must Demonstrate It Can Meet the § 1769(a)(1) Findings

The applicant's second Petition nowhere indicates that it will be able to satisfy all of the criteria in § 1769(a)(1). The Commission should require the applicant to make a second application that includes information that would satisfy the all of the § 1769(a)(1)[6] factors. In addition, the Commission should conduct an evidentiary hearing and require the applicant to present evidence under oath and subject to cross-examination in support of its showing of good cause.

In particular, the applicant should be required to demonstrate the RCEC's ability to meet several intervening changes in LORS since the time of the September 2007 approval of the amendment. The applicant should be required to provide evidence that the RCEC will comply with changes in LORS, or indicate that the changed LORS will require further project modifications.

First among the changes in LORS is the new state standard for NO_2 adopted by CARB on March 20, 2008. In the recent Eastshore Energy Center (06-AFC-6) proceedings, the Eastshore Committee PMPD has required the applicant to consult with CARB to identify the appropriate methodology for the new state standard and provide evidence at a supplemental evidentiary hearing. (*See* Notice of Availability of the Presiding Member's Proposed Decision and Notice of Evidentiary Hearing and Notice of Committee Conference, Eastshore Energy Center, 06-AFC-6, June 20, 2008 (hereinafter "Eastshore PMPD Notice").) Application of the new and more stringent state standard is particularly important where, as here, the Commission Final Decision approving the RCEC AFC expressed concern about the level of ozone precursors, such as NOx, that the facility will emit given that the local area is already out of attainment for ozone. (RCEC, Commission Final Decision, CEC-800-2007-003-CMF, Sept. 26, 2007, at 76-77.) The Commission should require the applicant to perform the same level of

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[6] The Notice of Receipt for the RCEC indicates that the Commission will consider the Petition in accordance with the provisions of § 1769(b). Section 1769(b) concerns the standard of review for a petition to change ownership, which has nothing to do with a petition for extension of time to commence construction. Moreover, the SEPCO committee specifically identified the § 1769(a) factors as the basis for findings in support of a petition under § 1720.3. (CPC Transcript, at 7-15.)

consultation with CARB and present the same amount of information at an evidentiary hearing as the Eastshore committee will require of that facility's applicant.

Second, again as identified in the recent Eastshore PMPD Notice, the applicant should be required to provide evidence regarding the relevance of the new ambient air quality data from CARB's March 18, 2008 Draft Health Risk Assessment on diesel particulate emissions in the Oakland area for the purpose of characterizing ambient air quality in the East Bay to ensure that the health risk assessment performed by Dr. Alvin Greenberg continues to be viable. This evidence is particularly important because the RCEC is to be constructed in a densely populated urban area with a significant existing burden of disease related to air pollution. (*See* Race, Class and the Patterns of Disease Distribution in Hayward: Decision-Making that Reinforces Health Inequity, Eastshore Energy Center, 06-AFC-6, Exhibit 532.) CARB's new Draft Health Risk Assessment may alter some of Dr. Greenberg's findings and necessitate further mitigation or project modification.

III. Conclusion

The scant history of petitions to extend the deadline to commence construction under § 1720.3 suggests that the applicant seeks an unprecedented second extension not provided for in the Commission's regulations. For this reason alone, the petition should be denied. On the merits, the applicant has failed to demonstrate how it would satisfy any of the elements of § 1769(a)(1) necessary for a finding of good cause. Instead, the applicant simply cites its failure to anticipate possible litigation and its continued lack of financing. That showing does not demonstrate good cause for what amounts to extraordinary relief. Moreover, even assuming the applicant were able to demonstrate good cause, the Commission must then perform CEQA review.

Throughout this process, the Commission should be mindful of the risks involved in allowing applicants to proceed on stale licenses and the possibility of an applicant requesting an extension of time simply to sell the license, rather than construct the power plant. Under these circumstances, the County respectfully requests that the Commission deny the applicant's second Petition.

Assistant County Counsel

By ______________________
Andrew Massey
Associate County Counsel

Attorneys for County of Alameda

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

Amendment to the APPLICATION FOR CERTIFICATION OF THE RUSSELL ENERGY CENTER POWER PLANT PROJECT

Docket No. 01-AFC-7C
PROOF OF SERVICE
(Revised 7/6/07)

INSTRUCTIONS: All parties shall 1) send an original signed document plus 12 copies OR 2) mail one original signed copy AND e-mail the document to the web address below, AND 3) all parties shall also send a printed OR electronic copy of the documents that shall include a proof of service declaration to each of the individuals on the proof of service:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 01-AFC-7C
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DECLARATION OF SERVICE

I, Dalia Liang, declare that on June 30, 2008, I deposited copies of the attached: County of Alameda's Comments on Russell City Energy Company LLC's Petition for Extension of Deadline for Commencement of Construction for the Russell City Energy Center in the United States mail at Oakland, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

OR

I deposited the same document at a designated place for collection maintained by Federal Express, an express service carrier, with fully-prepaid delivery fees, and addressed to those identified on the Proof of Service listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Dalia Liang

July 1, 2008

Dockets Unit
California Energy Commission
1516 Ninth Street, MS4
Sacramento, CA 95814
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Re: EASTSHORE ENERGY CENTER

Comments prepared by Robert Freehling, Policy Director at Local Power, LLC

Questions or comments about this letter should be directed to:

Rory Cox, California Program Director
Pacific Environment
311 California Street, Suite 650
Oakland, CA 94610
Ph: 415.399.8850 x302
Email: rcox@pacificenvironment.org

Dear Commissioners,

We appreciate your deliberative attention to the permitting of this project, and your careful consideration of these comments. These comments are written on behalf of the Local Clean Energy Alliance of the East Bay (LCEA), which is made up of the Bay Chapter of the Sierra Club, Bay Localize, EcoCity Builders, Pacific Environment and several other Bay Area organizations and businesses. All of our members are listed at the end of this letter. We are writing to voice our opposition to the permitting of the Russell City Energy Center Project.

California is heavily dependent today on natural gas to generate about forty percent of its electricity. While natural gas is much cleaner than coal, it still has many problems, including air pollution, greenhouse gases, and price volatility. And though there are still considerable supplies of natural gas in North America, these are not unlimited.

A confluence of events is creating an opportunity to move to a new paradigm for how we meet our energy needs. An impressive raft of policies, rules and legislation in California are aiming to address global warming, to increase environmental protection, to reduce dependency on fossil fuels, and to secure a stable and economical energy supply for the future. Leading examples include:

- AB 32, California's Greenhouse Gas law that would roll back carbon dioxide emissions to 1990 levels by 2020, equivalent to a reduction of about 25%.

- The Renewable Portfolio Standard that requires all utilities to obtain at least 20% of their electric energy needs from renewable sources by 2010.

- The Energy Action Plan that sets a goal of 33% renewable energy by 2020.

- The California Solar Initiative that commits $3 billion to subsidizing the construction of 3,000 megawatts of rooftop solar installations by 2017.

- Energy Efficiency programs that have been ramped up over the last few years to a total state budget of nearly $1 billion per year to reduce electricity consumption.

- Programs that require utilities to procure 5% of their peak capacity needs by reducing their customers' peak demand, *in addition to energy efficiency savings.*

Implementation of these initiatives will dramatically reduce California's usage of natural gas.

By applying its policy tools, California can avoid most new power plant construction while shutting down the state's fleet of aging power plants built in 1970 or prior. One of the most important policies is the state's mandate to increase renewable energy to 20% by 2010, and the Energy Action Plan goal to increase renewables to 33% by 2020. A study by Lawrence Berkeley National Laboratory for the California Energy Commission examined the effect of a 33% renewable energy supply on the need for natural gas generation, and found that this volume of renewable energy would allow for a large amount of the state's aging natural gas power plants to be retired without commissioning new ones. Replacing aging power plants with new natural gas plants would thus seem to be at odds with the goal of achieving significantly higher levels of renewable energy.

While it may be necessary to replace some of the aging plants with new natural gas power replacing all—or even most—of them in this way would represent failure for almost every major clean energy policy that the state has. There is no doubt that continuing to rely heavily on natural gas power plants is technically and conceptually easier for grid operators, and we will continue to need some amount of this resource for the near term Yet, it is imperative that alternative ways of meeting our future energy needs be given as high, or even higher, priority than simply taking the technically easier path. Along with answering the real technical question about how grid reliability can be maintained while reducing reliance on natural gas, there needs also to be an examination of the alternatives from the point of view of state policy and the environment. The challenges of climate change and depletion of fossil fuels will only increasingly make it necessary to face and surmount the technical challenges of moving to a new paradigm.

There are clearly abundant resources available today to the electric grid as a whole, yet planners ranging from the IOUs and regulatory bodies like the ISO, and all the way to the White House, keep insisting that reliability in California is a problem, and that there is a great need to build new power plants. This reliability is not a lack of total generation and transmission capacity for the state. In fact, the state has been on a major construction binge for natural gas power plants for the past eight years.

Power Plants On-Line by Year		
2008		
2007	2 facilities	177 MW
2006	5 facilities	1,487 MW*
2005	7 facilities	3,112 MW
2004	0 facilities	0 MW
2003	7.5 Facilities	3,668 MW*
2002	7 Facilities	2,729 MW*
2001	9.5 Facilities	1,914 MW
1999 & 2000	0 Facilities	0 MW
2001-2007	38 Facilities	13,087 MW

* Note: Some units split date they come on line. We generally use the earliest date project first unit is on line in the totals for each year. See below for years.

2006: Riverside (Unit 1 on line 6/1/06, Unit 2 on line 7/26/06)
2005: Mountainview (Unit 3 on line 12/9/05, Unit 4 on line 1/19/06, total MW added to 2005)
2003: Sunrise Combined Cycle (265 MW in 2003) is added separately from Sunrise Simple Cycle (320 MW in 2001) because was done as amendment, but is counted as one facility in 2001.
2002: Huntington Beach (Unit 3 on line 7/31/02. Unit 4 on line 8/7/03, total MW added to 2002.)

Source: California Energy Commission [1]

The table above omits additional generation that was built in the state but not under the licensing jurisdiction of the Energy Commission. Since 1999, this has amounted to 2,664 megawatts, for a grand total of 15,751 megawatts. This was accompanied by the retirement or mothballing of 7,548 megawatts of old power plants, for a net gain of 8,203 megawatts. [2] This updating of the electric generation infrastructure produced some important benefits, especially in reducing demand for natural gas fuel to generate electricity over the past eight years.

There are huge resources available to the state's electric power grid, including conventional generation from natural gas, nuclear, hydroelectric and renewable power sources. Under state law hydro under 30 megawatts is considered "renewable", however, for purposes of grid reliability small hydro is "dispatchable," meaning it can be ramped up and down in a controlled manner, unlike solar and wind which are said to be

[1] Power Plant Fact Sheet, California Energy Commission Media Office, updated 5/07/08. http://www.energy.ca.gov/sitingcases/FACTSHEET_SUMMARY.PDF

[2] Ibid.

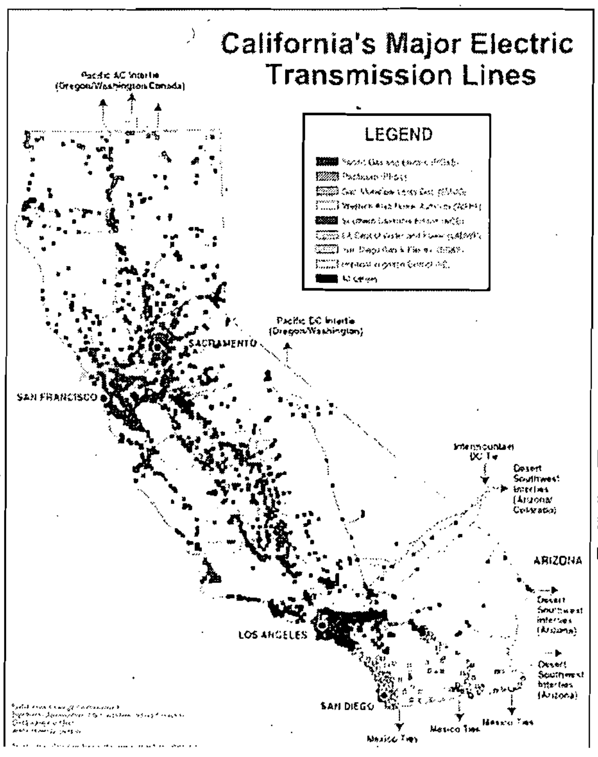
"intermittent" according to when the sun shines or the wind blows. The table below shows power supplies from different sources, adjusted for reliability factor called "effective load carrying capacity" (ELCC): [3]

	Capacity	elcc	reliable
	mw		mw
Natural Gas	40,832	100%	40,832
Other Thermal	3,446	100%	3,446
Nuclear	4,472	100%	4,472
Hydro	10,549	100%	10,549
Pumped Storage	3,670	95%	3,487
Renewables	5,739	50%	2,870
Total Database	68,707		65,654

Conventional power sources such as natural gas, nuclear and hydroelectric plants are considered to count 100% of their capacity toward reliability needs, and thus are rated with 100% Effective Load Carrying Capacity. About half of the state's renewable power is wind, which is quite variable and has closer to a 25% ELCC. For purposes of estimation a factor of 50% was used, which is conservative, since the other in-state renewable resources such as geothermal and the solar thermal power plants with natural gas backup have 100% ELCC.

The total generation resource above, of over 65,000 megawatts, exceeds the summer heat storm peak demand needs in 2006, which was just over 60,000 megawatts. That heat storm represented an event expected less than once in 30 years, a level of demand that is thousands of megawatts higher than the long term growth trend line. [4] Current state reliability criteria only require demand projections for a 1 in 2 year event, plus a margin of 15% to 17% for extra security. It is noteworthy that these design criteria for system resource planning were more than sufficient to meet the needs for the extraordinary 2006 event.

In addition to the power plants considered above, there are several other significant resources. For example, Investor Owned Utilities (IOUs) are required by the California



Database, California Energy Commission.
.XLS
expected long term growth rate in demand of 1.1 to
not point out that the cited peak demand in 2006
future expected growth.

Public Utilities Commission to obtain 5% of peak energy needs from Demand Response programs. While the utilities have fallen short of meeting this target, other programs allowing the utility to curtail their customers' energy usage during power emergencies—called Interruptible Load—has more than picked up all the slack. In all, 236,195 customer "Service Accounts" participated in the demand reduction programs offered by the Investor Owned Utilities. Another resource is the wide assortment of small customer-owned generation, particularly Backup Generators (BUGS), and rooftop solar photovoltaics (PV).

Finally, there are several major power transmission lines that bring in electricity from the north, the east and the southwest. [5] Import capacity includes 7,900 megawatts from the Pacific Northwest, 1,900 megawatts from Utah, 7,500 megawatts from the Desert Southwest, and 800 megawatts from Baja region of Mexico. [6]

Total Resources Available to California Electric Grid

Resource	Mw	elcc	reliable mw
Conventional Instate Generation	68,707		65,654
Transmission Import	18100		18100
BUGS Database [7]	3,880	90%	3,492
Peak Demand Resource (DR/IL) [8]	2,669	100%	2,669
Rooftop Solar	300	40%	120
Total All	93,656		90,035

If all these above resources are included, the power capacity for the state exceeds a staggering 90,000 megawatts, 50% higher than has ever been recorded as a peak need. Not all of this is always available when and where needed, but a surprising amount is, sometimes even in excess of the ISO's forecasts. [9]

The chart below helps to picture what a "typical" day of demand looks like for the California ISO grid. During the spring and fall daily electricity demand peaks at about 30,000 megawatts, while in the summer it can rise in the late afternoon to 40,000

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5 Map source: California Energy Commission, http://www.energy.ca.gov/maps/transmission_lines.html

6 US Transmission Capacity: Present Status and Future Prospects, by Eric Hirst, prepared for Edison Electric Institute and Office of Electric Transmission and Distribution, US Dept. of Energy, August 2004, p.34.

7 BUGS 1 – Database of Public Back-Up Generators (BUGS) in California, Updated January 2004. California Energy Commission, http://www.energy.ca.gov/database/EDITED_PUBLIC_BUGS_INVENTORY.XLS

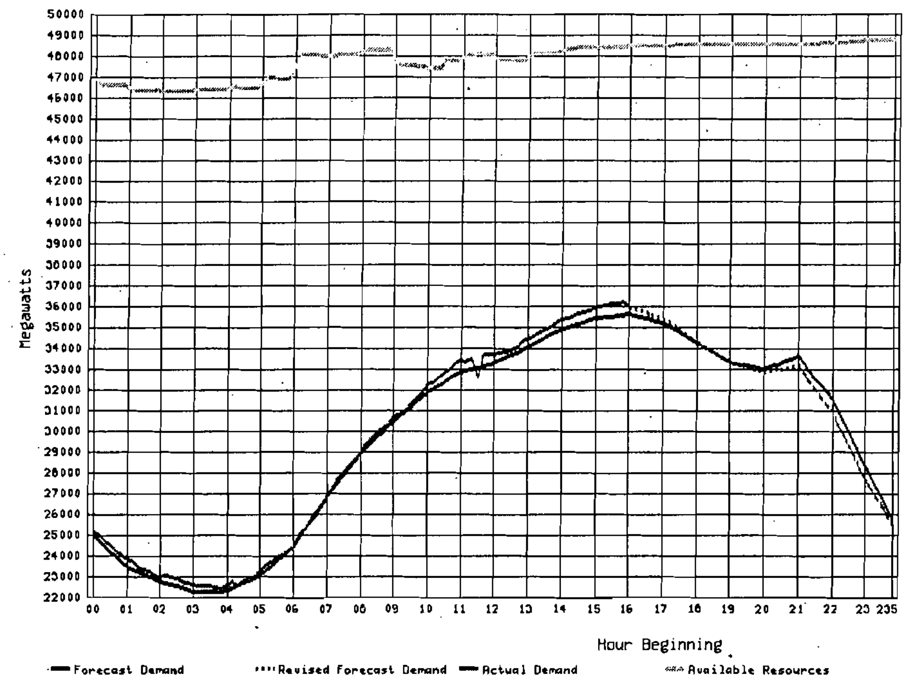
8 The State of Demand Response in California, A. Faruqui, R. Hledik, Publication Number CEC-200-2007-003-F, California Energy Commission Division of Electricity and Demand Analysis, September 2007. Table 6, p. 16.

9 July 2006 CAISO Actual System Daily Peak Demand,Generation and Imports at Time of Daily Peak,

CAL_ISO_08_29_2006.

megawatts or more. After the peak demand falls over a period of 10 to 12 hours to a low point in the early morning before dawn, when the demand begins to rise again.

California ISO Forecast and Demand for June 24, 2004



Given this, it is the position of the Local Clean Energy Alliance of the East Bay that this project simply is not needed. California has sufficient resources to meet electricity demand without the project. At a time when the state has a policy to aggressively develop renewable energy, we believe this project is a step in the wrong direction.

The Local Clean Energy Alliance is a growing coalition of local non-profits, businesses, and community leaders working for a clean energy future in the East Bay. Our members: Bay Localize, Berkeley Oil Independence Task Force, EcoCity Builders, Ecology Center, Energy Preparedness, Kyoto USA, Moss Beach Renewable Energy, Nomad Café, Oakland Community Action Network, Pacific Environment, Rainforest Action Network, Sierra Club – San Francisco Bay Chapter, Urban Alliance for Sustainability.

Yours,

Rory Cox, California Program Director
Pacific Environment
311 California Street, Suite 650
Oakland, CA 94610
Ph: 415.399.8850 x302; Email: rcox@pacificenvironment.org

Robert Sarvey
501 W. Grantline Rd.
Tracy, ca. 95376
209 835-7162

State of California
State Energy Resources and Conservation Division

In the matter of:	)	01-AFC-4C
	)	
East Altamont energy Center	)	Comments of Robert Sarvey
	)	on Extension Request

7-18-08

Date

Robert Sarvey

Comments on the Requested Three-Year Extension of the Start of Construction Deadline for the East Altamont Energy Center 01-AFC-04C

Introduction

On July 9th the Energy Commission Staff posted their analysis of the EAEC petition for an extension of time to construct on the Commission website. The analysis dated June 23 called for members of the public to comment on staff's analysis and the petition by July 19 due to inadvertent late posting of staff's analysis on the commission website. For the reasons outlined below I request that the commission summarily deny the petition. This project no longer complies with all LORS and no longer complies with the CEQA requirements necessary for the commission to approve an extension. Section 1720.3 sets the time for a project to begin construction at five years. **The section also allows an extension for good cause.** Section 1720.3 does not provide a procedure for commission review of extensions. To determine the standard of review for extensions we must look to past extension requests before the Commission. Only five extension requests have been submitted since the commission adopted Section 1720.3 three of them coincidentally were filed by Calpine Corporation. Generally applicants begin construction immediately after their license is granted. Only four extension requests have been brought before the Energy Commission. Below is a brief review of each previous request.

SEPCO

The Commission adopted Section 1720.3 in 1993. It received its first extension request in 1999 from SEPCO (92-AFC-2C). The extension request was controversial and opposed by many citizens groups in Rio Linda and also opposed by CEC Staff. Without any precedent being set in previous cases for extension requests the commission convened a "committee procedural conference" to discus how to proceed with the extension request. Commissioner Lauire stated, "This is a matter of first impression for the commission. And I want to make sure that any precedent set is a rational one." (Transcript of hearing on SEPCO Petition to Extend Deadline to commence construction SECO compliance proceeding 92-AFC-2C, January 24,2000).

In the SEPCO proceeding CEC staff argued that Section 1720.3 petitions must be considered procedurally in the same manner as amendment petitions under Section 1769(a). The Commission adopted staff's argument which required extension requests to be procedurally handled like amendment requests with required notices and comment periods. According to staff in the SEPCO proceeding the showing of good cause under Section 1720.3 would require the applicant to satisfy the requirements of Section 1769 (a)(A)-(G). The committee convened an evidentiary hearing to determine if the applicant could demonstrate good cause for the extension. In the May 26, 1999 order the Commission held that the granting of an extension to start construction of the power plant is a discretionary decision that is subject to CEQA. This established a two step process for extensions where first the Commission must establish if there is good cause to grant the extension and then CEQA review must be done to determine if the extension requests effect on the environment.

Russell City

The Russell City extension was approved on August 29, 2007. Unlike the SEPCO extension there was no public opposition to the extension request and CEC staff supported granting the extension. The project was in the midst of a major amendment and CEQA review was ongoing. Without much comment the request was granted at a CEC Business Meeting. The order to approve the extension stated that the applicant needed to complete three steps before it could begin construction:

1) Energy Commission's approval of the proposed amendment to relocate the project,
2) Public Utility Commission approval of PG&E's application to construct a transmission line for the project and
3) Project financing. No other person offered comments."

This was considered good cause for granting the extension. There was no need for the Commission to conduct a CEQA review because that was part of the ongoing amendment. The order approving the extension stated:

"There being no objection and good cause having been shown by petitioner, the California Energy Commission hereby grants the petition to extend the start of construction of the Russell City Energy Center from September 10, 2007, to September 10,2008."

Russell City is now in the process of requesting another extension but no ruling has been handed down at this time. There is substantial public opposition to the extension.

Salton Sea Geothermal

The Salton Sea project filed for a construction extension on November 12, 2007. There was no public opposition and the CEC staff recommended approval of the petition. The order defines good cause as the owner's inability to commence construction due to economic circumstances beyond its control. The order to approve the extension stated:

" There being no objection and good cause having been shown by petitioner, the California Energy Commission hereby grants the petition to extend the start of construction of the Salton Sea Geothermal Unit #6 from December 18, 2008 to December 18, 2011."

East Altamont

The Commission is now faced with the decision to approve an extension request for the East Altamont Energy Center. Unlike the Salton Sea Project and the Russell City extension there is public opposition to this amendment. The SJVAPCD has filed comments and the San Joaquin County Board of Supervisors will be presenting a resolution opposing the extension on July 27 at their regularly scheduled meeting. Members of the public have objected to the extension request.

The applicant in his extension request lists as good cause for the extension, the lack of project financing and a contract in the CPUC procurement proceeding. Lack of project financing alone is not good cause for an extension as required by Section 1720.3. If lack of financing alone can support a finding of good cause, then nothing would prevent applicants form receiving an endless series of extensions of the deadline to commence construction. Applicants without financing could seek Commission certification with no intention of ever constructing a power plant. Calpine has been in bankruptcy due to their ambitious overexpansion into the power market which has triggered their bankruptcy. These are not financial circumstances out of their control. Their financial mismanagement necessities the need for this extension request. Finding number one in the commission adoption order states "The East Altamont Energy Center is a merchant power plant whose capital costs will not be borne by the State's electricity ratepayers." Now we have a situation here where the applicant is asking for an extension so through the CPUC procurement process so the ratepayers can bear the capital costs of the power plant.

The applicant in this case has not practiced due diligence in pursuing this license. The applicant has allowed the air permit for the EAEC to expire despite the district notifying the applicant that the permit was set to expire. This is evidence that good cause does not exist to extend this construction permit. The staff analysis of this extension request states on page 2:

The District's Authority to Construct permit for the facility has expired. Prior to August 2007, the District sent the project owner a notice for the fees and renewal of the permit, which were to expire in August 2007. The project owner has not submitted the fees nor requested a renewal of the permit, thus the District's construction permit for the facility is no longer valid1. If the project owner requested the permit renewal and surrendered the fees, the District staff could not say whether the District would opt to renew the construction permits for the facility or require the project owner to reapply for a new permit, which could take as long as eight months to process.

The project no longer meets all Laws Ordinances Regulations and Standards (LORS) as outlined in Staffs analysis. The project no longer meets BACT requirements for NOx emissions. The project's start up and shut down emissions are subject to new limits. The State of California has implemented a new NO2 standard which the project's modeling indicates the project will violate. The projects ammonia slip limit no longer meets BACT. The original license required the surrender of 441.99 TPY of SOx emission reduction credits (banking certificates #662 and 741) to mitigate the project's PM10 emission impacts. The project owner has placed a "lien" on these emission reduction credits for another project. Because the other project has been approved, the SOx emission reduction credits that are earmarked for this project may no longer be available

The project no longer meets the requirements of CEQA that all significant impacts be mitigated. The SJVUAPCD has notified the Commission that the applicant's AQMA will no longer mitigate the CEQA impacts from the project on the San Joaquin Valley. The project's air quality analysis indicates that the project will violate the States new NO2 standard.

CEC staff concurs with all of the above flaws in the current project but recommends approval of the extension at an August business meeting. While I agree with most of staff's analysis I disagree with their conclusion that the extension be granted and these issue resolved when the project starts construction or the applicant sells the license. Without an air quality permit also known as the determination of compliance the Commission cannot approve the project extension. Section 1752.3 provides that the PMPD shall include findings and conclusions on the conformity with all applicable laws, including required conditions based upon the determination of compliance submitted by the local air pollution control district. Since the project no longer has a valid air permit extension of the projects license without and FDOC is inappropriate.

Conclusion

This extension request should be denied. The applicant has failed to keep their air permit current. The project owner has failed to keep the emission reduction credits assigned to this project intact. The project no longer complies with all LORS as explained above. The project no longer complies with CEQA as the projects adverse impacts in the SJVUAPCD are no longer mitigated and the projects NO2 impacts violate the state NO2 standard.

Calpine's insolvency created a situation where they couldn't get any financing. Poor business decisions by the applicant should not be considered good cause for an extension. We raised Calpine's impending bankruptcy as an issue in the original proceeding and we were told by the Commission that our concerns were not relevant to the license. The Commission should summarily dismiss the extension application. Should the commission decide not to dismiss the extension request a hearing should be held to determine if good cause has been established and if the project meets all LORS and CEQA requirments.

San Joaquin Valley
AIR POLLUTION CONTROL DISTRICT

DOCKET
01-AFC-4C
DATE JUN 30 2008
RECD. JUL 01 2008

June 30, 2008

Ms. Donna Stone
Compliance Project Manager
California Energy Commission
1516 Ninth Street, MS-2000
Sacramento, CA 95814

Subject: CEC Docket No. 01-AFC-04, East Altamont Energy Center
Comments on petition to extend start of construction date

Dear Ms. Stone:

The San Joaquin Valley Air Pollution Control District (District) has been notified of East Altamont Energy Center's (EAEC) petition to extend the start of construction date for their project by an additional three (3) years. As you are aware, EAEC entered into an Air Quality Mitigation Settlement Agreement (AQMA) with the District, which is included in Condition AQ-SC5 of the CEC certification of this project. The District offers the following comment on this petition:

As more than 5 years have passed without starting any construction, the AQMA needs to be revisited. Since the project was first certified, the District has gained a better understanding of how to mitigate emissions from projects that impact the San Joaquin Valley Air Basin, but that are not subject to District permitting requirements.

This is evidenced by the adoption of District Rule 9510 (Indirect Source Review) by the District's Board on December 15, 2005. This Rule includes a method of analyzing impacts, as well as a specific fee structure for any un-mitigated emissions. The AQMA should be amended to include the Rule 9510 fee structure.

Additionally, if there have been any changes to the project's offsetting package, those changes should be analyzed to determine the amount of un-mitigated impacts.

The District looks forward to working with the EAEC to properly amend the AQMA to ensure that the citizens in the San Joaquin Valley Air Basin are not unfairly impacted by the location of this project.

If you have any further questions regarding this matter, please contact myself or Jim Swaney, Permit Services Manager, at (559) 230-5900, or Mr. Swaney at jim.swaney@valleyair.org.

Sincerely,

David Warner
Director of Permit Services

DW:js

cc: Supervisor Leroy Ornellas
San Joaquin County
222 E. Weber, Room 701
Stockton, CA. 95202

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If you have any further questions regarding this matter, please contact myself or Jim Swaney, Permit Services Manager, at (559) 230-5900, or Mr. Swaney at jim.swaney@valleyair.org.

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cc: Supervisor Leroy Ornellas
San Joaquin County
222 E. Weber, Room 701
Stockton, CA. 95202

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:	)	Docket No. 01-AFC-4C
Application for Certification of the East Altamont Energy Center, LLC	)	

PROJECT OWNER'S COMMENTS ON THE STAFF ANALYSIS OF THE PROJECT OWNERS PETITION FOR EXTENSION OF DEADLINE FOR COMMENCEMENT OF CONSTRUCTION FOR THE EAST ALTAMONT ENERGY CENTER

July 11, 2008

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(916) 447-3512 (fax)

Attorneys for East Altamont Energy Center, LLC

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of: Application for Certification of the East Altamont Energy Center, LLC	))))))	Docket No. 01-AFC-4C

**PROJECT OWNER'S COMMENTS
ON THE
STAFF ANALYSIS OF THE PROJECT OWNERS PETITION FOR EXTENSION OF DEADLINE FOR COMMENCEMENT OF CONSTRUCTION FOR THE EAST ALTAMONT ENERGY CENTER**

Pursuant to the Notice to Interested Parties, publishing the Staff Analysis of the requested three year extension of the start of construction deadline for the East Altamont Energy Center ("Project"), the East Altamont Energy Center, LLC ("Project Owner") submits the following comments on the Staff Analysis.

The Project Owner thanks the Commission Staff for its timely review and for its recommendation for approval of our Petition to extend the start of construction deadline for three years. The Staff Analysis correctly states that the Project Owner will comply with and the Commission will ensure compliance with all conditions of certification as originally licensed. The Staff Analysis also correctly states that if the Project Owner wishes to make any modifications to the Project or to the conditions of certification, or should any external circumstances require changes to the conditions of certification, the Project Owner will file a timely petition to amend the license. We agree with Staff that implementation of the above measures will ensure that the Project remains in compliance with applicable laws, ordinances and regulations, and that the proposed extension of the start of construction deadline will not result in any significant adverse effect on the environment.

The Staff Analysis has identified four areas that will require additional attention prior to the start of construction of the East Altamont Energy Center and the Staff Analysis identifies specific permits or analysis that will need to updated. The Project Owner is in substantial agreement with each of the Staff's recommendations.

The Staff Analysis states that the Authority to Construct ("ATC")for the Project has expired. This is incorrect. As with this AFC license, the Project Owner has applied for an extension of the ATC prior to its expiration. The fee for the ATC extension has now paid and the modeling to demonstrate compliance with current air quality standards has been completed by the district.

In conclusion, the Project Owner concurs with the Staff Analysis and recommends that the Commission grant the Petition on the terms recommended by Staff.

July 11, 2008

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By Jeffery D. Harris

Greggory L. Wheatland
Jeffery D. Harris
2015 H Street
Sacramento, California 95811-3109
Telephone: (916) 447-2166
Facsimile: (916) 447-3512

Attorneys for East Altamont Energy Center, LLC

BEFORE THE STATE OF CALIFORNIA
STATE ENERGY RESOURCES AND CONSERVATION DIVISION

In the Matter of: East Altamont Energy Center	)))	Docket 01-AFC-4C

COMMENTS OF CARE ON EXTENSION REQUEST

CAlifornians for Renewable Energy, Inc. (CARE) respectfully objects to Calpine's Extension Request and provides these comments on the May 23, 2008 *Petition for Extension of Deadline for Commencement of Construction.* CARE was a party to the proceeding and so the Commission should have provided CARE written notice of the Petition but failed to do so. CARE opposes the Petition because Calpine has already defrauded California's energy ratepayers out of billions of dollars through unlawful contracts entered in to by the State with Calpine, contracts that purportedly would fund the construction of the East Altamont Energy Center.

In the amended and restated confirmation letter confirming the terms and conditions of the DWR contract[1] agreed to on April 22, 2002 and effective May 1, 2002 between Calpine Energy Services, L.P. and State of California Department of Water Resources regarding the sale/purchase of the Product under the terms and conditions as:

> (4) (a) Seller will use commercially reasonable efforts to complete its Otay Mesa (estimated installed capacity of 510 MW), Metcalf (estimated installed capacity of 600 MW), East Altamont (proposed installed capacity of 1100 MW) projects and a project designated in accordance with subsection (a)(iv) (collectively, the "Projects", each a "Project"). For any of the Projects, at the request of Buyer, which Buyer may elect to make in its sole discretion, Seller will, subject to the terms and conditions set forth below, assign or otherwise transfer to Buyer, free and clear of any liens or encumbrances created by Seller or its Affiliates, all of its right, title and interest in any such Project (including, without limitation, all permits, consents and approvals, engineering and design drawings, contracts and equipment entered into or acquired for the Project, and all other Project assets), to the extent that such rights, titles, interests or assets are assignable or transferable, if:

[1] See http://wwwcers.water.ca.gov/pdf_files/power_contracts/calpine/042202_clpn2final.pdf

(i) With respect to any Project, Seller permanently elects not to proceed with construction, development or commercial operation of the Project; or

(iii) With respect to Seller's East Altamont Project, Seller fails to obtain the CEC permit for the East Altamont Project by November 30, 2002, or Seller fails to commence construction of the East Altamont Project within one year of the date by which the order issuing such CEC permit and all other permits necessary for the start of construction become final and non-appealable through the passage of time or by the exhaustion of any appeals; or

(iv) With respect to the Project designated pursuant to this subparagraph (iv), Seller fails to obtain the Start Permit for the Designated Project by a Permit Start Date, or Seller fails to commence construction of the Designated Project within one year of the date the Start Permit and all other permits necessary for the start of construction become final and non-appealable through the passage of time or by the exhaustion of any appeals.

The Commission should not approve this Petition because:

1) On June 26, 2008, the United States Supreme Court issued a relevant ruling in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County et al.*, Case No. 06–1457. The court held that contract rates are presumptively reasonable only where Federal Energy Regulatory Commission ("FERC") has had an initial opportunity to review the contracts without applying the *Mobile-Sierra* presumption and therefore that the presumption should not apply to contracts entered into under "market-based" tariffs. The Calpine contract was not submitted to the FERC for review and therefore has not been found to be reasonable.

2) There is an outstanding unresolved complaint concerning the contract in the Federal Energy Regulatory Commission ("FERC") Docket No. EL07-40[2]. FERC granted a rehearing on June 11, 2007, but has not scheduled the hearing or addressed the complaint in another order.

[2] See Decision (D) 07-02-033 in the Resolution E-4055. Pacific Gas and Electric Company (PG&E) Request Commission Approval of Two Distinct Power Purchase Agreements With Subsidiaries of Calpine Corporation, for Resource Adequacy (RA) for the Period From 2008 to 2011. By Advice Letter 2916-E Filed on October 23, 2006., Application 07-01-020, at; http://www.cpuc.ca.gov/WORD_PDF/FINAL_DECISION/64791.DOC

Presumably, this rehearing will now be rescheduled and decided according to the guidance issued by the Supreme Court of the United States.

3) There is an outstanding unresolved petition for review of FERC Docket No. EL07-40 filed in the United States Court of Appeals, Ninth Circuit in Docket No. 08-70010. This case is stayed pending resolution of legal issues concerning the Western Energy Crisis of 2000-1.

ANALYSIS

On August 1, 2001 the San Francisco Chronicle reported that then Commission Chairman had "held as much as $510,000 of stock last year in companies his agency oversaw."[3] William J. Keese became a Calpine director in September 2005, less than 6 months after leaving the Commission. Keese was the presiding member in the East Altamont Energy Center. CARE also has raised the issue of Calpine's bankruptcy and insolvency before the Commission, CPUC, and the FERC and each has said it was not relevant, but now Calpine is attempting to use their financial situation purportedly as good cause for the Commission to grant the extension. Because William Keese was the presiding member in the project's approval and he now works as a Calpine director there is the appearance of conspiracy between the Commission and Calpine to defraud energy ratepayers (including CARE's members) out of billions of dollars in overcharges for electricity.

The attached US Supreme Court Decision makes clear that the burden of proof has shifted back on to the DWR, CEC, and FERC to demonstrate that "market based rates" and the DWR contracts in particular are lawful. CARE is seeking compensatory relief for California's ratepayers from the forty three billion dollars in long term DWR contracts signed during the 2000-1 energy crisis (including sixteen billion dollars worth with Calpine) before the US 9th

[3] See http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2001/08/01/MN201486.DTL&type=printable

circuit court of appeals that the US Supreme Court has now ruled these contracts unlawful, and the continued pursuit by CEC and Calpine in this proceeding to continue to perpetrate this huge fraud on California's ratepayers is clearly a course of action such as that which damages CARE's members further, for which we may seek additional relief beyond mere compensatory relief.

CONCLUSION

CARE requests that the proposed Petition concerning the above captioned project not be approved for the reasons discussed.

Respectfully submitted,

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July 18, 2008

Verification

I am an officer of the Commenting Corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18th day of July 2008, at San Francisco, California.

Lynne Brown

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MORGAN STANLEY CAPITAL GROUP INC. *v.* PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06–1457. Argued February 19, 2008—Decided June 26, 2008*

Under the *Mobile-Sierra* doctrine, the Federal Energy Regulatory Commission (FERC) must presume that the electricity rate set in a freely negotiated wholesale-energy contract meets the "just and reasonable" requirement of the Federal Power Act (FPA), see 16 U. S. C. §824d(a), and the presumption may be overcome only if FERC concludes that the contract seriously harms the public interest. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332; *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348. Under FERC's current regulatory regime, a wholesale electricity seller may file a "market-based" tariff, which simply states that the utility will enter into freely negotiated contracts with purchasers. Those contracts are not filed with FERC before they go into effect. In 2000 and 2001, there was a dramatic increase in the price of electricity in the western United States. As a result, respondents entered into long-term contracts with petitioners that locked in rates that were very high by historical standards. Respondents subsequently asked FERC to modify the contracts, contending that the rates should not be presumed just and reasonable under *Mobile-Sierra*. The Administrative Law Judge concluded that the presumption applied and that the contracts did not seriously harm the public interest. FERC affirmed, but the Ninth Circuit remanded. The court held that contract rates are pre-

*Together with No. 06–1462, *American Electric Power Service Corp. et al.* v. *Public Utility District No. 1 of Snohomish County et al.*, also on certiorari to the same court.

sumptively reasonable only where FERC has had an initial opportunity to review the contracts without applying the *Mobile-Sierra* presumption and therefore that the presumption should not apply to contracts entered into under "market-based" tariffs. The court alternatively held that there is a different standard for overcoming the *Mobile-Sierra* presumption when a *purchaser* challenges a contract: whether the contract exceeds a "zone of reasonableness."

Held:

1. The Commission was required to apply the *Mobile-Sierra* presumption in evaluating the contracts here. *Sierra* held that a rate set out in a contract must be presumed to be just and reasonable absent serious harm to the public interest, regardless of when the contract is challenged. *FPC* v. *Texaco Inc.*, 417 U. S. 380, distinguished. Also, the Ninth Circuit's rule requiring FERC to ask whether a contract was formed in an environment of market "dysfunction" is not supported by this Court's cases and plainly undermines the role of contracts in the FPA's statutory scheme. Pp. 15–19.

2. The Ninth Circuit's "zone of reasonableness" test fails to accord an adequate level of protection to contracts. The standard for a buyer's rate-increase challenge must be the same, generally, as the standard for a seller's challenge: The contract rate must seriously harm the public interest. The Ninth Circuit misread *Sierra* in holding that the standard for evaluating a high-rate challenge and setting aside a contract rate is whether consumers' electricity bills were higher than they would have been had the contract rates equaled "marginal cost." Under the *Mobile-Sierra* presumption, setting aside a contract rate requires a finding of "unequivocal public necessity," *Permian Basin Area Rate Cases*, 390 U. S. 747, 822, or "extraordinary circumstances," *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U. S. 571, 582. Pp. 19–23.

3. The judgment below is nonetheless affirmed on alternative grounds, based on two defects in FERC's analysis. First, the analysis was flawed or incomplete to the extent FERC looked simply to whether consumers' rates increased immediately upon conclusion of the relevant contracts, rather than determining whether the contracts imposed an excessive burden "down the line," relative to the rates consumers could have obtained (but for the contracts) after elimination of the dysfunctional market. *Sierra*'s "excessive burden" on customers was the current burden, not just the burden imposed at the contract's outset. See 350 U. S., at 355. Second, it is unclear from FERC's orders whether it found respondents' evidence inadequate to support their claim that petitioners engaged in unlawful market manipulation that altered the playing field for contract negotiations. In such a case, the Commission should not presume that a

contract is just and reasonable. Like fraud and duress, unlawful market activity directly affecting contract negotiations eliminates the premise on which the *Mobile-Sierra* presumption rests: that the contract rates are the product of fair, arms-length negotiations. On remand, FERC should amplify or clarify its findings on these two points. Pp. 23–26.

471 F. 3d 1053, affirmed and remanded.

SCALIA, J., delivered the opinion of the Court, in which KENNEDY, THOMAS, and ALITO, JJ., joined, and in which GINSBURG, J., joined as to Part III. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined. ROBERTS, C. J., and BREYER, J., took no part in the consideration or decision of the cases.

SUPREME COURT OF THE UNITED STATES

Nos. 06–1457 and 06–1462

MORGAN STANLEY CAPITAL GROUP INC., PETITIONER
06–1457 *v.*
PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, ET AL.

AMERICAN ELECTRIC POWER SERVICE CORPORATION, ET AL., PETITIONERS
06–1462 *v.*
PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 26, 2008]

JUSTICE SCALIA delivered the opinion of the Court.

Under the *Mobile-Sierra* doctrine, the Federal Energy Regulatory Commission (FERC or Commission) must presume that the rate set out in a freely negotiated wholesale-energy contract meets the "just and reasonable" requirement imposed by law. The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest. These cases present two questions about the scope of the *Mobile-Sierra* doctrine: First, does the presumption apply only when FERC has had an initial opportunity to review a contract rate without the presumption? Second, does the presumption impose as high a bar to challenges by purchasers of wholesale electricity as it does to challenges by sellers?

I

A

Statutory Background

The Federal Power Act (FPA), 41 Stat. 1063, as amended, gives the Commission[1] the authority to regulate the sale of electricity in interstate commerce—a market historically characterized by natural monopoly and therefore subject to abuses of market power. See 16 U. S. C. §824 *et seq.* Modeled on the Interstate Commerce Act, the FPA requires regulated utilities to file compilations of their rate schedules, or "tariffs," with the Commission, and to provide service to electricity purchasers on the terms and prices there set forth. §824d(c). Utilities wishing to change their tariffs must notify the Commission 60 days before the change is to go into effect. §824d(d). Unlike the Interstate Commerce Act, however, the FPA also permits utilities to set rates with individual electricity purchasers through bilateral contracts. §824d(c), (d). As we have explained elsewhere, the FPA "departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting." *Verizon Communications Inc.* v. *FCC*, 535 U. S. 467, 479 (2002). Like tariffs, contracts must be filed with the Commission before they go into effect. 16 U. S. C. §824d(c), (d).

The FPA requires all wholesale-electricity rates to be "just and reasonable." §824d(a). When a utility files a new rate with the Commission, through a change to its tariff or a new contract, the Commission may suspend the rate for up to five months while it investigates whether

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[1] We also use "Commission" to refer to the Federal Power Commission, FERC's predecessor.

the rate is just and reasonable. §824d(e). The Commission may, however, decline to investigate and permit the rate to go into effect—which does not amount to a determination that the rate is "just and reasonable." See 18 CFR §35.4 (2007). After a rate goes into effect, whether or not the Commission deemed it just and reasonable when filed, the Commission may conclude, in response to a complaint or on its own motion, that the rate is not just and reasonable and replace it with a lawful rate. 16 U. S. C. §824e(a) (2000 ed., Supp. V).

The statutory requirement that rates be "just and reasonable" is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions. See *FPC* v. *Texaco Inc.*, 417 U. S. 380, 389 (1974); *Permian Basin Area Rate Cases*, 390 U. S. 747, 767 (1968). We have repeatedly emphasized that the Commission is not bound to any one ratemaking formula. See *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, 498 U. S. 211, 224 (1991); *Permian Basin, supra*, at 776–777. But FERC must choose a method that entails an appropriate "balancing of the investor and the consumer interests." *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 603 (1944). In exercising its broad discretion, the Commission traditionally reviewed and set tariff rates under the "cost-of-service" method, which ensures that a seller of electricity recovers its costs plus a rate of return sufficient to attract necessary capital. See J. McGrew, Federal Energy Regulatory Commission 152, 160–161 (2003) (hereinafter McGrew).

In two cases decided on the same day in 1956, we addressed the authority of the Commission to modify rates set bilaterally by contract rather than unilaterally by tariff. In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, we rejected a natural-gas utility's argument that the Natural Gas Act's requirement that it file all new rates with the Commission authorized it to abrogate a lawful contract with a purchaser simply by filing a new tariff, see *id.*, at 336–337. The filing requirement, we explained, is merely a *precondition* to changing a rate, not an *authorization* to change rates in violation of a lawful contract (*i.e.*, a contract that sets a just and reasonable rate). See *id.*, at 339–344.

In *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348, 352–353 (1956), we applied the holding of *Mobile* to the analogous provisions of the FPA, concluding that the complaining utility could not supersede a contract rate simply by filing a new tariff. In *Sierra*, however, the Commission had concluded not only (contrary to our holding) that the newly filed tariff superseded the contract, but also that the contract rate itself was not just and reasonable, "solely because it yield[ed] less than a fair return on the net invested capital" of the utility. *Id.*, at 355. Thus, we were confronted with the question of how the Commission may evaluate whether a contract rate is just and reasonable.

We answered that question in the following way:

> "[T]he Commission's conclusion appears on its face to be based on an erroneous standard. . . . [W]hile it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. . . . In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Id.*, at 354–355 (emphasis deleted).

As we said in a later case, "[t]he regulatory system created by the [FPA] is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity." *Permian Basin, supra,* at 822.

Over the past 50 years, decisions of this Court and the Courts of Appeals have refined the *Mobile-Sierra* presumption to allow greater freedom of contract. In *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.*, 358 U. S. 103, 110–113 (1958), we held that parties could contract out of the *Mobile-Sierra* presumption by specifying in their contracts that a new rate filed with the Commission would supersede the contract rate. Courts of Appeals have held that contracting parties may also agree to a middle option between *Mobile-Sierra* and *Memphis Light:* A contract that does not allow the seller to supersede the contract rate by filing a new rate may nonetheless permit the Commission to set aside the contract rate if it results in an unfair rate of return, not just if it violates the public interest. See, *e.g.*, *Papago Tribal Util. Auth.* v. *FERC*, 723 F. 2d 950, 953 (CADC 1983); *Louisiana Power & Light Co.* v. *FERC*, 587 F. 2d 671, 675–676 (CA5 1979). Thus, as the *Mobile-Sierra* doctrine has developed, regulated parties have retained broad authority to specify whether FERC can review a contract rate solely for whether it violates the public interest or also for whether it results in an unfair rate of return. But the *Mobile-Sierra* presumption remains the default rule.

Moreover, even though the challenges in *Mobile* and *Sierra* were brought by sellers, lower courts have concluded that the *Mobile-Sierra* presumption also applies where a purchaser, rather than a seller, asks FERC to modify a contract. See *Potomac Elec. Power Co.* v. *FERC*, 210 F. 3d 403, 404–405, 409–410 (CADC 2000); *Boston Edison Co.* v. *FERC*, 856 F. 2d 361, 372 (CA1 1988). This Court has seemingly blessed that conclusion, explaining that under the FPA, "[w]hen commercial parties . . . avail themselves of rate agreements, the principal regulatory responsibility [is] not to relieve a contracting party of an unreasonable rate." *Verizon,* 535 U. S., at 479 (citing *Sierra, supra,* at 355).

Over the years, the Commission began to refer to the two modes of review—one with the *Mobile-Sierra* presumption and the other without—as the "public interest standard" and the "just and reasonable standard." See, *e.g., Southern Co. Servs., Inc. Gulf States Utils. Co.* v. *Southern Co. Servs., Inc.*, 39 FERC ¶63,026, pp. 65,134, 65,141 (1987). Decisions from the Courts of Appeals did likewise. See, *e.g., Kansas Cities* v. *FERC,* 723 F. 2d 82, 87–88 (CADC 1983); *Northeast Utils. Serv. Co.* v. *FERC*, 993 F. 2d 937, 961 (CA1 1993). We do not take this nomenclature to stand for the obviously indefensible proposition that a standard different from the statutory just-and-reasonable standard applies to contract rates. Rather, the term "public interest standard" refers to the differing *application* of that just-and-reasonable standard to contract rates. See *Philadelphia Elec. Co.*, 58 F. P. C. 88, 90 (1977). (It would be less confusing to adopt the Solicitor General's terminology, referring to the two differing applications of the just-and-reasonable standard as the "ordinary" "just and reasonable standard" and the "public interest standard." See Reply Brief for Respondent FERC 6.)

B

Recent FERC Innovations; Market-Based Tariffs

In recent decades, the Commission has undertaken an ambitious program of market-based reforms. Part of the impetus for those changes was technological evolution. Historically, electric utilities had been vertically integrated monopolies. For a particular geographic area, a single utility would control the generation of electricity, its transmission, and its distribution to consumers. See

Midwest ISO Transmission Owners v. *FERC*, 373 F. 3d 1361, 1363 (CADC 2004). Since the 1970's, however, engineering innovations have lowered the cost of generating electricity and transmitting it over long distances, enabling new entrants to challenge the regional generating monopolies of traditional utilities. See generally *New York* v. *FERC*, 535 U. S. 1, 7–8 (2002); *Public Util. Dist. No. 1 of Snohomish Cty.* v. *FERC*, 272 F. 3d 607, 610 (CADC 2001).

To take advantage of these changes, the Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity. It has sought to promote competition in those areas of the industry amenable to competition, such as the segment that generates electric power, while ensuring that the segment of the industry characterized by natural monopoly—namely, the transmission grid that conveys the generated electricity—cannot exert monopolistic influence over other areas. See *New York*, *supra*, at 9–10; *Snohomish*, *supra*. To that end, FERC required in Order No. 888 that each transmission provider offer transmission service to all customers on an equal basis by filing an "open access transmission tariff." Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21540 (1996); see *New York*, *supra*, at 10–12. That requirement prevents the utilities that own the grid from offering more favorable transmission terms to their own affiliates and thereby extending their monopoly power to other areas of the industry.

To further pry open the wholesale-electricity market and to reduce technical inefficiencies caused when different utilities operate different portions of the grid independently, the Commission has encouraged transmission providers to establish "Regional Transmission Organizations"—entities to which transmission providers would transfer operational control of their facilities for the purpose of efficient coordination. Order No. 2000, 65 Fed. Reg. 810, 811–812 (2000); see *Midwest ISO*, *supra*, at 1364. It has encouraged the management of those entities by "Independent System Operators," not-for-profit entities that operate transmission facilities in a nondiscriminatory manner. See *Midwest ISO*, *supra*. In addition to coordinating transmission service, Regional Transmission Organizations perform other functions, such as running auction markets for electricity sales and offering contracts for hedging against potential grid congestion. See Blumsack, Measuring the Benefits and Costs of Regional Electric Grid Integration, 28 Energy L. J. 147, 147 (2007).

Against this backdrop of technological change and market-based reforms, the Commission over the past two decades has begun to permit sellers of wholesale electricity to file "market-based" tariffs. These tariffs, instead of setting forth rate schedules or rate-fixing contracts, simply state that the seller will enter into freely negotiated contracts with purchasers. See generally Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities, Order No. 697, 72 Fed. Reg. 39904 (2007) (hereinafter Market-Based Rates); McGrew 160–167. FERC does not subject the contracts entered into under these tariffs (as it subjected traditional wholesale-power contracts) to §824d's requirement of immediate filing, apparently on the theory that the requirement has been satisfied by the initial filing of the market-based tariffs themselves. See Brief for Respondent FERC 28–29 (hereinafter Brief for FERC).

FERC will grant approval of a market-based tariff only if a utility demonstrates that it lacks or has adequately mitigated market power, lacks the capacity to erect other barriers to entry, and has avoided giving preferences to its affiliates. See Market-Based Rates, ¶7, 72 Fed. Reg. 39907. In addition to the initial authorization of a market-based tariff, FERC imposes ongoing reporting requirements. A seller must file quarterly reports summarizing the contracts that it has entered into, even extremely short-term contracts. See *California ex rel. Lockyer* v. *FERC*, 383 F. 3d 1006, 1013 (CA9 2004). It must also demonstrate every four months that it still lacks or has adequately mitigated market power. See *ibid.* If FERC determines from these filings that a seller has reattained market power, it may revoke the authority prospectively. See Market-Based Rates, ¶5, 72 Fed. Reg. 39906. And if the Commission finds that a seller has violated its Regional Transmission Organization's market rules, its tariff, or Commission orders, the Commission may take appropriate remedial action, such as ordering refunds, requiring disgorgement of profits, and imposing civil penalties. See *ibid.*

Both the Ninth Circuit and the D. C. Circuit have generally approved FERC's scheme of market-based tariffs. See *Lockyer*, *supra*, at 1011–1013; *Louisiana Energy & Power Auth.* v. *FERC*, 141 F. 3d 364, 365 (CADC 1998). We have not hitherto approved, and express no opinion today, on the lawfulness of the market-based-tariff system, which is not one of the issues before us. It suffices for the present cases to recognize that when a seller files a market-based tariff, purchasers no longer have the option of buying electricity at a rate set by tariff and contracts no longer need to be filed with FERC (and subjected to its investigatory power) before going into effect.

C
California's Electricity Regulation and Its Consequences

In 1996, California enacted Assembly Bill 1890 (AB 1890), which massively restructured the California electricity market. See 1996 Cal. Stat. ch. 854 (codified at Cal. Pub. Util. Code Ann. §§330–398.5 (West 2004 and Supp.

2008)); see generally Cudahy, Whither Deregulation: A Look at the Portents, 58 N. Y. U. Annual Survey of Am. Law 155, 172–185 (2001) (hereinafter Cudahy). The bill transferred operational control of the transmission facilities of California's three largest investor-owned utilities to an Independent Service Operator (Cal-ISO). See *Pacific Gas & Elec. Co.* v. *FERC*, 464 F. 3d 861, 864 (CA9 2006). It also established the California Power Exchange (CalPX), a nonprofit entity that operated a short-term market—or "spot market"—for electricity. The bill required California's three largest investor-owned utilities to divest most of their electricity-generation facilities. It then required those utilities to purchase and sell the bulk of their electricity from and to the CalPX's spot market, permitting only limited leeway for them to enter into long-term contracts. See *Public Util. Dist. No. 1 of Snohomish Cty.* v. *FERC*, 471 F. 3d 1053, 1068 (CA9 2006) (case below).

In 1997, FERC approved the Cal-ISO as consistent with the requirements for an Independent Service Operator established in Order No. 888. FERC also approved the CalPX and the investor-owned utilities' authority to make sales at market-based rates in the CalPX, finding that, in light of the divesture of their generation units and other conditions imposed under the restructuring plan, those utilities had adequately mitigated their market power. See *Pacific Gas & Elec. Co.,* 81 FERC ¶61,122, pp. 61,435, 61,435–61,436, 61,537–61,548 (1997).

The CalPX opened for business in March 1998. In the summer of 1999, it expanded to include an auction for sales of electricity under "forward contracts"—contracts in which sellers promise to deliver electricity more than one day in the future (sometimes many years). But the participation of California's large investor-owned utilities in that forward market was limited because, as we have said, AB 1890 strictly capped the amount of power that they could purchase outside of the spot market. See 471 F. 3d, at 1068.

That diminishment of the role of long-term contracts in the California electricity market turned out to be one of the seeds of an energy crisis. In the summer of 2000, the price of electricity in the CalPX's spot market jumped dramatically—more than fifteenfold. See *ibid.* The increase was the result of a combination of natural, economic, and regulatory factors: "flawed market rules; inadequate addition of generating facilities in the preceding years; a drop in available hydropower due to drought conditions; a rupture of a major pipeline supplying natural gas into California; strong growth in the economy and in electricity demand; unusually high temperatures; an increase in unplanned outages of extremely old generating facilities; and market manipulation." *CAlifornians for Renewable Energy, Inc.* v. *Sellers of Energy and Ancillary Servs.,* 119 FERC ¶61,058, pp. 61,243, 61,246 (2007). Because California's investor-owned utilities had for the most part been forbidden to obtain their power through long-term contracts, the turmoil in the spot market hit them hard. See Cudahy 174. The high prices led to rolling blackouts and saddled utilities with mounting debt.

In late 2000, the Commission took action. A central plank of its emergency effort was to eliminate the utilities' reliance on the CalPX's spot market and to shift their purchases to the forward market. To that end, FERC abolished the requirement that investor-owned utilities purchase and sell all power through the CalPX and encouraged them to enter into long-term contracts. See *San Diego Gas & Electric Co.* v. *Sellers of Energy and Ancillary Servs.*, 93 FERC ¶61,294, pp. 61,980, 61,982 (2000); see also 471 F. 3d, at 1069. The Commission also put price caps on wholesale electricity. See *San Diego Gas & Elec. Co.* v. *Sellers of Energy and Ancillary Servs.,* 95 FERC ¶61,418, p. 62,545 (2001). By June 2001, electricity prices began to decline to normal levels. *Id.*, at 62,456.

D

Genesis of These Cases

The principal respondents in these cases are western utilities that purchased power under long-term contracts during that tumultuous period in 2000 and 2001. Although they are not located in California, the high prices in California spilled over into other Western States. See 471 F. 3d, at 1069. Petitioners are the sellers that entered into the contracts with respondents.

The contracts between the parties included rates that were very high by historical standards. For example, respondent Snohomish signed a 9-year contract to purchase electricity from petitioner Morgan Stanley at a rate of $105/megawatt hour (MWh), whereas prices in the Pacific Northwest have historically averaged $24/MWh. The contract prices were substantially lower, however, than the prices that Snohomish would have paid in the spot market during the energy crisis, when prices peaked at $3,300/MWh. See *id.*, at 1069–1070.

After the crisis had passed, buyer's remorse set in and respondents asked FERC to modify the contracts. They contended that the rates in the contracts should not be presumed to be just and reasonable under *Mobile-Sierra* because, given the sellers' market-based tariffs, the contracts had never been initially approved by the Commission without the presumption. See *Nevada Power Co.* v. *Enron Power Marketing, Inc.*, 103 FERC ¶61,353, pp. 62,382, 62,387 (2003). Respondents also argued that contract modification was warranted even under the *Mobile-Sierra* presumption because the contract rates were so high that they violated the public interest. See 103 FERC, at 62,383, 62,387–62,395.

In a preliminary order, the Commission instructed the Administrative Law Judge (ALJ) to consider 12 different factors in deciding whether the presumption could be overcome for the contracts, such as the terms of the contracts, the available alternatives at the time of sale, the relationship of the rates to Commission benchmarks, the effect of the contracts on the financial health of the purchasers, and the impact of contract modification on national energy markets. After a hearing, the ALJ concluded that the *Mobile-Sierra* presumption should apply to the contracts and that the contracts did not seriously harm the public interest. In fact, according to the ALJ, even if the *Mobile-Sierra* presumption did not apply, respondents would not be entitled to have the contracts modified. 103 FERC, at 62,390–62,394.

Between the ALJ's decision and the Commission's ruling, the Commission's staff issued a report (Staff Report) concluding that unlawful activities of various sellers in the spot market had affected prices in the forward market. See *id.*, at 62,396. Respondents raised the report at oral argument before the Commission, and some of them argued that petitioners "were unlawfully manipulating market prices, thereby engaging in fraud and deception in violation of their market-based rate tariffs." *Ibid.* Petitioners contended, however, that the Staff Report demonstrated only a correlation between rates in the spot and forward markets, not a causal connection. See *ibid.*

FERC affirmed the ALJ. The Commission first held that the *Mobile-Sierra* presumption did apply to the contracts at issue. Although agreeing with respondents that the presumption applies only where FERC has had an initial opportunity to review a contract rate, the Commission relied on the somewhat metaphysical ground that the grant of market-based authority to petitioners qualified as that initial opportunity. See 103 FERC, at 62,388–62,389. The Commission then held that respondents could not overcome the *Mobile-Sierra* presumption. It recognized that the Staff Report had "found that spot market distortions flowed through to forward power prices," 103 FERC, at 62,396–62,397, but concluded that this finding, even if true, was not "determinative" because:

> "a finding that the unjust and unreasonable spot market caused forward bilateral prices to be unjust and unreasonable would be relevant to contract modification only where there is a 'just and reasonable' standard of review. . . . Under the 'public interest' standard, to justify contract modification it is not enough to show that forward prices became unjust and unreasonable due to the impact of spot market dysfunctions; it must be shown that the rates, terms and conditions are contrary to the public interest." *Id.*, at 62,397.

The Commission determined that under the factors identified in *Sierra*, as well as under a totality-of-the-circumstances test, respondents had not demonstrated that the contracts threatened the public interest. See 103 FERC, at 62,397–62,399. On rehearing, respondents reiterated their complaints, including their charge that "their contracts were the product of market manipulation by Enron, Morgan Stanley and other [sellers]." 105 FERC ¶61,185, pp. 61,979, 61,989 (2003). The Commission answered that there was "no evidence to support a finding of market manipulation that specifically affected the contracts at issue." *Ibid.*

Respondents filed petitions for review in the Ninth Circuit, which granted the petitions and remanded to the Commission, finding two flaws in the Commission's analysis.[2] First, the court agreed with respondents that rates set by contract (whether pursuant to a market-based tariff

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[2] In a holding not challenged before this Court, the Ninth Circuit concluded that the contracts at issue did not contain "*Memphis* clause[s]," 471 F. 3d 1053, 1079 (2006) (citing *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.*, 358 U. S. 103 (1958)), see *supra*, at 5, that would have precluded application of the *Mobile-Sierra* presumption.

or not) are presumptively reasonable only where FERC has had an initial opportunity to review the contracts without applying the *Mobile-Sierra* presumption. To satisfy that prerequisite under the market-based tariff regime, the court said, the Commission must promptly review the terms of contracts after their formation and must modify those that do not appear to be just and reasonable when evaluated without the *Mobile-Sierra* presumption (rather than merely revoking market-based authority prospectively but leaving pre-existing contracts intact). See 471 F. 3d, at 1075–1077, 1079–1085. This initial review must include an inquiry into "the market conditions in which the contracts at issue were formed," and market "dysfunction" is a ground for finding a contract not to be just and reasonable. *Id.*, at 1085–1087. Second, the Ninth Circuit held that even assuming that the *Mobile-Sierra* presumption applied, the standard for overcoming that presumption is different for a *purchaser's* challenge to a contract, namely, whether the contract rate exceeds a "zone of reasonableness." 471 F. 3d, at 1088–1090.

We granted certiorari. See 551 U. S. ___ (2007).

II

A

Application of *Mobile-Sierra* Presumption to Contracts Concluded under Market-Based Rate Authority

As noted earlier, the FERC order under review here agreed with the Ninth Circuit's premise that the Commission must have an initial opportunity to review a contract without the *Mobile-Sierra* presumption, but maintained that the authorization for market-based rate authority qualified as that initial review. Before this Court, however, FERC changes its tune, arguing that there is no such prerequisite—or at least that FERC could reasonably conclude so and therefore that *Chevron* deference is in order. See Brief for FERC 20–21, 33–34; *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). We will not uphold a discretionary agency decision where the agency has offered a justification in court different from what it provided in its opinion. See *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94–95 (1943). But FERC has lucked out: The *Chenery* doctrine has no application to these cases, because we conclude that the Commission was *required*, under our decision in *Sierra*, to apply the *Mobile-Sierra* presumption in its evaluation of the contracts here. That it provided a different rationale for the necessary result is no cause for upsetting its ruling. "To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency action into a ping-pong game." *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759, 766–767, n. 6 (1969) (plurality opinion).

We are in broad agreement with the Ninth Circuit on a central premise: There is only one statutory standard for assessing wholesale electricity rates, whether set by contract or tariff—the just-and-reasonable standard. The plain text of the FPA states that "[a]ll rates . . . shall be just and reasonable." 16 U. S. C. §824d(a); see also §824e(a) (2000 ed., Supp. V). But we disagree with the Ninth Circuit's interpretation of *Sierra* as requiring (contrary to the statute) that the Commission apply the standard differently, depending on *when* a contract rate is challenged. In the Ninth Circuit's view, *Sierra* was premised on the idea that "as long as the rate was just and reasonable when the contract was formed, there would be a presumption. . .that the reasonableness continued throughout the term of the contract." 471 F. 3d, at 1077. In other words, so long as the Commission concludes (either after a hearing or by allowing a rate to go into effect) that a contract rate is just and reasonable when initially filed, the rate will be presumed just and reasonable in future proceedings.

That is a misreading of *Sierra*. *Sierra* was grounded in the commonsense notion that "[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them." *Verizon*, 535 U. S., at 479. Therefore, only when the mutually agreed-upon contract rate seriously harms the consuming public may the Commission declare it not to be just and reasonable.[3] *Sierra* thus provided a definition of what it means for a rate to satisfy the just-and-reasonable standard in the contract context—a definition that applies regardless of when the contract is reviewed. The Ninth Circuit, by contrast, essentially read *Sierra* "as the equivalent of an estoppel doctrine," whereby an initial Commission opportunity for review prevents the Commission from modifying the rates absent serious future harm to the public interest. Tewksbury & Lim, Applying the *Mobile-Sierra* Doctrine to Market-Based Rate Contracts, 26 Energy L. J. 437, 457–458 (2005). But *Sierra* said nothing of the sort. And given that the Commission's passive permission for a rate to go into effect does not constitute a finding that the rate is just and reasonable, it would be odd to treat that initial "opportunity for review" as curtailing later challenges.

The Ninth Circuit found support for its prerequisite in our decision in *FPC* v. *Texaco Inc.*, 417 U. S. 380 (1974). In that case, we warned that the Commission's attempt to rely solely on market forces to evaluate rates charged by

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[3] We do not say, as the dissent alleges, *post*, at 7 (opinion of STEVENS, J.), that the public interest is not also relevant in a challenge to unilaterally set rates. But it is the "'sole concern'" in a contract case. See *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348, 355 (1956).

small natural-gas producers was inconsistent with the Natural Gas Act's insistence that rates be just and reasonable. See *id.*, at 397. The Ninth Circuit apparently took this to mean that all initially filed contracts must be subject to review without the *Mobile-Sierra* presumption. But *Texaco* had nothing to do with that doctrine. It held that the Commission had improperly implemented a scheme of *total deregulation* by applying no standard of review at all to small-producer rates. See 417 U. S., at 395–397. It did not cast doubt on the proposition that in a proper regulatory scheme, the ordinary mode for evaluating contractually set rates is to look to whether the rates seriously harm the public interest, not to whether they are unfair to one of the parties that voluntarily assented to the contract. Cf. *id.*, at 391, n. 4.

Nor do we agree with the Ninth Circuit that FERC must inquire into whether a contract was formed in an environment of market "dysfunction" before applying the *Mobile-Sierra* presumption. Markets are not perfect, and one of the reasons that parties enter into wholesale-power contracts is precisely to hedge against the volatility that market imperfections produce. That is why one of the Commission's responses to the energy crisis was to remove regulatory barriers to long-term contracts. It would be a perverse rule that rendered contracts less likely to be enforced when there is volatility in the market. (Such a rule would come into play, after all, *only* when a contract formed in a period of "dysfunction" did *not* significantly harm the consuming public, since contracts that seriously harm the public should be set aside even under the *Mobile-Sierra* presumption.) By enabling sophisticated parties who weathered market turmoil by entering long-term contracts to renounce those contracts once the storm has passed, the Ninth Circuit's holding would reduce the incentive to conclude such contracts in the future. Such a rule has no support in our case law and plainly undermines the role of contracts in the FPA's statutory scheme.

To be sure, FERC has ample authority to set aside a contract where there is unfair dealing at the contract formation stage—for instance, if it finds traditional grounds for the abrogation of the contract such as fraud or duress. See 103 FERC, at 62,399–62,400 ("[T]here is no evidence of unfairness, bad faith, or duress in the original negotiations"). In addition, if the "dysfunctional" market conditions under which the contract was formed were caused by illegal action of one of the parties, FERC should not apply the *Mobile-Sierra* presumption. See Part III, *infra*. But the mere fact that the market is imperfect, or even chaotic, is no reason to undermine the stabilizing force of contracts that the FPA embraced as an alternative to "purely tariff-based regulation." *Verizon*, 535 U. S., at 479. We may add that evaluating market "dysfunction" is a very difficult and highly speculative task—not one that the FPA would likely require the agency to engage in before holding sophisticated parties to their bargains.

We reiterate that we do not address the lawfulness of FERC's market-based-rates scheme, which assuredly has its critics. But any needed revision in that scheme is properly addressed in a challenge to the scheme itself, not through a disfigurement of the venerable *Mobile-Sierra* doctrine. We hold only that FERC may abrogate a valid contract only if it harms the public interest.

B

Application of "Excessive Burden" Exception to High-Rate Challenges

We turn now to the Ninth Circuit's second holding: that a "zone of reasonableness" test should be used to evaluate a buyer's challenge that a rate is too high. In our view that fails to accord an adequate level of protection to contracts. The standard for a buyer's challenge must be the same, generally speaking, as the standard for a seller's challenge: The contract rate must seriously harm the public interest. That is the standard that the Commission applied in the proceedings below.

We are again in agreement with the Ninth Circuit on a starting premise: It is clear that the three factors we identified in *Sierra*—"where [a 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," 350 U. S., at 355—are not all precisely applicable to the high-rate challenge of a purchaser (where, for example, the relevant question is not whether "other customers" [of the utility] would be excessively burdened, but whether any customers of the purchaser would be); and that those three factors are in any event not the exclusive components of the public interest. In its decision below, the Commission recognized both these realities. See 103 FERC, at 62,397 ("Nevada Companies failed to show that the contract terms at issue impose an excessive burden *on their customers*" (emphasis added)); *id.*, at 62,398 ("The record also demonstrates that Snohomish presented no evidence that its contract with Morgan Stanley adversely affected Snohomish *or its ratepayers*" (emphasis added)); *id.*, at 62,398–62,399 (evaluating the "totality of circumstances"); see also Brief for FERC 41–42.[4]

Where we disagree with the Ninth Circuit is on the

[4] The dissent criticizes the Commission's decision because it took into account under the heading "totality of the circumstances" only the circumstances of the contract formation, not "circumstances exogenous to contract negotiations, including natural disasters and market manipulation by entities not parties to the challenged contract." *Post*, at 13. Those considerations are relevant to whether the contracts impose an "excessive burden" on consumers relative to what they would have paid absent the contracts. It is precisely our uncertainty whether the Commission considered those "circumstances exogenous to contract negotiations," discussed in Part III of our opinion, that causes us to approve the remand to FERC.

overarching "zone of reasonableness" standard it established for evaluating a high-rate challenge and setting aside a contract rate: whether consumers' electricity bills "are higher than they would otherwise have been had the challenged contracts called for rates within the just and reasonable range," *i.e.*, rates that equal "marginal cost."[5] 471 F. 3d, at 1089. The Ninth Circuit derived this test from our statement in *Sierra* that a contract rate would have to be modified if it were so low that it imposed an "excessive burden" on other wholesale purchasers. The Ninth Circuit took "excessive burden" to mean merely the burden caused when one set of consumers is forced to pay above marginal cost to compensate for below-marginal-

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[5] Elsewhere the Ninth Circuit softened this standard somewhat, saying that "[e]ven if a particular rate exceeds marginal cost . . . it may still be within this reasonable range—or 'zone of reasonableness'—if that higher-than-cost-based price results from normal market forces and is part of a general trend toward rates that do reflect cost." 471 F. 3d, at 1089. We are not sure (and we think no one can be sure) precisely what this means. It has no basis in our opinions, and is in any event wrong because its point of departure (the general principle that rates cannot exceed marginal cost) contradicts *Mobile-Sierra.*

The Ninth Circuit purported to find support for its "zone of reasonableness" test in the case law of the District of Columbia Circuit. But the cited case stands only for the proposition that a market-based scheme must assure that market forces will, "over the long pull," cause rates to approximate marginal cost. *Interstate Natural Gas Assn. of Am.* v. *FERC*, 285 F. 3d 18, 31 (2002). Nowhere does the opinion suggest that the standard for reforming a particular contract validly entered into under a market-based scheme is whether the rates approximate marginal cost.

By the same token, our approval of FERC's decision not to set *prospective* area rates solely with reference to pre-existing contract prices, *Permian Basin Area Rate Cases*, 390 U. S. 747, 792–793 (1968), does not support, as the dissent thinks, *post*, at 8, n. 2, the view that the standard for abrogating an *existing*, valid contract is anything less than the *Mobile-Sierra* standard. *That* is the standard *Permian Basin* applied when actually confronted with the issue of contract modification. See 390 U. S., at 781–784, 821–822.

cost rates charged other consumers. See 471 F. 3d, at 1088. And it proceeded to apply a similar notion of "excessive burden" to high-rate challenges (where all the burden of the above-marginal-cost contract rate falls on the purchaser's own customers, and does not affect the customers of third parties). *Id.*, at 1089. That is a misreading of *Sierra* and our later cases. A presumption of validity that disappears when the rate is above marginal cost is no presumption of validity at all, but a reinstitution of cost-based rather than contract-based regulation. We have said that, under the *Mobile-Sierra* presumption, setting aside a contract rate requires a finding of "unequivocal public necessity," *Permian Basin*, 390 U. S., at 822, or "extraordinary circumstances," *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U. S. 571, 582 (1981). In no way can these descriptions be thought to refer to the mere exceeding of marginal cost.

The Ninth Circuit's standard would give short shrift to the important role of contracts in the FPA, as reflected in our decision in *Sierra*, and would threaten to inject more volatility into the electricity market by undermining a key source of stability. The FPA recognizes that contract stability ultimately benefits consumers, even if short-term rates for a subset of the public might be high by historical standards—which is why it permits rates to be set by contract and not just by tariff. As the Commission has recently put it, its "first and foremost duty is to protect consumers from unjust and unreasonable rates; however, . . . uncertainties regarding rate stability and contract sanctity can have a chilling effect on investments and a seller's willingness to enter into long-term contracts and this, in turn, can harm customers in the long run." Market-Based Rates, ¶6, 72 Fed. Reg. 33906–33907.

Besides being wrong in principle, in its practical effect the Ninth Circuit's rule would impose an onerous new burden on the Commission, requiring it to calculate the marginal cost of the power sold under a market-based contract. Assuming that FERC even ventured to undertake such an analysis, rather than reverting to the *ancien régime* of cost-of-service ratesetting, the regulatory costs would be enormous. We think that the FPA intended to reserve the Commission's contract-abrogation power for those extraordinary circumstances where the public will be severely harmed.[6]

III

Defects in FERC's Analysis Supporting Remand

Despite our significant disagreement with the Ninth

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[6]The dissent claims that we have misread the FPA because its provisions "do not distinguish between rates set unilaterally by tariff and rates set bilaterally by contract." *Post*, at 2. But the dissent's interpretation, whatever plausibility it has as an original matter, cannot be squared with *Sierra*, which plainly distinguished between unilaterally and bilaterally set rates, and said that the only relevant consideration for the Commission in the latter case is whether the public interest is harmed. And the circumstances identified in *Sierra* as implicating the public interest refer to something more than a small dent in the consumer's pocket, which is why our subsequent cases have described the standard as a high one.

At the end of the day, the dissent simply argues against the settled understanding of the FPA that has prevailed in this Court, lower courts, and the Commission for half a century. Although the dissent is correct that we have never used the phrase "*Mobile-Sierra* doctrine" in our cases, that is probably because the understanding of it was so uniform that no circuit split concerning its meaning arose until the Ninth Circuit's erroneous decision in these cases. If one searches the Commission's reports, over 600 decisions since 2000 alone have cited the doctrine, see Brief for Electric Power Supply Association et al. as *Amici Curiae* 15, and the Courts of Appeals have used the term "*Mobile-Sierra* doctrine" (or "*Sierra-Mobile*" doctrine) over 75 times since 1974. If there were ever a context where long-settled understanding should be honored it is here, where a *statutory* decision (subject to revision by Congress) has been understood the same way for many years by lower courts, by this Court, by the federal agency the statute governs, and hence surely by the private actors trying to observe the law.

Circuit, we find two errors in the Commission's analysis, and we therefore affirm the judgment below on alternative grounds.

First, it appears, as the Ninth Circuit concluded, see 471 F. 3d, at 1090, that the Commission may have looked simply to whether consumers' rates increased immediately upon the relevant contracts' going into effect, rather than determining whether the contracts imposed an excessive burden on consumers "down the line," relative to the rates they could have obtained (but for the contracts) after elimination of the dysfunctional market. For example, the Commission concluded that two of the respondents would experience "rate decreases of approximately 20 percent for retail service" during the period covered by the contracts. 103 FERC, at 62,397. But the baseline for that computation was the rate they were paying before the contracts went into effect. That disparity is certainly a relevant consideration; but so is the disparity between the contract rate and the rates consumers would have paid (but for the contracts) further down the line, when the open market was no longer dysfunctional. That disparity, past a certain point, could amount to an "excessive burden." That is what was contemplated by *Sierra*, which involved a challenge 5 years into a 15-year contract. The "excessive burden" on other customers to which the opinion referred was assuredly the current burden, and not only the burden imposed at the very outset of the contract. See 350 U. S., at 355. The "unequivocal public necessity" that justifies overriding the *Mobile-Sierra* presumption does not disappear as a factor once the contract enters into force. Thus, FERC's analysis on this point was flawed—or at least incomplete. As the Ninth Circuit put it, "[i]t is entirely possible that rates had increased so high during the energy crises because of dysfunction in the spot market that, even with the acknowledged decrease in rates, consumers still paid more under the forward contracts than they otherwise would have." 471 F. 3d, at 1090. If that is so, and if that increase is so great that, even taking into account the desirability of fostering market-stabilizing long-term contracts, the rates impose an excessive burden on consumers or otherwise seriously harm the public interest, the rates must be disallowed.

Second, respondents alleged before FERC that some of the petitioners in these cases had engaged in market manipulation in the spot market. See, *e.g.*, 105 FERC, at 61,989 ("Snohomish and Nevada Companies argue that their contracts were the product of market manipulation by Enron, Morgan Stanley and other Respondents, which, as established by the Commission Staff, engaged in market manipulation"). The Staff Report concluded, as we have said, that the abnormally high prices in the spot market during the energy crisis influenced the terms of contracts in the forward market. But the Commission dismissed the relevance of the Staff Report on the ground that it had not demonstrated that forward market prices were so high as to overcome the *Mobile-Sierra* presumption. We conclude, however, that if it is clear that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations, the Commission should not presume that the contract is just and reasonable. Like fraud and duress, unlawful market activity that directly affects contract negotiations eliminates the premise on which the *Mobile-Sierra* presumption rests: that the contract rates are the product of fair, arms-length negotiations. The mere fact that the unlawful activity occurred in a different (but related) market does not automatically establish that it had no effect upon the contract—especially given the Staff Report's (unsurprising) finding that high prices in the one market produced high prices in the other. We are unable to determine from the Commission's orders whether it found the evidence inadequate to support the claim that respondents' alleged unlawful activities affected the contracts at issue here. It said in its order on rehearing, 105 FERC, at 61,989, that "[w]e . . . found no evidence to support a finding of market manipulation [by respondents] that specifically affected the contracts at issue." But perhaps that must be read in light of the Commission's above described rejection of the Staff Report on the ground that high spot market prices caused by manipulation are irrelevant unless the forward market prices fail the *Mobile-Sierra* standard; and in light of the statement in its initial order, in apparent response to the claim of spot-market manipulation by respondents, 103 FERC, at 62,397, that "a finding that the unjust and unreasonable spot market prices caused forward bilateral prices to be unjust and unreasonable would be relevant to contract modification only where there is a 'just and reasonable' standard of review."

We emphasize that the mere fact of a party's engaging in unlawful activity in the spot market does not deprive its forward contracts of the benefit of the *Mobile-Sierra* presumption. There is no reason why FERC should be able to abrogate a contract on these grounds without finding a causal connection between unlawful activity and the contract rate. Where, however, causality has been established, the *Mobile-Sierra* presumption should not apply.

On remand, the Commission should amplify or clarify its findings on these two points. The judgment of the Court of Appeals is affirmed, and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE and JUSTICE BREYER took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 06–1457 and 06–1462

MORGAN STANLEY CAPITAL GROUP INC., PETITIONER

06–1457 *v.*

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, ET AL.

AMERICAN ELECTRIC POWER SERVICE CORPORATION, ET AL., PETITIONERS

06–1462 *v.*

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 26, 2008]

JUSTICE GINSBURG, concurring in part and concurring in the judgment.

Recommending denial of the petition for certiorari in these cases, the Federal Energy Regulatory Commission urged that review "would be premature" given "the interlocutory nature of th[e] issues." Brief for Respondent Federal Energy Regulatory Commission in Opposition 22, 25. In this regard, the Commission called our attention to "new measures" it had taken, as well as recent enactments by Congress, bearing on "the evaluation of contracts under *Mobile-Sierra*." *Id.*, at 14–16. In view of these developments, the Commission suggested, this Court should await "the better-developed record that would be produced by FER[C] . . . on remand." *Id.*, at 22. I agree that the Court would have been better informed had it awaited the Commission's decision on remand. I think it plain, however, that the Commission erred in the two respects identified by the Court. See *ante*, at 24–26. I therefore concur in the Court's judgment and join Part III of the Court's opinion.

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[June 26, 2008]

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

The basic question presented by these complicated cases is whether "the Federal Energy Regulatory Commission (FERC or Commission) must presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement imposed by law." *Ante*, at 1. The opening sentence of the Court's opinion tells us that the "*Mobile-Sierra* doctrine"—a term that makes its first appearance in the United States Reports today—mandates an affirmative answer. This holding finds no support in either case that lends its name to the doctrine. Nevertheless, in the interest of guarding against "disfigurement of the venerable *Mobile-Sierra* doctrine," *ante*, at 19, the Court mangles both the governing statute and precedent.

I

Under the Federal Power Act (FPA), 41 Stat. 1063, 16 U. S. C. §791a *et seq.*, wholesale electricity prices are established in the first instance by public utilities, either via tariffs or in contracts with purchasers. §824d(c). Whether set by tariff or contract, all rates must be filed with the Commission. See *ibid.* Section 205(a) of the FPA provides, "All rates and charges . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." 16 U. S. C. §824d(a). Pursuant to §206(a), if FERC determines "that any rate . . . or that any rule, regulation, practice, or contract affect[ing] such rate . . . is unjust [or] unreasonable . . . , the Commission shall determine the just and reasonable rate, . . . rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order." 16 U. S. C. §824e(a). These provisions distinguish between the rate-setting roles of utilities (which initially set rates) and the Commission (which may override utility-set rates that are not just and reasonable), but they do not distinguish between rates set unilaterally by tariff and rates set bilaterally by contract. However the utility sets its prices, the standard of review is the same—rates must be just and reasonable.

The Court purports to acknowledge that "[t]here is only one statutory standard for assessing wholesale electricity rates, whether set by contract or tariff—the just-and-reasonable standard." *Ante*, at 16. Unlike rates set by tariff, however, the Court holds that any "freely negotiated" contract rate is presumptively just and reasonable unless it "seriously harms" the public interest. *Ante*, at 1. According to the Court, this presumption represents a "differing *application* of [the] just-and-reasonable standard," but not a different standard altogether. *Ante*, at 6.

I disagree. There is no significant difference between requiring a heightened showing to overcome an otherwise conclusive presumption and imposing a heightened standard of review. I agree that applying a separate standard of review to contract rates is "obviously indefensible," *ibid.*, but that is also true with respect to the Court's presumption.

Even if the "*Mobile-Sierra* presumption" were not tantamount to a separate standard, nothing in the statute mandates "differing *application*" of the statutory standard to rates set by contract. *Ibid.* Section 206(a) of the FPA provides, "without qualification or exception," that FERC may replace any unjust or unreasonable contract with a lawful contract. *Permian Basin Area Rate Cases*, 390 U. S. 747, 783–784 (1968) (construing identical language in the Natural Gas Act, 15 U. S. C. §717d(a)). The statute does not say anything about a mandatory presumption for contracts, much less define the burden of proof for overcoming it or delineate the circumstances for its nonapplication. Cf. *ante*, at 1, 19. Nor does the statute prohibit FERC from considering marginal cost when reviewing rates set by contract. Cf. *ante*, at 20–22, and n. 5.

If Congress had intended to impose such detailed constraints on the Commission's authority to review contract rates, it would have done so itself in the FPA. Congress instead used the general words "just and reasonable" because it wanted to give FERC, not the courts, wide latitude in setting policy. As we explained in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984):

> "'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' *Morton* v. *Ruiz*, 415 U. S. 199, 231 (1974).

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." (Footnote omitted.)

Consistent with this understanding of administrative law, our cases interpreting the FPA have invariably "emphasized that courts are without authority to set aside any rate adopted by the Commission which is within a 'zone of reasonableness.'" *Permian Basin*, 390 U. S., at 797. But see *ante*, at 19 (asserting that "a 'zone of reasonableness' test . . . fails to accord an adequate level of protection to contracts"). This deference makes eminent sense because "rate-making agencies are not bound to the service of any single regulatory formula; they are permitted, unless their statutory authority otherwise plainly indicates, 'to make the pragmatic adjustments which may be called for by particular circumstances.'" *Permian Basin*, 390 U. S., at 776–777. Despite paying lipservice to this principle, see *ante*, at 3, the Court binds the Commission to a rigid formula of the Court's own making.

Having found no statutory text that supports its vision of the *Mobile-Sierra* doctrine, the Court invokes the "important role of contracts in the FPA." *Ante*, at 22. But contracts play an "important role" in the FPA only insofar as the statute "departed from the scheme of purely tariff-based regulation." *Verizon Communications Inc.* v. *FCC*, 535 U. S. 467, 479 (2002). In allowing parties to establish rates by contract, Congress did not intend to immunize such rates from just-and-reasonable review. Both *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348 (1956), the supposed progenitors of the "*Mobile-Sierra* presumption," make this point in no uncertain terms. See *Sierra*, 350 U. S., at 353 ("The Commission has undoubted power under §206(a) to prescribe a change in contract rates whenever it determines such rates to be unlawful"); *Mobile*, 350 U. S., at 344 ("[C]ontracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest").[1] Accordingly, the fact that the FPA tolerates contracts does not make it subservient to contracts.

II

Neither of the eponymous cases in the "*Mobile-Sierra* presumption," nor any of our subsequent decisions, substantiates the Court's atextual reading of §§205 and 206.

As the Court acknowledges, *Mobile* itself says nothing about what standard of review applies to rates established by contract. See *ante*, at 3–4. Rather, *Mobile* merely held that utilities cannot unilaterally abrogate contracts with purchasers by filing new rate schedules with the Commission. See 350 U. S., at 339–341. The Court neglects to mention, however, that although *Mobile* had no occasion to comment on the standard of review, it did imply that Congress would not have permitted parties to establish rates by contract but for "the protection of the public

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[1] See also, *e.g.*, *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U. S. 571, 582 (1981) *(Arkla)* ("[T]he clear purpose of the congressional scheme" for rate filing is to "gran[t] the Commission an opportunity in every case to judge the reasonableness of the rate"); *Permian Basin Area Rate Cases*, 390 U. S. 747, 784 (1968) ("[T]he Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests").

interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public." *Id.*, at 339.

In *Sierra*, a public utility entered into a long-term contract to sell electricity "at a special low rate" in order to forestall potential competition. See 350 U. S., at 351–352. Several years later the utility complained that the rate provided too little profit and was therefore not "just and reasonable." The Commission agreed and set aside the rate "solely because it yield[ed] less than a fair return on the net invested capital." See *id.*, at 354–355. The Court vacated and remanded on the ground that the Commission had applied an erroneous standard. "[W]hile it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return," the Court reasoned, "it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain." *Id.*, at 355. When the seller has agreed to a rate that it later challenges as too low, "the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Ibid.* The Court further elaborated on what it meant by the "public interest":

> "That the purpose of the power given the Commission by §206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in §201 of the Act that the scheme of regulation imposed 'is necessary in the public interest.' When §206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either 'unjust' or 'unreasonable' simply be-

cause it is unprofitable to the public utility." *Ibid.*

Sierra therefore held that, in accordance with the statement of policy in the FPA, 16 U. S. C. §824(a), whether a rate is "just and reasonable" is measured against the public interest, not the private interests of regulated sellers. Contrary to the opinion of the Court, see *ante*, at 23, n. 6, *Sierra* instructs that the public interest is the touchstone for just-and-reasonable review of *all* rates, not just contract rates. *Sierra* drew a distinction between the Commission's authority to *impose* low rates on utilities and its authority to *abrogate* low rates agreed to by utilities because these actions impact the public interest differently, not because the public interest governs rates set bilaterally but not rates set unilaterally. When the Commission imposes rates that afford less than a fair return, it compromises the public's interest in attracting necessary capital. The impact is different, however, if a utility has agreed to a low rate because investors recognize that the utility, not the regulator, is responsible for the unattractive rate of return.

Sierra used "public interest" as shorthand for the interest of consumers in paying "'the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.'" *Permian Basin*, 390 U. S., at 793 (quoting *Atlantic Refining Co.* v. *Public Serv. Comm'n of N. Y.*, 360 U. S. 378, 388 (1959)). Whereas high rates directly implicate this interest, low rates do so only indirectly, such as when the rate is so low that it "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. Nothing in *Sierra* purports to mandate a "serious harm" standard of review, or to require any assumption that high rates and low rates impose symmetric burdens on the public interest. Cf. *ante*, at 19–20. As we later explained in *FPC* v. *Texaco Inc.*, 417 U. S. 380, 399 (1974), the Commission cannot ignore even "a small dent in the consumer's pocket" because "the Act makes unlawful all rates which are not just and reasonable, and does not say a little unlawfulness is permitted."

Brushing aside the text of the FPA, as well as the holdings in *Mobile* and *Sierra* themselves, the Court cherry picks language from *Verizon*, *Arkla*, and *Permian Basin*. Both *Verizon* and *Arkla* mentioned the *Mobile-Sierra* line of cases only in passing, and neither case had anything to do with just-and-reasonable review of rates. See *Verizon*, 535 U. S., at 479; *Arkla*, 453 U. S. 571, 582 (1981). Furthermore, the statement in *Permian Basin* about "unequivocal public necessity," 390 U. S., at 822, speaks to the difficulty of establishing injury to the public interest in the context of a low-rate challenge, not a high-rate challenge.[2]

[2] The Court repeatedly quotes the following snippet from the 75-page opinion in *Permian Basin:* "The regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity." 390 U. S., at 822 (cited *ante*, at 5, 22, 24). Like *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348 (1956), however, *Permian Basin* made this statement in the course of rejecting a low-rate challenge. Read in context, the Court's reference to "unequivocal public necessity" is a loose restatement of *Sierra*, which required "evidence of injury to the public interest," and which underscored how rarely a utility will be able to demonstrate that a "contract price is so 'low as to adversely affect the public interest.'" 390 U. S., at 820–821 (quoting *Sierra*, 350 U. S., at 355). The Court's expansive reading of the "unequivocal public necessity" statement cannot be squared with *Permian Basin*'s discussion of the Commission's authority to review rates set by contract: "Although the Natural Gas Act is premised upon a continuing system of private contracting, the Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests." 390 U. S., at 784 (citation omitted). Nor can it be reconciled with *Permian Basin*'s rejection of the producers' arguments (1) that the Commission "wrongly invalidated existing contracts" by imposing a ceiling on rates, see *id.*, at 781–784, and (2) that the Commission was compelled to adopt contract

The Court's reliance on these few stray sentences calls to mind our admonishment in *Permian Basin:* "The Commission's exercise of its regulatory authority must be assessed in light of its purposes and consequences, and not by references to isolated phrases from previous cases." *Id.*, at 791, n. 60.

III

Lacking any grounding in the FPA or precedent, the Court concludes, as a matter of policy, that the *Mobile-Sierra* presumption is necessary to ensure stability in volatile energy markets and to reduce regulatory costs. See *ante*, at 22–23. Of course, "the desirability of fostering market-stabilizing long-term contracts," *ante*, at 25, plays into the public interest insofar as the "Commission's responsibilities include the protection of future, as well as present, consumer interests," *Permian Basin*, 390 U. S., at 798; see also *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.*, 358 U. S. 103, 113 (1958) ("It seems plain that Congress . . . was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake"). But under the FPA, Congress has charged FERC, not the courts, with balancing the short-term and long-term interests of consumers. See *Permian Basin*, 390 U. S., at 792 ("The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors").

Moreover, not even FERC has the authority to endorse the rule announced by the Court today. The FPA does not

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prices as the basis for computing area rates, see *id.*, at 792–795.

indulge, much less require, a "practically insurmountable" presumption, see *Papago Tribal Util. Auth.* v. *FERC*, 723 F. 2d 950, 954 (CADC 1983) (opinion for the court by Scalia, J.), that all rates set by contract comport with the public interest and are therefore just and reasonable. Congress enacted the FPA precisely because it concluded that regulation was necessary to protect consumers from deficient markets. It follows, then, that "the Commission lacks the authority to place exclusive reliance on market prices." *Texaco*, 417 U. S., at 400; see also *id.*, at 399 ("In subjecting producers to regulation because of anticompetitive conditions in the industry, Congress could not have assumed that 'just and reasonable' rates could conclusively be determined by reference to market price"). For this reason, we have already rejected the policy rationale proffered by the Court today:

> "It may be, as some economists have persuasively argued, that the assumptions of the 1930's about the competitive structure of the natural gas industry, if true then, are no longer true today. It may also be that control of prices in this industry, in a time of shortage, if such there be, is counterproductive to the interests of the consumer in increasing the production of natural gas. It is not the Court's role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process." *Id.*, at 400 (footnote omitted).

Balancing the short-term and long-term interests of consumers entails difficult judgment calls, and to the extent FERC actually engages in this balancing, its reasoned determination is entitled to deference. But FERC cannot abdicate its statutory responsibility to ensure just and reasonable rates through the expedient of a heavy-handed presumption. This is not to say that the Commission should abrogate any contract that increases rates, but to underscore that the agency is "obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection by Congress." *Permian Basin*, 390 U. S., at 791.

IV

Even if, as the Court holds today, the "*Mobile-Sierra* presumption" is merely a "differing *application*" of the statutory just-and-reasonable standard, FERC's orders must be set aside because they were not decided on this basis.

The FERC orders repeatedly aver that the agency is applying a "public interest" standard different from and distinctly more demanding than the statutory standard. See, *e.g.*, App. 1198a ("[T]he burden of showing that a contract is contrary to the public interest is a higher burden than showing that a contract is not just and reasonable. . . . The fact that a contract may be found to be unjust and unreasonable under [§§205 and 206] does not in and of itself demonstrate that the contract is contrary to the public interest under the Supreme Court cases"). Indeed, the Commission's misunderstanding of our cases is so egregious that the sellers, concerned that the orders would be overturned, asked the Commission for "clarification that the public interest standard of review does not authorize unjust and unreasonable rates." *Id.*, at 1506a, 1567a. FERC clarified as follows:

> "[I]f rates . . . become unjust and unreasonable and the contract at issue is subject to the *Mobile-Sierra* standard of review, the Commission under court precedent may not change the contract simply because it is no longer just and reasonable. If parties' market-based rate contracts provide for the public interest

> standard of review, the Commission is bound to a higher burden to support modification of such contracts." *Id.*, at 1506a, 1567a.

Whereas in *Texaco* we faulted the Commission for failing to "expressly mention the just-and-reasonable standard," 417 U. S., at 396, in these cases FERC refused outright to apply that standard.[3]

In addition to misrepresenting FERC's understanding of the *Mobile-Sierra* doctrine as a presumption rather than a separate standard, the Court overstates the extent to which FERC considered the lawfulness of the rates. The Court recognizes, as it must, that the three factors identified in *Sierra* are neither exclusive nor "precisely applicable to the high-rate challenge of a purchaser." See *ante*, at 20; Brief for Respondent FERC 41–42. Although FERC applied what it termed the "*Sierra* Three-Prong Test," App. 1276a, the Court contends the agency did not err because it also evaluated the "'totality of the circumstances,'" see *ante*, at 20. But FERC's totality-of-the-circumstances review was infected by its misapprehension of the standard "dictated by the U. S. Supreme Court under the *Mobile-Sierra* doctrine." App. 1229a.

Whereas the focus of §§205(a) and 206(a) is on the reasonableness of the rates charged, not the conduct of the contracting parties, FERC restricted its review to the contracting parties' behavior around the time of formation. See *id.*, at 1280a–1284a. FERC seems to have thought it was powerless to conduct just-and-reasonable review unless the contract was already subject to abrogation

[3] The Court contends that FERC's application of the *Mobile-Sierra* doctrine "should be honored" because it represents the "settled understanding of the FPA." *Ante*, at 23, n. 6. As explained above, however, FERC's interpretation of the FPA (and of our cases construing the FPA) is "'obviously indefensible,'" *supra*, at 3 (quoting *ante*, at 6), and is therefore not entitled to any deference.

based on contract defenses such as fraud or duress. By including contracts within the scope of §206(a), however, Congress must have concluded that contract defenses are insufficient to protect the public interest. But see *ante*, at 19 (holding that the "*Mobile-Sierra* presumption" applies in all circumstances absent "traditional grounds for . . . abrogation" or "illegal action" by a contracting party).[4] Indeed, nothing in the FPA or this Court's cases precludes FERC from considering circumstances exogenous to contract negotiations, including natural disasters and market manipulation by entities not parties to the challenged contract.[5] FERC's error is obvious from the face of the orders, which repeatedly state the Commission's belief that it could not consider evidence relevant to the reasonableness of the contract rates.[6]

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[4] The Court quite sensibly instructs FERC that "if it is clear that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations, the Commission should not presume that the contract is just and reasonable"; and that the "mere fact that the unlawful activity occurred in a different (but related) market does not automatically establish that it had no effect upon the contract—especially given the Staff Report's (unsurprising) finding that high prices in the one market produced high prices in the other." *Ante*, at 25. I disagree, however, with the Court's suggestion that the FPA restricts FERC's review of contract rates to these limited criteria.

[5] The FPA does not specify how market deficiencies should weigh in FERC's review of contract rates. Depending on the circumstances and how one balances the short-term and long-term interests of consumers, evidence of "market turmoil" may, as the Court argues, support rather detract from a finding that contract rates are just and reasonable. See *ante*, at 18. Whether any given contract rate "ultimately benefits consumers," *ante*, at 22, however, is a determination that Congress has vested in FERC, not this Court.

[6] See, *e.g.*, App. 1275a ("[A] finding that the unjust and unreasonable spot market prices caused forward bilateral prices to be unjust and unreasonable would be relevant to contract modification only where there is a 'just and reasonable' standard of review. As we have previously concluded, the contracts at issue in this proceeding do not provide

Although the Court and the Commission attempt to recast FERC's orders as applying the statutory standard, see *ante*, at 13–14; Brief for Respondent FERC 21, under the doctrine set forth in *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943), "we cannot accept appellate counsel's *post hoc* rationalizations for agency action; for an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself," *Texaco*, 417 U. S., at 397 (internal quotation marks omitted). Furthermore, even assuming FERC subjectively believed that it was applying the just-and-reasonable standard despite its repeated declarations to the contrary, each order must be deemed "so ambiguous that it falls short of that standard of clarity that administrative orders must exhibit." *Id.*, at 395–396.

In order to get around the *Chenery* doctrine, the Court not only mischaracterizes FERC's orders, but also takes a more radical tack: It concludes that whatever the rationale set forth in FERC's orders, *Chenery* does not apply because "the Commission was *required*, under our decision in *Sierra*, to apply the *Mobile-Sierra* presumption in its evaluation of the contracts here." *Ante*, at 16. This point prompts the Court to comment that "FERC has lucked out." *Ibid.* If the Commission has "lucked out," it is not only a purely fortuitous victory, but also a Pyrrhic one.

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for such a standard but rather evidence an intent that the contracts may be changed only pursuant to the 'public interest' standard of review. Under the 'public interest' standard, to justify contract modification it is not enough to show that forward prices became unjust and unreasonable due to the impact of spot market dysfunctions" (footnote omitted)); *id.*, at 1527a ("Complainants were required to meet the public interest standard of review, not the just and reasonable standard of review which could have taken into account the causal connection between the spot market prices and forward bilateral market prices"); *id.*, at 1534a ("The Staff Report did not make any findings regarding the justness and reasonableness of any contract rates and any such findings would not be relevant here because the just and reasonable standard is not applicable").

Although FERC prevails in these cases despite having "offered a justification in court different from what it provided in its opinion," *ibid.*, it has paid a tremendous price. The Court has curtailed the agency's authority to interpret the terms "just and reasonable" and thereby substantially narrowed FERC's discretion to protect the public interest by the means it thinks best. Contrary to congressional intent, FERC no longer has the flexibility to adjust its review of contractual rates to account for changing conditions in the energy markets or among consumers. Cf. *Permian Basin*, 390 U. S., at 784 ("[A]dministrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances").

V

The decision of the Court of Appeals for the Ninth Circuit deserves praise for its efforts to bring the freewheeling *Mobile-Sierra* doctrine back in line with the FPA and this Court's cases. I cannot endorse the opinion in its entirety, however, because it verges into the same sort of improper policymaking that I have criticized in the Court's opinion. Both decisions would hobble the Commission, albeit from different sides. Congress has not authorized courts to prescribe energy policy by imposing presumptions or prerequisites, or by making marginal cost the sole concern or no concern at all. I would therefore vacate and remand the cases in order to give the Commission an opportunity to evaluate the contract rates in light of a proper understanding of its discretion.

I respectfully dissent.

EAST ALTAMONT ENERGY CENTER DOCKET NUMBER (01-AFC-4C)

ADDENDUM #1 TO PUBLIC COMMENTS

ON THE

REQUEST FOR A THREE-YEAR EXTENSION TO THE DEADLINE

FOR

COMMENCEMENT OF CONSTRUCTION

Eight comments have been received from:

Adam Coles

Sara Phinney

Roger Sun

Rob Simpson (with 2 attachments)

Robert Sarvey

San Joaquin Valley Air Pollution Control District

Project Owner's Comments on the Staff Analysis of the Petition

Californian's for Renewable Energy, Inc. (CARE) with attachments

From: Adam C <atomco@hotmail.com>
To: <dstone@energy.state.ca.us>
Date: 7/11/2008 8:43 AM
Subject: Application for Certification of the East Altamont

Donna,

Please do not allow the East Altamont Power Plant to be built in the current proposed location. It will be far too close to Mountain House where we live. My wife and I just had a baby girl and I'm very concerned the pollution from the power plant will affect her over her life and worsen her health. Please do not allow this power plant to be built here, it's way too close to children and many young families that need clean air. Thanks for your consideration, Adam Coles

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From: Sara Phinney <sara_phinney@yahoo.com>
To: <dstone@energy.state.ca.us>
Date: 7/11/2008 8:04 AM
Subject: Power Plant near Mountain House

Donna:
I am a 3 year Mountain House resident and was very disturbed to learn about this power plant that might be built less than a mile from my home. Please do not allow this to happen. I wanted to raise my children in a nice area free from concern of major pollution. I understand newer technology might make it safer, but not safe enough for me and my neighbors.
There has been no construction on this plant in 5 years, whereas Mountain House and Tracy have grown, please do not approve the extension to something so harmful to so many.
Besides the health risk, with the economy in the shape it is, the building of a plant in such close proximity to residents would damage Mountain House and its residents even further financially. People will not want to buy in the cute community next to the nasty power plant. We cannot afford to move now, we certainly would not be able to move to a safe location if you build the plant.
Please, hear our voices, and think of our children, do not allow this to be built.
Thank you
Sara Phinney
Mountain House, CA

From: "Sun, Roger" <roger.sun@intel.com>
To: "dstone@energy.state.ca.us" <dstone@energy.state.ca.us>
CC: "Sun, Roger" <roger.sun@intel.com>
Date: 7/14/2008 6:52 PM
Subject: East Altamont Energy Center start of construction permit extension

Dear Ms. Stone

I am writing this email to let you know that as a Mountain House resident, I strongly urge California Energy Commission
to take additional measures to assess the environmental impact of proposed power plant being built near Mountain House.
Since 2003, the Mountain House neighborhood has grown rapidly to more than 8000 residents now and targeted to reach 44000
when all villages are completing construction. The proposed power plant site is less than 1 mile to Mountain House
neighborhood, we can not underestimate the public health issue and potential accidents may cause by East Altamont Energy
Center. I think Mountain House residents have not been given adequate public notice about this project. Some people
including myself got this information from a Mountain House forum which a lot people expressed the concerns of building
this power plant. California Energy Commission should conduct public hearings in Mountain House neighborhood about this
project, completely disclose the environment impact and hear the feedbacks from local residents before making a decision
on the permit extension.

Please let me know if you need more information from me, I can be reached at (408)765-6752.

Sincerely,

Roger Sun