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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**Nos. 03-74208, *et al.*,  
(consolidated)**

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**PUBLIC UTILITY DISTRICT NO. 1 OF  
SNOHOMISH COUNTY, WASHINGTON, *et al.*,  
PETITIONERS,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

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**ON PETITION FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**CYNTHIA A. MARLETTE  
GENERAL COUNSEL**

**DENNIS LANE  
SOLICITOR**

**LONA T. PERRY  
ATTORNEY**

**FOR RESPONDENT  
FEDERAL ENERGY REGULATORY  
COMMISSION  
WASHINGTON, D.C. 20426**

**SEPTEMBER 22, 2004**

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**ON PETITION FOR REVIEW OF ORDERS OF THE  
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**BRIEF OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

---

**STATEMENT OF THE ISSUE**

Whether the Commission reasonably denied complaints seeking to modify contracts upon finding that Petitioners failed to meet the *Mobile-Sierra* public interest standard or to demonstrate any other grounds to justify abrogation.

**STATUTORY AND REGULATORY PROVISIONS**

The pertinent statutes and regulations are contained in the Addendum to this brief.



## STATEMENT OF JURISDICTION

Respondent agrees with Petitioners' Statement of Jurisdiction.

## STATEMENT OF THE CASE

### I. Nature of the Case, Course of Proceedings, and Disposition Below

The Nevada Power Company and Sierra Pacific Power Company (collectively "Nevada Companies"), Southern California Water Company ("SCWC") and Public Utility District No. 1, Snohomish County, Washington ("Snohomish")<sup>1</sup> filed complaints at FERC against a group of sellers from whom they had purchased electric energy under long-term bilateral contracts. The complaints alleged that dysfunctions in the California electricity spot markets caused the bilateral forward contracts complained of to be unjust and unreasonable, and sought the extraordinary remedy of contract modification.

In *Nevada Power Co.*, 99 FERC ¶ 61,047 (2002) ("April 11 Order"), the Commission set the complaints for hearing, including the issue of whether the complainants must show that the challenged contracts were contrary to the public

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<sup>1</sup> The Nevada Companies, SCWC and Snohomish, along with the Office of the Nevada Attorney General, Bureau of Consumer Protection ("Nevada BCP"), are collectively "petitioners." Intervenor Briefs were filed by the Public Utilities Commission of Nevada ("Nevada PUC"), and jointly by the California Electricity Oversight Board ("CEOB") and the Public Utilities Commission of the State of California ("CPUC"). As the Joint Intervenor Brief of the CEOB and CPUC simply expresses support for the petitioners without making any substantive argument, their brief will not be further discussed.

interest under the *Mobile-Sierra*<sup>2</sup> doctrine to obtain contract modification. In *Nevada Power Co.*, 100 FERC ¶ 61,273 (2002) (“September 17 Order”), the Commission reaffirmed its decision setting issues for hearing, except that it found that Morgan Stanley Capital Groups’ contract with Snohomish contained an express provision invoking the *Mobile-Sierra* doctrine.

After the hearing, the Administrative Law Judge (“ALJ”) concluded that the parties to the contracts at issue intended the *Mobile-Sierra* standard to apply in these circumstances, and that the complainants failed to meet their burden under that standard. *Nevada Power Co.*, 101 FERC ¶ 63,031 (2002) (“Initial Decision”). The Commission affirmed the ALJ’s decision, *Nevada Power Co.*, 103 FERC ¶ 61,353 (2003) (“Order on Initial Decision”), and denied rehearing, *Nevada Power Co.*, 105 FERC ¶ 61,185 (2003) (“Rehearing Order”).

## **II. Statement of Facts**

### **A. Statutory and Regulatory Background**

The Federal Power Act (“FPA”), 16 U.S.C. § 824, *et seq.*, gives FERC jurisdiction over the rates, terms and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. FPA § 206(a), 16 U.S.C. § 825e(a), provides that, whenever the Commission, after a hearing had

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<sup>2</sup> *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (“*Mobile*”); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (“*Sierra*”) (collectively “*Mobile-Sierra*”).

upon its own motion or upon complaint, finds a rate “unjust, unreasonable, unduly discriminatory or preferential, @the Commission shall determine the just and reasonable rate to be thereafter in force. The Commission or the complainant has the burden of proof in any § 206 proceeding. 16 U.S.C. § 824e(b).

The *Mobile-Sierra* doctrine further constrains contract modification. Under *Mobile-Sierra*, where parties have negotiated a contract that sets fixed prices and denies either party the right to change such prices unilaterally, FERC may abrogate or modify the contract only if the public interest so requires. See *Texaco Inc. v. FERC*, 148 F.3d 1091, 1095 (D.C. Cir. 1998); *Metropolitan Edison Co. v. FERC*, 595 F.2d 851, 855 (D.C. Cir. 1979).

### **B. The Crisis in California Spot Markets<sup>3</sup>**

In 1996, the California legislature restructured the power industry in California. See *In re: California Power Exch. Corp.*, 245 F.3d 1110, 1114 (9th Cir. 2001) (“*CalPX*”). As part of the restructuring, California created the California Power Exchange Corporation (“*CalPX*”) and California Independent System Operator (“*CAISO*”). The *CalPX* administered a single-price auction market for day-ahead and day-of electricity trading, determining a single market

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<sup>3</sup> Spot market sales are sales for services lasting 24 hours or less, entered into the day of or day prior to delivery. Forward contracts are supply contracts for future delivery of a fixed quantity of power at a predetermined price, directly negotiated between buyer and seller.

clearing price based on demand and supply bids. *See CalPX*, 245 F.3d at 1114. The CAISO operates the California transmission grid and administers a real-time imbalance market to ensure that supply meets demand at the time of delivery. *Id.* at 1115.

California required the three largest California investor-owned utilities (“IOUs”) to divest substantial portions of their generation facilities, and froze the IOUs’ retail rates. *See CalPX*, 245 F.3d at 1114-15. To promote the CalPX spot market, the IOUs were required to bid their generation into and buy their requirements from the CalPX, and all purchases from the CalPX were deemed to be “prudent per se” by the CPUC. *Id.*

In the summer of 2000, wholesale electricity prices in California increased significantly, particularly in the CalPX spot markets. *CalPX*, 245 F.3d at 1115. On July 26, 2000, the Commission instituted an investigation of the California bulk power markets. *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 93 FERC ¶ 61,121 at 61,354 (2000) (“November 1 Order”). FERC staff identified three major factors contributing to the high prices. First, competitive market forces played a major role due to significantly increased power production costs, combined with increased demand due to unusually high temperatures, and a scarcity of available generation resources. *Id.*

Second, “[m]any of the market dysfunctions in California and the exposure of California consumers to high prices [could] be traced directly to an over-reliance on spot markets.” *Id.* at 61,359. Under the CPUC’s market rules, the IOUs were over-exposed to spot market volatility by the requirement that they buy and sell through the CalPX. *Id.* at 61,354. Frozen retail rates meant demand did not decrease as the price of power rose, thus allowing prices to rise well above competitive levels. *Id.* at 61,354-55. While both suppliers and customers prefer to manage risk through forward contracts because of spot market volatility, the CPUC’s market rules prevented the IOUs from engaging significantly in forward contracts. *Id.* at 61,359. The limitations on long-term contracting in favor of spot market purchasing produced chronic underscheduling, turning the CAISO’s real-time imbalance energy market, with its high volatility, from a market of last resort into a significant source of supply. *CalPX*, 245 F.3d at 1116.

Third, evidence suggested that circumstances created an opportunity for sellers to exercise market power in the spot markets (where market power is defined as prices above short-run marginal cost) at certain times. *Id.* at 61,355. However, insufficient data precluded a determination regarding whether market power was exercised by individual sellers. *Id.*

The flawed California market rules and structure, combined with the imbalance of supply and demand, caused “unjust and unreasonable rates for short-

term energy (Day-Ahead, Day-of, Ancillary Services and real-time energy sales) under certain conditions.” *Id.* at 61,349-50. But FERC did not find that volatility in the spot market caused forward contract prices to be unreasonable. While “[s]ellers will certainly be aware that supplies of power are tight and that the IOUs are now aggressively seeking to avoid the exposure of the spot markets,” two factors offset sellers’ ability to take advantage in the forward markets. *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 93 FERC ¶ 61,294 at 61,994 (2000) (“December 15 Order”). First, “suppliers . . . benefit from the stable revenue stream of forward markets and have every bit as much incentive to avoid the volatility of the spot markets as do purchasers.” *Id.* “While suppliers clearly benefit on the upside of price volatility, the risks of price swings move in both directions. A supplier that relies exclusively on spot markets is exposed to the risk that, due to favorable weather or supply conditions, prices will be too low to cover its costs.” *Id.* n. 33. Second, “suppliers will bargain knowing that the spot market’s size will be greatly reduced [by more forward purchasing] and that next summer’s spot prices will therefore not be fueled by frenzied buyers whose over-reliance on last minute purchases have forced them to bid up the prices to obtain needed supply.” *Id.*

The December 15 Order eliminated the CalPX buy-sell requirement, which, because it which led to chronic underscheduling, effectively transformed the

CAISO from supplying imbalance services to administering a sizeable real-time energy market. 93 FERC at 61,195. Because the CPUC refused to eliminate its requirement that the IOUs purchase in the CalPX spot market, the Commission was forced to terminate the CalPX tariff. *Cal PX*, 245 F.3d at 1117.

FERC's mitigation measures sought to reduce the size of the CAISO's spot markets to "levels more reflective of appropriate risk management." *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 95 FERC ¶ 61,418 at 62,546 (2001). The Commission, however, denied requests to extend market mitigation measures into the forward contract market because FERC did not find that the forward contract markets were flawed. *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 97 FERC ¶ 61,275 at 62,245 (2001) ("December 19 Order").

### **C. The Challenged Orders**

#### **1. The Orders Setting Petitioners' Complaints for Hearing**

Petitioners the Nevada Companies, SCWC and Snohomish, filed complaints seeking modification of certain forward energy contracts based on allegations that the dysfunctions in the California electricity spot markets caused those forward, long-term contracts, negotiated in the bilateral markets, to be unjust and unreasonable. The Nevada Companies complained of their contracts with Morgan Stanley, Calpine Energy Services, L.P., Mirant Americas Energy Marketing, L.P.,

Reliant Energy Services, Inc., El Paso Merchant Energy, L.P., BP Energy Company, American Electric Power Service Corporation, Enron Power Marketing, Inc., and Allegheny Energy Supply Company, LLC. April 11 Order at 3, ER3. SCWC’s complaint addressed its contract with Mirant, *id.* at 6, ER 6, and Snohomish complained against Morgan Stanley, *id.* at 8, ER 8.

“The Commission’s long-standing policy, consistent with a substantial body of Supreme Court and other judicial precedent, has been to recognize the sanctity of contracts.” *Id.* at 12, ER 12. Further, “[p]reservation of contracts has, if anything, become even more critical since the policy was first adopted. Competitive power markets simply cannot attract the capital needed to build adequate generating infrastructure without regulatory certainty, including certainty that the Commission will not modify market-based contracts unless there are extraordinary circumstances.” *Id.*

Nevertheless, the unusual circumstances made it appropriate to set the Petitioners’ complaints for hearing on the issue of “whether the dysfunctional California spot markets adversely affected the long-term bilateral markets, and, if so, whether modification of any individual contract at issue is warranted.” *Id.* at 14, ER 14. Also at issue was whether the standard applicable to the complaints was the just and reasonable or the *Mobile-Sierra* public interest standard. *Id.* at 12, ER 12. Under *Mobile-Sierra*, where parties contract for a particular rate and do



not reserve their rights unilaterally to propose a rate change, FERC cannot supersede that rate unless required by the public interest. *See, e.g., Boston Edison Co. v. FERC*, 233 F.3d 60, 64-65 (1st. Cir. 2000).

The challenged contracts were all entered into under the umbrella Western Systems Power Pool Agreement (“WSPPA”), and consist of the WSPPA and any amendments and a Confirmation Agreement. Initial Decision ¶¶ 20, 23. These are *pro forma* agreements that allow the parties to fill in the blanks by adding their names, the rate, the length of service, and the quantities. *Id.* n. 46.

For all but one of the challenged contracts, WSPPA § 6.1 appeared to be the only contractual provision governing the parties’ rights to make changes to their contracts. April 11 Order at 12, ER 12. Section 6.1 states:

Nothing contained herein shall be construed as affecting in any way the rights of the Parties to jointly make application to FERC for a change in the rates and charges, classification, service, terms or conditions affecting WSPP transactions under Section 205 of the Federal Power Act and pursuant to FERC rules and regulations promulgated thereunder.

*Id.* at 3, ER 3. The Commission found it lacked a sufficient record to address the *Mobile-Sierra* issue with respect to the complainants’ rights definitively and, accordingly, set for hearing the issue of whether the *Mobile-Sierra* standard applied to these contracts. *Id.* at 13, ER 13.

Rather than relying on § 6.1 in the umbrella WSPPA, the Snohomish/Morgan Stanley contract contained a separate provision governing the

parties' rights to make changes, which was also set for hearing. *Id.* Section 39B of the Confirmation Agreement between Snohomish and Morgan Stanley, states: "The rates for service specified in this Agreement shall remain in effect for the term of this Agreement and shall not be subject to change through application to FERC pursuant to the provisions of Section 205 or 206 of the Federal Power Act." *Id.* at 13 n. 11, ER13.

The September 17 Order denied requests for rehearing of the April 11 Order, September 17 Order ¶ 5, ER 25, except that it granted Morgan Stanley's request for rehearing, finding that § 39B of the Snohomish/Morgan Stanley Agreement triggered *Mobile-Sierra* protections, *id.* ¶ 20, ER 31.

## **2. The Order on Initial Decision**

### **a. The *Mobile-Sierra* Standard Applies**

After the hearing, the ALJ concluded that the parties to the contracts at issue intended the *Mobile-Sierra* standard to apply, and that the complainants failed to meet their burden under that standard. Initial Decision ¶ 257. The Order on Initial Decision affirmed the ALJ. Order on Initial Decision ¶¶ 3-4, ER 202.

The record showed that the challenged contracts were entered into under the umbrella WSPPA, and consequently incorporate terms and conditions of the WSPPA, including § 6.1. *Id.* ¶ 36, ER 213. Section 6.1 allows parties to jointly seek modification of the rates, terms and conditions of the contracts under FPA §

205, 16 U.S.C. § 824d, but does not address parties' FPA § 206 rights. *Id.* The Commission found that § 6.1 triggered *Mobile-Sierra* protections:

Section 6.1 of the WSPP Agreement allows parties to jointly seek modification of the rates, terms and conditions of a contract under FPA Section 205, but does not address customer rights to file a complaint pursuant to FPA Section 206. On first glance, Section 6.1 is confusing since Section 205 is the statutory provision by which a seller makes a rate change filing and Section 206 is the provision by which a non-seller (purchaser or other affected person) may seek a rate change. However, we conclude that the reference to a “joint” Section 205 filing evidences an intent that neither seller nor buyer be able to seek changes under Section 205 or 206 of the FPA other than under the “public interest” standard of review. Although the parties could have used specific language disallowing a unilateral filing by the seller under Section 205, or the filing of a complaint by the buyer under Section 206 of the FPA, the most reasonable reading of Section 6.1 is that they intended to exclude any unilateral filings at the Commission. As the ALJ explained, “under the maxim ‘*expressio unius est exclusion alterius*,’ (the expression of one thing is the exclusion of the other), the only interpretation of Section 6.1 of the [WSPP Agreement] is that the parties thought about, contemplated, and provided for applications to FERC, excluding all applications not specifically provided for in the contracts.” Therefore, the parties to the challenged contracts did not intend to retain for Complainants the right to unilaterally seek changes to their contracts. Thus, we conclude that Complainants must demonstrate that the contracts in question are contrary to the public interest in order to support modification of the contracts.

*Id.* ¶ 36, ER 213-24 (quoting Initial Decision ¶ 30) (footnotes omitted). As § 6.1 does not expressly address *Mobile-Sierra*, contrary interpretation (*i.e.*, that *Mobile-Sierra* did not apply), would “fly in the face of” *Texaco*, which held: “the law is quite clear: absent contractual language ‘susceptible to the construction that the rate may be altered while the contract[] subsists,’ the *Mobile-Sierra* doctrine

applies.” *Id.* n. 46 (quoting *Texaco*, 148 F.3d at 1096, quoting *Appalachian Power Co. v. FPC*, 529 F.2d 342, 348 (D.C. Cir. 1976)).

Complainants contended that *Mobile-Sierra* could not apply to the market-based rate contracts at issue here because the contracts have not been previously reviewed and determined to be just and reasonable by the Commission. *Id.* ¶ 37, ER 214. However, prior Commission review under FPA § 205 occurs in the market-based rate context when the Commission determines that a seller lacks market power or has taken steps to mitigate it, and authorizes the seller to make sales at market-based rates, pre-determining that rates under future contracts will fall in a just and reasonable range due to competition. *Id.*, ER 214-25 (relying on *State of Cal. ex rel. Bill Lockyer v. British Columbia Power Exch. Corp.*, 99 FERC ¶ 61,247 at 62,063 (2002), *on reh’g*, 100 FERC ¶ 61,295 (2002), *aff’d in part, remanded in part*, *State of California ex rel. Lockyer v. FERC*, No. 02-73093 (9<sup>th</sup> Cir. Sept. 9, 2004) (“*Lockyer*”).

Snohomish sought rehearing of the September 17 Order’s determination that its contract with Morgan Stanley was subject to *Mobile-Sierra*, arguing that § 39B only addresses unilateral changes to the contract rate, and does not apply to its complaint seeking to shorten the contract term. *Id.* ¶¶ 38-39, ER 215. The Commission found, however, that the contract length is inextricably linked with the contract rate, and Snohomish’s complaint in any event primarily alleges that

the contract rate is unjust and unreasonable, not that the contract term is unjustifiably long. *Id.* ¶ 39, ER 215-16. Further, if § 39B applied only to challenges of the contract rate, and the Snohomish complaint applied to the contract term, the “public interest” standard would still apply because WSPPA § 6.1 would control. *Id.* ¶ 40, ER 216.

The Commission also rejected the contention that the “public interest” standard does not apply to challenges brought by third-parties to the contract, finding no legal precedent supporting the proposition that non-signatory parties may challenge a *Mobile-Sierra* contract under the just and reasonable standard. *Id.* ¶ 41, ER 216. By virtue of WSPPA § 35, Snohomish’s Collateral Annex was also part of the WSPPA and thus governed by § 6.1, which means it is subject to the public interest standard. *Id.* ¶ 115 and ¶ 119, ER 242.

**b. The *Mobile-Sierra* Standard Was Not Met**

The Commission relied on not only the evidentiary record in this proceeding, but also the findings of the Staff Report <sup>4</sup> and evidence submitted in the 100-Day Discovery Proceeding, <sup>5</sup> to find that complainants failed to meet their

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<sup>4</sup> The Commission Staff’s Final Report on Price Manipulation in Western Markets in Docket No. PA02-2-000 (“Staff Report”).

<sup>5</sup> On November 20, 2002, the Commission issued an order allowing parties in the Docket No. EL00-95, *et al.*, proceeding to adduce evidence that was either indicative or counter-indicative of market manipulation that may have occurred during the California energy crisis of 2000-2001 (the “100-Day Discovery

burden to show that contract modification was warranted by the public interest. *Id.* ¶ 94, ER 233. The Staff Report found that spot market distortions influenced forward power prices, particularly those for contracts of one to two years time to delivery. *Id.*, ER 234. The Staff Report and the 100-Day Discovery Proceeding evidence suggested that the California ISO and PX markets were subjected to market manipulation and gaming. *Id.* The findings from the Staff Report and the 100-Day Discovery Proceedings documents were contested in the “show cause” proceedings that address alleged manipulation in the spot markets. *Id.* Nonetheless, assuming the allegations were true would not determine the issues in this proceeding. *Id.* The Commission had already found the CAISO and CalPX spot markets dysfunctional during the relevant period, with unjust and unreasonable rates, and therefore the evidence of market manipulation merely suggests yet another cause of the dysfunctions and the unjust and unreasonable rates. *Id.*

Those findings do not control here because the public interest, not the just and reasonable, standard applies. 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 if a “just and reasonable” standard

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Proceeding”). *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 101 FERC ¶ 61,186 (2002), *on reh’g*, 102 FERC ¶ 61,164 (2003).

applied. *Id.* Under the applicable “public interest” standard for the contracts at issue, it is not enough for complainants to show that their rates have become unjust and unreasonable due to the impact of spot market dysfunctions. Instead, they must show that the rates, terms and conditions are contrary to the public interest. *Id.* Here, complainants failed to demonstrate that any of the three prongs announced in *Sierra*,<sup>6</sup> or any other evidentiary factor, warranted a finding that any contract is contrary to the public interest and should be modified. *Id.* ¶ 95, ER 234.

No credible record evidence showed that the challenged contracts placed complainants in financial distress so as to threaten their ability to continue service, imposed an excessive burden on customers, or were unduly discriminatory. *Id.* ¶ 96, ER 235. The Nevada Companies’ cash flow projections show positive cash balances for each of the next several years, even assuming dividend and debt payments, indicating continuing ability to access capital markets. *Id.* ¶ 97, ER 235. The Nevada Companies’ claimed financial hardship related to their pre-November 2000 precarious financial position, well before the majority of the contracts at issue were executed. *Id.* Similarly, no evidence showed that the Nevada Companies’ contracts imposed an excessive burden on customers; in November 2002, Nevada

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<sup>6</sup> In *Sierra* the Court stated that: “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.” 350 U.S. at 355.

Companies projected rate decreases of approximately twenty percent for retail service commencing June 1 to August 1, 2003. *Id.* ¶ 98, ER 235.

There was likewise no evidence that the SCWC/Mirant contract caused SCWC financial distress. *Id.* ¶ 99, ER 236. Quite the opposite, SCWC realized a profit for the power purchased under the challenged SCWC/Mirant Agreement for \$95/MWh, and sold back to Mirant for \$173/MWh. *Id.* The contract also benefited SCWC by avoiding the risk of price volatility and achieving rate certainty. *Id.* The overall savings to SCWC from its forward contracting and marketing strategy amounted to \$13.6 million. *Id.*

SCWC did not show an excessive burden on its customers. *Id.* Pursuant to the terms of a settlement between SCWC and CPUC, there was no rate increase for SCWC's ratepayers who are permanent residents of SCWC's service territory. *Id.* The other group of SCWC ratepayers, owners of second homes in SCWC's service area, faced an average monthly electric bill of \$35.13. *Id.*

Snohomish presented no evidence that its contract with Morgan Stanley adversely affected Snohomish or its ratepayers. *Id.* ¶ 100, ER 236. The Snohomish/Morgan Stanley contract is no more than five percent of Snohomish's portfolio costs, and constitutes only three percent of Snohomish's load, resulting in an eight percent increase over 2001 rates, while other contracts account for a rate increase of fifty-one percent. *Id.*, ER 236-37. Snohomish's rate increase occurred



prior to Snohomish's negotiating its contract with Morgan Stanley, and prior even to Snohomish issuing the request for proposal for the power purchase in question. *Id.*, ER 237.

Complainants also failed to submit evidence showing that the challenged contracts are unduly discriminatory. *Id.* ¶ 101, ER 237. Only Snohomish alleged discrimination, based on the fact that other parties who contracted with Morgan Stanley have other terms. *Id.* This is not the type of discrimination that would satisfy the *Mobile-Sierra* doctrine. As the doctrine looks to the public interest, not the private interest of utilities, only discrimination against customers or others who are not parties to the contract, not discrimination against Snohomish, is of concern under *Mobile-Sierra*. *Id.* No showing of such discrimination was made by Snohomish. *Id.*

In addition, nothing in the extensive evidentiary record on the totality of the circumstances surrounding the challenged contracts supported contract modification. *Id.* ¶ 102, ER 237. For example, the Nevada Companies' contracts were standard products arranged through independent third-party brokers, and consequently the sellers were price takers. *Id.* Rather than being forced into these purchases, the Nevada Companies were buying as much power as they could before sellers discovered the Companies' already precarious financial position. *Id.*, ER 237-38. To this end, the Nevada Companies' aggressive procurement strategy

led to purchases above the amount necessary to serve their native retail load. *Id.*, ER 238, *see id.* ¶ 47, ER 219 (accelerated procurement strategy). In fact, the Nevada Companies doubled their previous annual wholesale power purchases, and more than quadrupled their wholesale power sales as compared to 2000 sales. *Id.*

The Nevada Companies failed to hedge for the risk that spot market prices would fall, and did not pursue a mix of products to reduce risks associated with market volatility through portfolio diversification. *Id.* ¶ 103, ER 238. Rather, most of their contracts at issue were for less than one year duration, with many for 90 days. *Id.* ¶ 49, ER219. The Nevada Companies rejected longer-term transactions that were offered, and rejected two Calpine proposals and one Duke proposal offered at prices substantially lower than the challenged contract rate. *Id.* Further, there were ample choices: the Nevada Companies purchased from thirty-nine separate providers in 2000 and 2001, and Sierra Pacific purchased from forty-five to forty-seven separate providers in the same time frame. *Id.* The number of sellers available demonstrates that the Companies were free to reject offers and turn to other suppliers. *Id.*

Execution of the Snohomish/Morgan Stanley contract was preceded by extensive bid solicitation and negotiation of the contract terms. *Id.* ¶ 105, ER 239. Snohomish's request for proposals, sent to seventeen suppliers, elicited five bids, including Morgan Stanley's, which was modified twice with terms suggested by

Snohomish. *Id.* Snohomish voluntarily chose the length of its contract that it now challenges, and negotiated a price with Morgan Stanley (\$105/MWh) substantially lower than the \$125/MWh price authorized by Snohomish's Board, and on which Snohomish's retail rates were based. *Id.* Further, Snohomish profited from reselling the Morgan Stanley power, as it sold power during the first five months of 2001 at an average price of \$134/MWh, for a net profit of \$17 million. *Id.* ¶ 106, ER 239.

It was SCWC's choice to wait until March 2001, when energy prices were at their peak, to start a bid solicitation process to replace its contract with Dynegy, Inc., which expired in May 2001. *Id.* ¶ 107, ER 239-40. Despite limiting bids to fixed-price offers within the range of \$90/MWh for terms ranging from one to seven years, SCWC still received three different responses to its proposal with varying options. *Id.* ER 240. SCWC admittedly expected prices to drop, but still entered into the challenged contract. *Id.* SCWC in fact realized a profit by buying the power from Mirant at \$95/MWh, and selling it back to Mirant at \$173/MWh. *Id.*

The Commission concluded that evidence of the totality of the circumstances showed that the contracts at issue resulted from choices voluntarily made by the complainants, who voluntarily left themselves open to possible unnecessary risks. *Id.* ¶ 108, ER 240. Better alternatives meant complainants

were not compelled to enter into the contracts at issue here. *Id.* Finally, nothing in the record before the ALJ, in the Staff Report, or in the 100-Day Discovery Proceeding evidence, supports a finding of market manipulation specific to the long-term contracts at issue here. *Id.* ¶ 109, ER 241.

Therefore, based on the record, complainants were seeking contract modification based on dissatisfaction with their bargains. *Id.* ¶ 110, ER 241. Allegations that contracts have become uneconomic by the passage of time do not render them contrary to the public interest under the FPA. *Id.* (citing *Sierra*, 350 U.S. at 354-55; *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 409 (D.C. Cir. 2000) (“*PEPCO*”); *Papago Tribal Auth. v. FERC*, 723 F.2d 950, 953 (D.C. Cir. 1983) (“*Papago*”); *Soyland Power Coop. Inc. v. Central Ill. Pub. Serv. Co.*, 51 FERC ¶ 61,004 at 61,013 (1990)). Because the record clearly indicated that the challenged transactions were the result of complainants’ voluntary choices, and did not show unfairness, bad faith or duress in the original negotiations, the complainants were not entitled to change their bargains. *Id.*

### **3. The Rehearing Order**

#### **a. The *Mobile-Sierra* Standard Applies**

On rehearing, complainants argued that the Commission violated its statutory obligation to ensure just and reasonable rates by imposing the higher public interest burden of proof before mitigating unjust and unreasonable prices in

the contracts at issue. Rehearing Order ¶ 13, ER 396. According to complainants, the contract prices were not just and reasonable at contract formation because, as determined in the Staff Report, the CalPX and CAISO spot market dysfunctions adversely affected prices in forward contracts, and the sellers engaged in fraud, deception and misrepresentation, and market manipulation, resulting in unjust and unreasonable prices. *Id.* Complainants alleged that the forward markets were not competitive during the relevant time, and thus could not produce just and reasonable prices. *Id.*

The Commission found that it had not violated its statutory obligation with respect to modification of the contracts, as interpreted by the Supreme Court. *Id.* ¶ 15, ER 397. The *Mobile-Sierra* doctrine holds that, where the parties have negotiated a contract that sets firm prices, and denies either party the right to change those prices unilaterally, the Commission may abrogate or modify the contract only if the public interest so requires. *Id.* (citing *Texaco*, 148 F.3d at 1095). The burden to demonstrate that the contract rates in question are contrary to the public interest is on the complainants. *Id.* Once a party signs a *Mobile-Sierra* contract, it cannot later escape the contract by claiming that the rates were not just and reasonable when it signed the contract, unless there is evidence, such as the seller fraudulently inducing the buyer to execute the contract. *Id.* No such

evidence was found in the instant record, including the Staff Report and the 100-Day Discovery Proceeding submittals. *Id.*

The contention that the Commission could not apply the public interest standard because it had not previously found the contract rates just and reasonable fails to acknowledge that the contracts were lawfully entered into after prior Commission authorization of the sellers' market-based rate authority under FPA § 205. *Id.* ¶ 16, ER 397-98. Upon a showing that the seller lacks, or has mitigated, market power in the relevant market, the Commission pre-determines under FPA § 205 that sales at market-based rates will be just and reasonable.<sup>7</sup> In effect, the Commission makes a “blanket” just and reasonable determination covering subsequent market-based sales made by the seller. *Id.*

This grant of market-based rate authority constitutes what is known as the “initial review” of rates in the cost-based rate context. *Id.* ¶ 17, ER 398. After the initial review, and assuming the public interest standard does not apply contractually to future challenges, a party may file under FPA § 206 to demonstrate a previously approved rate is no longer just and reasonable. *Id.* Where a party lacks unilateral FPA § 206 filing rights, the party may seek changes by demonstrating that the contract rate is contrary to the public interest. *Id.* In

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<sup>7</sup> *Id.*, ER 398 (citing *Louisiana Energy and Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993)).

essence, complainants seek to add another layer to this process, claiming that contracts subject to the public interest standard should nevertheless be reviewed again under the just and reasonable standard. *Id.* This argument, however, has no support in either the statute or the relevant Commission or Court precedent, and would in fact lead to uncertainty in the market, as a party who suddenly finds that its deal has become uneconomical can undo the terms to which it was contractually bound. *Id.* This is precisely what the *Mobile-Sierra* doctrine was designed to avoid, and the Commission saw no support for an exception to this established doctrine simply because a party has contracted in a market-based rate regime. *Id.*

Thus, the initial just and reasonable review for market-based rates occurs when the authorization for market-based rates is granted. *Id.* ¶ 20, ER 399. If rates subsequently 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, but only where the higher public interest burden supports contract modification. *Id.*

Complainants further argued that the Commission erred in finding that the public interest standard of review is applicable under WSPPA § 6.1. *Id.* ¶ 21, ER 400. However, nothing in the parties' testimony or other evidence provided any indication that the parties intended to allow the complainants to make unilateral changes to the terms of the contracts in question. *Id.* ¶ 22, ER 400. Accordingly,

the Commission affirmed the ALJ's finding that:

the reference to a "joint" Section 205 filing evidences an intent that neither seller nor buyer be able to seek changes under Section 205 or 206 of the FPA other than under the "public interest" standard of review. Although the parties could have used specific language disallowing a unilateral filing by the seller under Section 205, or the filing of a complaint by the buyer under Section 206 of the FPA, the most reasonable reading of Section 6.1 is that they intended to exclude any unilateral filings at the Commission.

See Order on Initial Decision ¶ 28, ER 210.

SCWC and Snohomish argued that § 6.1 does not apply to individual transactions under the WSPPA, but only to adding or removing Service Schedules under the WSPPA. Rehearing Order ¶ 23, ER 400. The Commission rejected this argument, finding that the relevant language in § 6.1 explicitly refers to possible changes in the rates, charges, classification, service, terms, or conditions "affecting WSPP transactions," and not just to Service Schedules appearing in the last part of the WSPPA. *Id.* ¶ 24, ER 400 (quoting WSPPA § 6.1).

Nevada Companies argued that, pursuant to *Union Pacific Fuels, Inc. v. FERC*, 129 F.3d 157 (D.C. Cir. 1997), the parties' failure to address explicitly the issue of the applicable standard of review evidences an intent to apply the just and reasonable standard. Rehearing Order ¶ 26, ER 401. The Commission found *Union Pacific* inapposite because the contracts at issue in *Union Pacific* contained



a so-called *Memphis*<sup>8</sup> clause, allowing unilateral contract changes, which is not present here.

The Commission also rejected the contention that it set the public interest standard as the default standard for contract modification because the parties were silent on the standard of review in their agreements. *Id.* ¶ 27, ER 402. Here, the Commission set the issue of the applicable standard of review for hearing to determine the intent of the parties. *Id.* The Commission’s determination on the applicable standard rested on the testimony and the ALJ’s conclusions interpreting the intent of the parties, as reflected in WSPPA § 6.1, not on a preconceived standard. *Id.*

Snohomish argued that *Mobile-Sierra* only applies where a utility is challenging a rate as too low. *Id.* ¶ 30, ER 403. This argument is incorrect as, “[i]n later cases, the *Mobile-Sierra* doctrine was applied to contracts containing rates that allegedly were too high.” *Id.* (quoting Order on Initial Decision ¶ 7, ER 203).

Snohomish further argued that the Commission should have reviewed the contracts at issue under the just and reasonable standard to protect the rights of

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<sup>8</sup> Parties to a contract may expressly agree that a contract can be changed either unilaterally or by FERC under the just and reasonable standard. *See United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958) (“*Memphis*”).

third parties, specifically, Snohomish's ratepayers. *Id.* ¶ 31, ER 403. Snohomish, Nevada BCP, and Nevada PUC contended that the Commission at the very least should have applied the flexible public interest standard, relying on *Northeast Utils. Serv. Co.*, 66 FERC ¶ 61,332 (1994). "There is no Commission or court precedent that supports a finding that a non-signatory party may challenge a *Mobile-Sierra* contract under the 'just and reasonable' standard of review, as opposed to the 'public interest' standard of review." *Id.* ¶ 32, ER 404 (quoting Order on Initial Decision ¶ 41, ER 216). In addition, there was no basis for applying a more flexible public interest standard. *Id.* The record shows that Snohomish's ratepayers were not adversely affected by the contract at issue. *Id.* Similarly, the Nevada Companies failed to show that the contracts at issue imposed an excessive burden on their ratepayers. *Id.* ¶ 33, ER 405.

Snohomish argued that § 39B in its contract with Morgan Stanley bars unilateral changes affecting only rates for service, while Snohomish challenges the term of the contract in this proceeding. *Id.* ¶ 35, ER 405. The Commission again rejected this contention, reiterating that:

In a contract entered into pursuant to market-based rate authority, the negotiated term is intricately linked to the contract rate. The primary basis for Snohomish's complaint is the allegation that the rate in its contract with Morgan Stanley is unjust and unreasonable, not that the term of the contract is unjustifiably long.

*Id.* (citing Order on Initial Decision ¶ 39, ER 215-16).

**b. The *Mobile-Sierra* Standard Was Not Met**

On the question of whether the Nevada Companies' contracts imposed an excessive burden on their customers, the Nevada BPC acknowledged that the Nevada Companies' retail rates decreased, but argued that customers paid significantly more than they would have if the prices had been reasonable. Rehearing Order ¶ 36, ER 405-06. Complainants, however, failed to produce record evidence on the effect of the contracts at issue on the Nevada Companies' customers. *Id.*, ER 406.

SCWC asserted error in the finding that the SCWC/Mirant contract's effect on SCWC retail customers was minimal when, according to SCWC, its ratepayers have seen an overall 38 percent increase in their electric bills. *Id.* ¶ 37, ER 406. As a result of this rate increase, as approved by the CPUC, SCWC was allowed to recover a portion of the costs of the Mirant contract up to a weighted average cost of energy of \$77/MWh. *Id.*

The Commission rejected this contention, reiterating that:

SCWC offered no evidence showing that the challenged contracts impose an excessive burden on its customers. The record evidence establishes that there was no rate increase for SCWC's ratepayers who are permanent residents of SCWC's service territory pursuant to the terms of the settlement between SCWC and CPUC. Under the terms of the settlement, the other group of SCWC's ratepayers, owners of second homes in SCWC's service area, were to face an average monthly electric bill of \$35.13. (Footnotes omitted).

*Id.* ¶ 38, ER 406 (citing Order on Initial Decision ¶ 99, ER 236).

The public interest test requires a showing that the contract places an excessive burden on ratepayers sufficient to modify the contract. *Id.* SCWC did not show how an average monthly electric bill of \$35.13 amounts to an excessive burden on the affected ratepayers. *Id.* Moreover, the weighted average cost of energy of \$77/MWh, which forms the basis for SCWC's retail rates, is only \$3 more than the \$74 advisory benchmark that SCWC contends would be a just and reasonable price for its contract with Mirant. *Id.*

Snohomish disagreed with the Commission's conclusion that its contract with Morgan Stanley did not impose an excessive burden on its ratepayers. *Id.* ¶ 39, ER 406. Snohomish did not challenge the Commission's finding that the Snohomish-Morgan Stanley contract is no more than five percent of Snohomish's portfolio costs and constitutes only three percent of Snohomish's load, resulting in an eight percent increase over 2001 rates, while other contracts account for rate increase of fifty-one percent. *Id.* (citing Order on Initial Decision ¶ 100, ER 236-37). However, Snohomish argued that the five percent threshold is arbitrary, and proffered the amounts imposed on Snohomish's ratepayers by the contract in question. *Id.*, ER 407.

The lack of burden finding rested, however, on record evidence that the Morgan Stanley contract resulted in an eight percent increase over 2001 rates, while other Snohomish contracts account for a rate increase of fifty-one percent.

*Id.* ¶ 40, ER 407. Moreover, Snohomish's rate increase occurred prior to Snohomish's negotiating its contract with Morgan Stanley, and prior to issuing a Request for Proposals (“RFP”) for the power purchase in question. *Id.*

Snohomish contended that the rate increase approval, although it preceded the Morgan Stanley contract, was directly related to the Morgan Stanley contract because the rate increase allowed Snohomish to pay for the contract. *Id.* ¶ 41, ER 407. However, as the rate increase approval preceded even the requests for proposals, it cannot be said that the Morgan Stanley contract caused the rate increase. *Id.* ¶ 42, ER 407.

Complainants also argued that the Commission failed to justify upholding contract prices in excess of its \$74/MWh benchmark price. Rehearing Order ¶ 45, ER 408. Complainants referred to the December 15 Order, 93 FERC ¶ 61,294, which declined to extend the California spot market mitigation measures to forward markets, but adopted \$74/MWh for five-year contracts supplying around-the-clock power as a reference point in addressing any complaints regarding the pricing of contracts negotiated in forward markets. Rehearing Order ¶ 46, ER 408. While that reference point would be helpful in assessing possible complaints challenging forward prices, the Commission never suggested that a contractual price exceeding it would be sufficient, by itself, to abrogate the contract. *Id.* Quite to the contrary, the Commission expected that “buyers may elect to negotiate

above [the benchmark] to the extent they believe the particular contract or supplier brings value which suits their needs (*e.g.*, shorter-term contracts, favorable terms and conditions, assignment of the risk of variable cost exposure, the particular characteristics of the supplier or its resource portfolio, etc.).” *Id.* (quoting December 15 Order, 93 FERC at 61,995).

Further, the reference point related to five-year around-the-clock power is inapplicable here. All the Nevada Companies’ contracts, for example, are for twelve months or shorter for standard on-peak 6x16 blocks of power. *Id.* ¶ 49, ER 409. The Nevada Companies failed to provide any calculations adjusting the \$74/MWh benchmark to reflect those terms. *Id.* In addition, while energy is typically traded in 25-MW blocks, Mirant took on the risk of supplying SCWC with a 15-MW Add lot@sale. *Id.* ¶ 47, ER 408. As a result, neither the ALJ nor the Commission had any evidence on which to assess the complainants’ arguments regarding the relationship of the challenged contract prices to the advisory benchmark. *Id.* ¶ 49, ER 409. Moreover, neither SCWC nor Snohomish specified \$74/MWh as a target price in their requests for proposals, even though their contracts post-dated the December 15 Order. *Id.* ¶¶ 47- 48, ER 408-09.

Complainants argued that the Commission, while providing relief to purchasers in the California spot market, reneged on its promise to assess complaints regarding forward bilateral contracts executed during the time the spot

market was dysfunctional under the just and reasonable standard. *Id.* ¶ 50, ER 409. However, the December 15 Order never mandated the application of the just and reasonable standard to forward contracts. *Id.* ¶ 51, ER 409.

### **c. The Totality of the Circumstances**

The Nevada Companies and Nevada BCP argued that the Commission’s analysis of the “totality of circumstances” inappropriately focused on the complainants’ buying practices and ignored many other factors. *Id.* ¶ 52, ER 409. The availability of other alternatives and the complainants’ buying practices are indicative of circumstances under which the transactions in question were executed. *Id.* ¶ 53, ER 409. The availability of more competitively priced products demonstrates that the complainants were not forced to enter into the transactions at issue. *Id.* They were free to reject offers that led to the contracts in question, and turn to other suppliers. *Id.*

Snohomish argues it did not have any meaningful alternatives at the time the contract was executed. *Id.* ¶ 54, ER 410. According to Snohomish, the Western forward market was illiquid; the response rate to its request for proposals was very low; and two of the five bidders that responded refused to offer the firm, around-the-clock, quality of power service needed to serve Snohomish’s customers reliably. *Id.* The three remaining bids, Snohomish continues, were not meaningful alternatives either because they did not offer supply of sufficient quantity. *Id.*

Furthermore, Snohomish argues that, contrary to the Commission's finding in the Order on Initial Decision, it was never offered shorter-term contracts. *Id.*

However, the record showed that Snohomish could have executed a contract for a shorter term than its contract with Morgan Stanley or entered into two separate agreements with a total term of the challenged contract. *Id.* ¶ 55, ER 410. Specifically, as an alternative, Morgan Stanley proposed power sales for one, two or three years with gradually decreasing prices, respectively. *Id.* Morgan Stanley also offered an alternative arrangement of two separate deals, one for five years (at above market prices) and another for five to seven years (at below market prices). *Id.* Snohomish rejected both alternatives, instead choosing to pass the risk of price volatility to Morgan Stanley and pay a below market rate of \$105/MWh for the first several years, even though this contract had a longer term than the alternatives. *Id.* Snohomish expected, based on its forward curve dated April 2001, that its contract with Morgan Stanley would provide Snohomish with power at a price far below market for at least two years. *Id.*

SCWC also claimed that it lacked alternatives to the Mirant contract. *Id.* ¶ 56, ER 410. Of the three different proposals with varying options responding to its request for proposals, SCWC contends all were unacceptable because they were tainted by the dysfunctions in the spot market. *Id.*



The record shows, however, that the price and the term of the Mirant contract were consistent with SCWC's target price of \$90/MWh and request for one-to-seven year terms. *Id.* ¶ 57, ER 410. SCWC issued the request for proposals to only six suppliers, and as a result, received three responses containing varying options. *Id.*, ER 411. SCWC chose the Mirant contract terms, despite a price slightly higher than the requested target price, because it provided for the 15 MW block "odd lot" sale. *Id.*

SCWC challenges the Commission's finding that "it was SCWC's choice to wait until March 2001 when the energy prices were at their peak to start a bid solicitation process to replace its contract with Dynegy Inc. that was to expire in May 2001." *Id.* ¶ 58, ER 411 (quoting Order on Initial Decision ¶ 107, ER 230-40). SCWC states that it could not have forecasted that in March 2001 prices would be at their peak. *Id.*

The finding was based on Dynegy's proposal, in October 2000, after a summer of high prices, to extend its contract with SCWC on a "blend and extend" rate of between \$46.50/MWh to \$54.50/MWh, depending on the contract length. *Id.* ¶ 59, ER 411. At that time, SCWC knew that the prices had risen substantially above the \$35.50/MWh price in its existing one-year Dynegy contract, but rejected the proposed extension. *Id.* Having rejected the proposal, SCWC waited to secure supply until March 2001, when the prices were at their peak. *Id.*

SCWC entered into a contract of a considerable length to secure the price it wanted, in spite of its expectation that high prices would not persist for long, due to a number of things, such as California streamlining authorizations for new generation; demand shifts from spot to forward markets, *etc.* *Id.* ¶ 63, ER 412 (citing Initial Decision ¶ 159). SCWC chose to shift the risk of price volatility onto Mirant through a fixed rate. *Id.* However, after the spot market prices fell below the level SCWC expected, SCWC became dissatisfied with its bargain. *Id.*

Snohomish and the Nevada Companies argued that their contracts were the product of the market manipulation by Enron, Morgan Stanley and other Respondents established by the Commission Staff. *Id.* ¶ 64, ER 412. Nevada PUC and Nevada BCP added that the findings here contradict earlier findings that two Enron power marketers manipulated spot markets. *Id.* There is no inconsistency, however, as the Commission reviewed the Staff Report findings and 100-Day Discovery Proceeding evidence and found no evidence supported a finding of market manipulation in forward markets that specifically affected the contracts at issue. *Id.* ¶ 65, ER 413.

Snohomish also contended that a showing of unfairness, bad faith, or duress is not required to meet the public interest standard. *Id.* ¶ 66, ER 413. But those factors, if shown to occur at the contract formation stage, could be an alternative ground for modifying the challenged contracts. *Id.* ¶ 68, ER 413. Consideration of

those factors as part of a broader range of evidence concerning the totality of circumstances surrounding formation of these contracts imposed no harm on the complainants. *Id.* Rather, complainants' failure to make this showing, like their failures to meet the *Sierra* three-prong test, doomed their attempts to modify their contracts. *Id.*

As evidence of duress and exercise of market power by Morgan Stanley, Snohomish points to Morgan Stanley's awareness of Snohomish's need to conclude the transactions as soon as possible, and the paucity of suppliers. *Id.* ¶ 69, ER 413. In Snohomish's opinion, the fact that Morgan Stanley refreshed offer prices constitutes a compelling evidence of an exercise of market power. *Id.*

The evidentiary record did not support those allegations, but showed that Snohomish required Morgan Stanley to submit its bid twice to comply with modified terms suggested by Snohomish. *Id.* ¶ 70, ER 414. Snohomish, represented by counsel, dictated negotiation deadlines and several contract terms. *Id.* The evidence also demonstrated that, shortly after Snohomish entered into the contract, it stated to its customers that the Morgan Stanley and other forward contracts **A**give [it] a lot of security against the uncertainty of market fluctuations,**@** and insulate the ratepayers from market volatility. *Id.*

**d. The Collateral Annex**

Snohomish sought reconsideration of the decision upholding the Collateral Annex. *Id.* ¶ 75, ER 415. On rehearing, the Commission reiterated that the WSPP Agreement, Collateral Annex, Confirmation Agreement and Attachment A together form a single, integrated agreement, and that the Collateral Annex should be reviewed under the public interest standard. *Id.* ¶ 77, ER 416. Even if § 39B does not apply to the Collateral Annex, the Collateral Annex would be evaluated under the public interest standard pursuant to WSPPA § 6.1. *Id.* Furthermore, because the Collateral Annex is an integral part of the Snohomish/Morgan Stanley contract, the Collateral Annex cannot be examined separately from the rest of the contract. *Id.* In the Order on Initial Decision, the Commission extensively analyzed all the evidence pertaining to the Snohomish-Morgan Stanley contract and concluded that Snohomish failed to present sufficient evidence showing that its contract with Morgan Stanley is contrary to the public interest. *Id.*

**e. Requests for Rehearing of the April 23 Order**

On April 23, 2003, in *Nevada Power Co. v. Enron Power Marketing, Inc.*, 103 FERC ¶ 61,080 (2003) (the “April 23 Order”), the Commission denied a motion filed by SCWC and Snohomish requesting disclosure of alleged prohibited off-the-record communications during a March 26, 2003 press conference attended by three Commissioners and a conference call the same day between two

commissioners and a group of Wall Street analysts. Rehearing Order ¶ 80, ER 417. The April 23 Order disagreed with movants' characterization of the briefings as prohibited off-the-record communications; nevertheless, to allay any concerns, the Commission directed its staff to place a transcript of the press conference and a summary of the telephone conference in the decisional record of this proceeding. April 23 Order ¶ 2. The Commission stated that the transcript and summary would apprise the parties of any non-public communication, thereby maintaining the integrity of the process and curing any possible prejudice that the contacts may have caused in this proceeding. *Id.* Accordingly, the Commission also denied Snohomish's additional request that the two commissioners who participated in the conference call recuse themselves from further participation in this proceeding. *Id.*

**(i) Ex Parte Allegations**

On rehearing, SCWC and Snohomish contended that the Commission erred in finding that the conference call did not violate Rule 2201 of the Commission's regulations, 18 C.F.R. § 385.2201, and that Chairman Wood and Commissioner Brownell were not required to recuse themselves. Rehearing Order ¶ 82, ER 417. They claimed specifically that the Commission's Revised Summary of Events and Invitation List show that Chairman Wood and Commissioner Brownell violated Rule 2201 in the conference call by offering opinions about the merits and their likely votes in this and other contract proceedings. *Id.* They also pointed to an

April 8, 2003 news article by Jason Leopold that claimed some analysts described Commissioner Brownell as stating that she and Chairman Wood would vote to uphold the contracts. *Id.* They argued that even if the conference call only repeated what was said at the open meeting, the conversation still violated Rule 2201. *Id.*

SCWC and Snohomish's arguments lacked merit. *Id.* ¶ 83, ER 417. The summary demonstrates that the call merely was an effort to brief the financial community on action taken that same day at FERC's public meeting with respect to important and controversial cases involving the California and Western energy markets, as well as on actions scheduled to be taken and postponed, but nevertheless discussed at the public meeting, in particular, as relevant here, Nevada Power's long-term contracts. *Id.*, ER 417-18. Such inquiries in the context of a briefing, however, do not constitute a communication on the merits capable of influencing a decision, the prerequisite for an *ex parte* violation. *Id.* (citing 18 C.F.R. § 2201(c)(5)). If that were the case, the Commission's *ex parte* rule could impede the Commissioners from expressing themselves or offering their opinions to the public, a common and necessary part of their jobs as public servants. *Id.*

Further, nothing particularly new was discussed in the approximately 45-minute conference call, nor did anyone try to influence the decision in this proceeding. *Id.* ¶ 84, ER 418. The Inspector General of the Department of

Energy, who investigated these allegations, “did not identify evidence, based on that available record, substantiating the allegation that the conduct of the call violated any Commission procedural rule.” *Id.* (citing U.S. Department of Energy Office of Inspector General Special Inquiry, DOE/IG – 0610 June 2003). The Inspector General interviewed seventeen Wall Street representatives from twelve companies, nine of whom acknowledged participating in some or all of the conference call, and *none* of whom stated that Chairman Wood or Commissioner Brownell explicitly indicated, during the conference call, how they would vote on the contract cases. *Id.* (citing U.S. Department of Energy Office of Inspector General Special Inquiry, DOE/IG – 0610 June 2003, Results of the Inquiry at 3).

SCWC and Snohomish’s concern that the Commissioners’ statements bound them to a particular vote is likewise unfounded, *id.* ¶ 85, ER 418, as is their reliance on cases involving public statements made by decision-makers that they would vote a certain way, prior to examining the evidence. *Id.*, ER 419 (citing *Antoniou v. SEC*, 877 F.2d 721, 724 (8<sup>th</sup> Cir. 1989); *McClure v. Independent School Dist. No. 16*, 228 F.3d 1205 (10<sup>th</sup> Cir. 2000); *Staton v. Mayes*, 552 F.2d 908 (10<sup>th</sup> Cir. 1977); and *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970)). Chairman Wood and Commissioner Brownell stated repeatedly in public, in contrast, they were still examining the evidence and had not made a final decision. *Id.* Moreover, at the time of the conference call, a massive record

had already been reviewed by the commissioners. *Id.* The record, which started to be compiled as early as December 2001, included by the time of the conference call voluminous pleadings, trial testimony, exhibits, initial and reply briefs, an ALJ initial decision, and briefs on and opposing exceptions. *Id.* To think that the Commissioners had not formed some preliminary opinions in these circumstances is simply unrealistic. *Id.* Accordingly, the conference call at issue here reflected no prejudgment of the type discussed in the cases cited by petitioners. *Id.*

Even assuming the conference call could be considered a prohibited off-the-record communication, any possible violation has already been remedied by disclosure. *Id.* ¶ 86, ER 419. Administrative proceedings blemished by *ex parte* communications may be remedied administratively by disclosing the communication and its contents. *Id.* (citing 5 U.S.C. § 557(d)(1)(C)&(D); *Professional Air Traffic Controllers Org. v. Federal Labor Relations Authority*, 685 F.2d 547, 565 n.36 (1982)). Disclosing summaries of meetings Commission officials held with industry officials apprised other parties “of any argument that may have been presented privately, thereby maintaining the integrity of the process and curing any possible prejudice that the contacts may have caused.” *Id.* (citing *Louisiana Ass’n of Indep. Producers v. FERC*, 958 F.2d 1101, 1112 (D.C. Cir. 1992)).



In addition, in *Louisiana*, the court made clear that recusal was not necessary or desirable even if there had been *ex parte* communications. *Id.* ¶ 87, ER 420 (citing *Louisiana*, 958 F.2d at 1112; *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948) (“It is expected that administrative official will build up expertise through experience with recurring issues.”); and *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (“Such expertise should not lightly be tossed aside.”)). Recusal here, therefore, would be an extraordinary and unwarranted remedy. *Id.* (citing *Power Auth. of N.Y. v. FERC*, 743 F.2d 93, 110 (2nd Cir. 1984) (“The mere existence of such communications hardly requires a court or administrative body to disqualify itself”)). The court further explained, 743 F.2d at 110, what factors would justify recusal:

recusal would be required only if the communications posed a serious likelihood of affecting the agency’s ability to act fairly and impartially in the matter before it. In resolving that issue, one must look to the nature of the communications and particularly to whether they contain factual matter or other information outside of the record, which the parties did not have an opportunity to rebut.

As described above, the conference call contained no factual matter or other information outside the record, and even assuming it did, SCWC and Snohomish had ample chance to rebut it at the oral argument or by filing a response. *Id.* ¶ 88, ER 420.

## (ii) Alleged Sunshine Act Violations

On July 28, 2003, Snohomish filed a supplemental request for rehearing alleging that the March 26 conference call violated the Sunshine Act, because no public notice was published and the meeting was not recorded. *Id.* ¶ 95, ER 422. While this was an untimely request for rehearing of the April 23 Order, and therefore did not preserve the issue for judicial review, *id.* (citing 16 U.S.C. § 8251(a) and (b)), the Commission addressed and rejected the allegations.

The Sunshine Act applies only to a “meeting of an agency.” *Id.*, ER 423 (citing 5 U.S.C. § 552(b); 5 U.S.C. § 552b(a)(2), *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 469 (1984) (“None of the Sunshine Act’s requirements is triggered, however, “unless the gathering in question is a ‘meeting’ of that agency.”). Section 552b(a)(2) defines a Sunshine Act “meeting” as “the deliberations of at least the number of individualized agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business.” *Id.* (citing *Natural Resources Defense Council, Inc. v. NRC*, 216 F.3d 1180, 1182 (D.C. Cir. 2000)). Accordingly, the Sunshine Act only applies where a quorum of the Commission is present. *Id.* (citing 18 C.F.R. § 375.202(a)(1)). At least three members of the Commission are required to be present for a quorum to exist. *Id.* Specifically, the Department of Energy Organization Act, 42 U.S.C. §§ 7101-7352, which

established FERC, provides that for “a quorum for the transaction of business shall consist of at least three members present.” *Id.* (citing 42 U.S.C. § 7171(e)); *see also* 18 C.F.R. § 375.101(e)(defining a quorum of the Commission as consisting of “at least three members present”). Because only two Commissioners (Chairman Wood and Commissioner Brownell) participated in the call, there was no quorum to constitute a FERC “meeting” subject to the Sunshine Act. *Id.*

Moreover, as discussed above, the conference call did not involve any “deliberations” that “determine or result in the joint conduct or disposition of official agency business.” *Id.* ¶ 96, ER 423 (citing 5 U.S.C. § 552b(a)(2)). The summary of the March 26 conference call confirms that the two commissioners merely expressed viewpoints that had already been discussed at the March 26 open meeting. *Id.* Even if the Commissioners did express their views regarding this proceeding, no “official agency business” was disposed of or conducted during the conference call. *Id.* Therefore, the Commission rejected Snohomish’s Sunshine Act allegation. *Id.*

## SUMMARY OF ARGUMENT

### **Petitioners' Contracts Are Subject to the *Mobile-Sierra* Standard.**

Parties to a contract may expressly agree that a contract can be changed either unilaterally or by FERC under the just and reasonable standard. Absent such agreement, *Mobile-Sierra* permits contract modification only if the party seeking a change demonstrates that modification is required by the public interest.

Here, the Commission reasonably determined, following a hearing, that the parties intended *Mobile-Sierra* to apply. For all but one of the challenged contracts, § 6.1 of the umbrella WSPPA governed changes to the contract. Section 6.1 allows parties to jointly seek modification of the rates, terms and conditions of a contract under FPA § 205, but does not expressly address customers' FPA § 206 rights. The Commission found this language to evidence an intent to leave *Mobile-Sierra* protections in place, in accordance with recent D.C. Circuit and First Circuit precedent finding *Mobile-Sierra* applicable where parties have not contractually waived those rights. The Commission also reasonably rejected the contention that § 6.1 does not apply to challenges to individual Confirmation Agreements; § 6.1 expressly applies to changes "affecting WSPP transactions," which would include Confirmation Agreements.

The Commission also found that the Snohomish/Morgan Stanley contract was subject to *Mobile-Sierra* because § 39B limited both FPA §§ 205 and 206

rights. Snohomish contends § 39B only limits challenges to contract rates, not the contract term, but the gravamen of Snohomish's complaint is that the contract rate is unjust and unreasonable. Further, § 39B provides that the rates "shall remain in effect for the term of this agreement" without change, thus linking the negotiated term with the contract rate. In any event, even if § 39B applied only to rates, attempts to change the contract term would be governed by WSPPA § 6.1, which dictates that *Mobile-Sierra* applies.

Notwithstanding that their contracts trigger *Mobile-Sierra* protections, petitioners and intervenors assert *Mobile-Sierra*: (1) is inapplicable to claims by third parties; (2) is not properly evaluated in this circumstance under the *Sierra* three-prong analysis; and (3) is inapplicable to market-based rates because they were not previously found just and reasonable.

No court precedent supports finding that third parties may challenge a *Mobile-Sierra* contract under the just and reasonable, rather than the public interest, standard. The First Circuit reversed FERC for making precisely that finding, and petitioners proffer no authorities contradicting the First Circuit's express holding on this point.

Petitioners and intervenors contend that the three-prong *Sierra* public-interest test concerned a seller seeking to increase an alleged low rate, whereas, here, the buyers are seeking to lower an alleged high rate. However, courts have

applied *Mobile-Sierra*, and specifically the three-prong *Sierra* analysis, to buyer's complaints that their rates are too high. Further, the Commission considered not just the three *Sierra* factors, but also the totality of the circumstances.

The Commission had previously addressed the justness and reasonableness of these contract rates when the Commission awarded the sellers market-based rate authority. Upon a showing that a seller lacks or has mitigated market power, the Commission pre-determines, under FPA § 205, that subsequent sales by that seller at market-based rates will be just and reasonable.

While this initial market-based rate review cannot assure that the sellers' rates will remain just and reasonable under all subsequent circumstances, this is not a fault of the market-based rate regime, but a function of the statutory design. With either *cost or market-based* rates, if the circumstances that gave rise to the initial approval of the rate have allegedly changed, complaints must be made under FPA § 206. If the challenged rates, whether cost or market-based, are set by a *Mobile-Sierra* contract, no change to the contract may be made solely because the contract is no longer just and reasonable; rather, it must be shown that the public interest requires a change.

The Commission's action here is not contrary to its decision setting a reference point of \$74/MWh, for five-year around-the-clock supply contracts, to assess complaints concerning long-term contracts. The reference point is a tool for

assessing possible complaints challenging forward prices, not a breakpoint for contract abrogation. Setting a reference point cannot override *Mobile-Sierra* and require that the just and reasonable standard would be applied to all forward contracts. Moreover, the \$74/MWh reference point is a suggested price for five-year contracts for supply around-the-clock, which cannot be appropriately compared to the Nevada Companies' contracts, which are for twelve months or shorter of standard on-peak 6x16 blocks of power. Further, although the reference point was announced prior to execution of their contracts, neither SCWC nor Snohomish's requests for proposals specified a target price of \$74/MWh.

**Petitioners Failed to Meet Their Public Interest Burden.**

The Commission properly considered the totality of the circumstances and concluded that petitioners failed to meet their burden of showing that contract modification was required in the public interest. Petitioners and intervenors assert that the Commission should have made a generic finding that long-term contracts are unjust and unreasonable based upon the dysfunctions in the California spot markets, and they dispute the Commission's factual findings as to their individual contracts. These contentions are without merit.

It cannot be assumed that rates in the forward contract market were unjust and unreasonable based upon spot market dysfunctions. Sellers bargaining for forward contracts have as much incentive as purchasers to avoid spot market

volatility, and have reason to anticipate that spot market dysfunctions will be corrected. Further, during this period spot and forward markets were driven by changes in market fundamentals and competitive conditions, in particular, increased power production costs combined with increased demand, due to the unusually high temperature and a scarcity of generation resources through the West, and California in particular.

As it cannot be assumed that spot market dysfunctions resulted in unjust and unreasonable forward contract rates, the Commission set for hearing whether the dysfunctional California spot markets adversely affected the long-term bilateral markets, and, if so, whether modification of any individual contract at issue here was warranted. Petitioners' flawed expert testimony and analyses failed to prove that the dysfunctional spot markets adversely affected the long-term bilateral contract markets. While the Commission Staff Report stated that spot prices influenced certain forward contract prices, that statement was contested and did not in any event constitute a conclusion that spot market dysfunctions caused forward prices to be unjust and unreasonable, let alone contrary to the public interest. Petitioners also failed to present evidence of any specific manipulation by the defendant sellers that impacted forward markets generally, or any contract at issue specifically. While the Nevada Companies point to findings that Enron and others



manipulated the spot market, sellers' witnesses refuted the allegations that those alleged spot market manipulations inflated prices in the forward markets.

Failing to prove a generic basis for contract modification, petitioners were offered a chance to address the circumstances surrounding their contracts to show that modification was warranted. The Nevada Companies failed to show that they or their ratepayers were adversely affected by the contracts. The Nevada Companies' cash flow projections showed positive cash balances for each of the next several years. Although the Nevada Companies' witness testified that retail customers of the Nevada Companies received significant rate increases prior to the rate decreases, the witness' testimony was unsupported and failed to separate the effect of the current contracts on rates from the effect of market fundamentals or other factors.

The Commission then considered whether there was unfairness, bad faith, or duress in the contract negotiations. The Nevada Companies' contracts were standard products arranged through independent third-party brokers, and thus the sellers were price-takers. In view of their already precarious financial situation, the Nevada Companies employed an aggressive procurement strategy to purchase more power than necessary to serve their native load. Despite having alternatives, they failed to hedge for the risk of lower prices, and did not pursue transactions to reduce the risks associated with market volatility.

Snohomish contends that the Snohomish/Morgan Stanley contract was contrary to the public interest because the California spot market crisis imposed an excessive burden on its customers. The impact of the spot market crisis on Snohomish does not speak to whether the Morgan Stanley contract imposed an excessive burden on Snohomish's ratepayers or was otherwise contrary to the public interest. Further, the rate increase on which Snohomish relies as burdensome to its ratepayers, occurred *prior to* Snohomish's negotiating its contract with Morgan Stanley. Indeed, Snohomish made a profit from reselling the power that it purchased from Morgan Stanley, which benefited its customers.

The Morgan Stanley contract was no more than five percent of Snohomish's portfolio costs and constituted only three percent of Snohomish's load, resulting in an eight percent increase over 2001 rates. Other contracts accounted for the remaining fifty-one percent of Snohomish's claimed sixty percent increase in rates as a result of the market crisis. The Commission was well within its discretion in concluding that the demonstrated impact of the Morgan Stanley contract rates did not rise to the level of offending the public interest.

Snohomish contends the Morgan Stanley contract was unduly discriminatory because the term is longer and the rate higher than Morgan Stanley contracts with others. Even if this disparity did unduly discriminate against Snohomish, *Mobile-*

*Sierra* addresses the public interest, *i.e.*, the interest of third parties to the contract, not Snohomish's private interests.

The evidence refuted Snohomish's claim that it had no meaningful alternatives to the Morgan Stanley contract. Snohomish issued a request for proposal to seventeen suppliers, and received five bids, including Morgan Stanley's. Morgan Stanley had to resubmit its bid twice with modified terms suggested by Snohomish. Snohomish voluntarily selected the length of its contract, and rejected shorter terms at lower rates. Further, the purported evidence of Morgan Stanley's alleged bad faith in negotiating the contract was largely stricken from the record by the ALJ as incompetent testimony.

Snohomish also challenges the Collateral Annex to its contract with Morgan Stanley, arguing that Annex is not in the public interest due to the unreasonable expense of maintaining the collateral. The Collateral Annex is an integral part of the Snohomish/Morgan Stanley contract, modification of which the Commission found unsupported under the public interest. Even if the collateral requirement was unreasonable to Snohomish, that would not render it contrary to the *public* interest.

Likewise, no evidence showed that the SCWC/Mirant contract placed SCWC in financial distress. The contract permitted SCWC to avoid the risk of price volatility and achieve rate certainty, obtaining savings of \$13.26 million from

its overall forward contracting and marketing strategy. SCWC realized a profit when it sold power purchased at \$95/MWh under the SCWC/Mirant agreement back to Mirant at \$173/MWh. The Commission did subsequently require SCWC to refund this profit to Mirant because SCWC made the sales without obtaining market-based rate authority. That does not change the fundamental finding that SCWC produced no evidence that the contract placed it in financial distress, and indeed achieved substantial cost savings compared to the market price at the time.

SCWC likewise failed to show that the SCWC/Mirant contract excessively burdened its customers. While SCWC contends the contract caused its purchased-power costs in its retail rates to increase 38%, this did not result in a rate increase for SCWC's ratepayers who are permanent residents of SCWC's service territory. The other group of SCWC's ratepayers, non-permanent residents with second homes in SCWC's service area, faced an average monthly electric bill of \$35.13.

The Commission also found no evidence of unfairness, bad faith or duress at the inception of the contract. SCWC chose to wait until March 2001, when the energy prices were at their peak, to start a bid solicitation process to replace its contract with Dynegy, Inc., which was to expire in May 2001. SCWC formulated a restrictive request for proposals, yet received three different responses with varying options. While SCWC contends that it had no lower-priced options during the bidding process, it had previously rejected an offer by Dynegy to extend its

contract on a “blend and extend” rate of between \$46.50 MWh and \$54.50/MWh, even though SCWC knew at that time that prices had risen substantially above the \$35.50/MWh price in its Dynegy contract.

Thus, petitioners failed to meet their burden to show that the public interest requires modification of their contracts. Much of the proffered evidence went either to the issue of whether the rates were just and reasonable, which does not address the issue here, or was discounted or rejected by the ALJ at hearing. Absent clear error, this Court defers to the ALJ’s determination of the weight and inference to be accorded disputed evidence. Further, even if petitioners’ evidence were accepted as reliable and probative of the points they claim, the Commission’s findings nevertheless must be affirmed because they are supported by substantial evidence.

### **Snohomish Failed to Show Any Violation of Due Process**

Snohomish contends that the participation of Chairman Woods and Commissioner Brownell in a March 26, 2003 conference call with Wall Street analysts violated the Commission’s rules against *ex parte* communications and predetermined official actions. Snohomish asserts that Commissioner Brownell made statements committing herself and Chairman Woods to rejecting complaints seeking to abrogate long-term contracts as a result of the California spot market crisis.

The evidence showed, however, that during the telephone conference, the Commissioners merely repeated what they had already said at FERC's open meeting or gave general background information. The summary of the conference call shows that both Chairman Woods and Commission Brownell specifically stated that evidence was still under review and no final decision had been made. While the Commissioners may have had views on the law and policy involved in the case, it would be unrealistic to expect otherwise, considering the fact that the Commission had at that point been reviewing the record, which started to be compiled as early as December 2001, and included voluminous pleadings, trial testimony, exhibits, initial and reply briefs, an ALJ initial decision, and briefs on and opposing exceptions.

Further, to allay any concerns, the Commission directed its staff to place a summary of the telephone conference in the decisional record. That disclosure cured any possible prejudice the contacts may have caused.

Snohomish's claim that the May 26 conference call violated the Sunshine Act similarly is without merit. The Sunshine Act applies only to a "meeting" of an agency, which requires the presence of a quorum. Three commissioners constitute a quorum for Commission action. Thus, a telephone conference involving two commissioners cannot constitute a "meeting" subject to the Sunshine Act. Furthermore, the Sunshine Act claim is jurisdictionally defective as Snohomish

raised this claim in an untimely request for rehearing. In any event, Snohomish's claim that the May 26 conference call violated the Sunshine Act rests on its claim that Chairman Woods and Commissioner Brownell predetermined their votes in that call, a position without merit, as discussed above.

Snohomish now complains that its due process rights were violated by consideration of the Staff Report and the evidence from the 100 Day Discovery Proceeding without identification of the specific evidence on which the Commission relied. However, Snohomish itself requested that the Commission reopen the record to admit that very evidence, knowing it was seeking to have contested material placed in the record. Whether the evidence is contested is, in any event, of no relevance because the Commission assumed all of the contested allegations of market manipulation in that evidence to be true for purposes of this proceeding. That assumed evidence of spot market manipulation did not advance Snohomish's case, however, because the Commission had already found that the spot market rates were unjust and unreasonable. Further, Snohomish failed to show that the unjust and unreasonable spot market rates, or the assumed manipulation in the spot markets, carried over to the forward contracts at issue, rendering them contrary to the public interest.

Snohomish likewise fails to substantiate its claims that certain of the ALJ's procedural and evidentiary rulings violated due process. The ALJ's limitation of

Snohomish's cross-examination of certain witnesses complied with the ALJ's obligation under Commission rules to assure that the taking of evidence proceeds with all reasonable diligence and the least delay. Snohomish failed to demonstrate that it was prejudiced by the ALJ's ruling, making no proffer of what further it would have been able to establish by longer cross-examination.

Snohomish also complains the ALJ rejected its proffered evidence on spot market manipulation. The Commission conducted its investigation of such alleged manipulation in a separate proceeding. This ruling did not prejudice Snohomish because the Commission assumed for purposes of this proceeding that the alleged spot market manipulation occurred.



## ARGUMENT

### I. STANDARD OF REVIEW

The Court's review of FERC's interpretation of the FPA is governed by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Chevron* requires a court to “decide (1) whether the statute unambiguously forbids the Agency interpretation, and, if not, (2) whether the interpretation, for other reasons, exceeds the bounds of the permissible.” *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). “The two-step *Chevron* framework thus allows this Court to defer to the Commission's interpretations of the statutory provisions it administers, but [the Court] remain[s] ‘the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.’” *American Rivers v. FERC*, 201 F.3d 1186, 1194 (9<sup>th</sup> Cir. 2000).

Thus, deference is owed to the agency's reasonable interpretation of an ambiguous statutory provision intended by Congress to be left to the agency's discretion. *Dillingham v. INS*, 267 F.3d 996, 1005 (9<sup>th</sup> Cir. 2001); *see also City of Seattle v. FERC*, 923 F.2d 713, 715 (9<sup>th</sup> Cir. 1991) (courts generally show “great deference” to the Commission's interpretation of the law it administers). Likewise, the Commission's reasonable interpretation of its own orders will be upheld. *Mid-Continent Area Power Pool v. FERC*, 305 F.3d 780, 783 (8<sup>th</sup> Cir. 2002) (“We

must give deference to the Commission's interpretation of its own orders."); *Texaco*, 148 F.3d at 1099.

The Commission's interpretation of contracts is likewise entitled to deference. *City of Seattle*, 923 F.2d at 716. Relying on *Texas Gas Trans. Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960), petitioners seek to evade that deference by asserting that the Commission's statutory interpretation was based solely upon an "ordinary canon of construction" and not upon the Commission's particular expertise. SCWC Br. 40-41, Nevada Cos. Br. 42-43, Nevada PUC Br. 14-15.

This argument fails, however, because the Commission relied upon not only the canons of construction, but also the testimony adduced at hearing and the ALJ's conclusions regarding the parties' intent. Rehearing Order ¶ 27, ER 402. Further, FERC's expertise in the industry aids it in interpreting contracts, even where it is not necessary to go beyond the plain language. *City of Seattle*, 923 F.2d at 716 ("FERC's special expertise in this area helps it to perceive the plain meaning of the language used, and that is still another reason for us to show deference to its interpretations"). *See also National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1570 (D.C. Cir. 1987) (even where the agency relies only upon the language of the agreement itself, "deference should be given because the Congressional grant of authority to the agency indicates that the agency's interpretation typically will be enhanced by technical knowledge") (emphasis in original); *Muratore v.*

*OPM*, 222 F.3d 918, 922 (11<sup>th</sup> Cir. 2000) (“courts routinely defer to the Federal Energy Regulatory Commission’s contract interpretation because ‘the Commission has greater technical expertise than [do the courts] in the often arcane field of natural gas pipeline regulation’”) (quoting *Baltimore Gas & Elec. Co. v. FERC*, 26 F.3d 1129, 1135 (D.C. Cir. 1994)); *Cascade Natural Gas Co. v. FERC*, 61 F.3d 1479 (10<sup>th</sup> Cir. 1995) (deference is due the Commission’s contractual interpretation due to the Commission’s “vast experience in the interpretation of the language contained in natural gas tariffs”). Indeed, *National Fuel*, 811 F.2d at 1570, found that *Chevron* implicitly modified *Texas Gas*, because, under *Chevron*, the “explicit delegation of power to an agency compels a court to give deference to the agency’s conclusions even on ‘pure’ questions of law within that domain,” *id.* at 1569. *Accord Cascade*, 61 F.3d at 1486; *Muratore*, 222 F.3d at 922.

The Commission’s function in applying the *Mobile-Sierra* test is “not only to appraise the facts and draw inferences from them but also to bring to bear upon the problem an expert judgment and determine from analysis of the total situation on which side of the controversy the public interest lies.” *Metropolitan Edison*, 595 F.2d at 858-59. The Commission’s policy assessments are owed “great deference.” *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000) (“TAPS”). See *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9<sup>th</sup> Cir. 1996) (“We defer to the specific policy decisions of an

administrative agency unless they are arbitrary, capricious, or manifestly contrary to statute”).

The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825l(b). Substantial evidence ““means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the evidence is susceptible of more than one rational interpretation, [the Court] must uphold [FERC’s] findings.”” *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003) (quoting *Eichler v. SEC*, 757 F.2d 1066, 1069 (9th Cir. 1985)). Thus, even if petitioners’ evidence had been accepted as reliable and probative of the points they claim, the Commission must nonetheless be affirmed if substantial evidence supports its findings. *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1379 (9<sup>th</sup> Cir. 1978).

The Court likewise defers to the Commission on questions of methodology and evaluating competing expert opinions. *Bear Lake*, 324 F.3d at 1077. “It is the Commission’s function to reach conclusions on conflicting engineering and economic issues so long as its judgment is reasonable and based on the evidence.” *Sierra Pacific Power Co. v. FERC*, 793 F.2d 1086, 1088 (9th Cir. 1986). Absent clear error, the Court also defers to the ALJ’s determination of the weight and inference to be accorded disputed evidence. *Ash Grove*, 577 F.2d at 1379.

## **II. PETITIONERS WERE PROPERLY HELD TO THE *MOBILE-SIERRA* PUBLIC INTEREST BURDEN OF PROOF.**

Parties to a power supply contract may expressly agree that it can be changed either unilaterally or by FERC under the just and reasonable standard. *See Memphis*, 358 U.S. 103. Absent such agreement, the contract may be modified only if the requisite public interest finding is made. “The law is quite clear: absent contractual language ‘susceptible to the construction that the rate may be altered while the contract [] subsists,’ the *Mobile-Sierra* doctrine applies.” *Texaco*, 148 F.3d at 1096 (quoting *Appalachian*, 529 F.2d at 348). Under *Mobile-Sierra*, a contract that sets firm prices and denies either party the right to change such prices unilaterally may not be abrogated or modified unless required by the public interest. *See Texaco*, 148 F.3d at 1095; *Metropolitan Edison*, 595 F.2d at 855. The party seeking change bears the burden of demonstrating that the public interest requires a change. Rehearing Order ¶ 15, ER 395.

### **A. The Commission Properly Found the *Mobile-Sierra* Standard Applicable to the Challenged Contracts.**

The April 11 Order found that, for all but one of the challenged contracts, § 6.1 of the umbrella WSPPA appeared to be the only contractual provision affecting the parties’ rights to make changes to their contracts. April 11 Order 13, ER 13; September 17 Order ¶ 19, ER 30. As additional record development was required to interpret that provision and to ascertain the intent of the parties, the Commission

set the issue of how § 6.1 applied to FPA § 206 complaints for hearing to permit scrutiny of the contract, related documents, and parole or extrinsic evidence. September 17 Order ¶ 19, ER 30. Thus, the Commission did not apply the *Mobile-Sierra* standard by default. Nevada Cos. Br. 44; Nevada PUC Br. 31-33. Rather, based upon the testimony adduced at the hearing and the ALJ's conclusions interpreting the parties' intent, the Commission found that the *Mobile-Sierra* standard applied to complaints addressing the contracts governed by WSPPA § 6.1. Rehearing Order ¶ 27, ER 402.

The Snohomish/Morgan Stanley contract contained a separate provision, § 39B of the Confirmation Agreement, that addressed FPA §§ 205 and 206 rights, which was initially also set for hearing. April 11 Order at 13, ER 13. In the September 17 Order, however, the Commission granted Morgan Stanley's request for rehearing, finding that § 39B triggered *Mobile-Sierra* protections. September 17 Order ¶ 20, ER 31.

**1. The Commission Properly Interpreted WSPPA § 6.1.**

The Commission properly interpreted WSPPA § 6.1 as invoking *Mobile-Sierra* protections. Rehearing Order ¶ 22, ER 400. WSPPA § 6.1 provides that:

Nothing contained herein shall be construed as affecting in any way the rights of the Parties to jointly make application to FERC for a change in the rates and charges, classification, service, terms, or conditions affecting SWPP transactions under Section 205 of the Federal Power Act and pursuant to FERC rules and regulations promulgated thereunder. . . .

Section 6.1 therefore allows parties to jointly seek modification of the rates, terms and conditions of a contract under FPA § 205, but does not address customers' rights to file a complaint pursuant to FPA § 206. Order on Initial Decision ¶ 36, ER 213. The Commission concluded that the reference to a "joint" FPA § 205 filing evidenced an intent that *Mobile-Sierra* apply when the buyer or seller seeks a unilateral change. *Id.* Although the parties could have specifically disallowed unilateral § 205 filing by a seller, or unilateral complaint filing by the buyer under § 206, the silence in § 6.1 can be reasonably interpreted to exclude any unilateral filings at the Commission. *Id.* "As the ALJ explained, 'under the maxim '*expressio unius est exclusion alterius*' (the expression of one thing is the exclusion of the other), the only interpretation of Section 6.1 of the [WSPP Agreement] is that the parties thought about, contemplated, and provided for applications to FERC, excluding all applications not specifically provided for in the contracts.'" *Id.* (quoting Initial Decision ¶ 30). The Commission therefore concluded that the challenged contracts did not give complainants the right to unilaterally seek changes. *Id.*, ER 214. *See also* Rehearing Order ¶ 22, ER 400.

It is argued that the absence in § 6.1 of any mention of § 206 complaints permits only the inference that the parties intended to preclude unilateral § 205 filings, not unilateral § 206 filings. SCWC Br. 51, Nevada PUC Br. 33, Nevada Cos. Br. 52. However, contrary to SCWC assertions, SCWC Br. 51 (citing

*Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002)), §§ 205 and 206 “create a series of two or more things that should be understood to go hand and hand” as they set out the filing rights relevant to seller and buyer, respectively.

Petitioners’ interpretation -- that precluding unilateral § 205 filings without mentioning § 206 leads to the inference that the just and reasonable standard applies to § 206 complaints -- was rejected by *Texaco*, 148 F.3d 1091 (concerning the equivalent provisions, §§ 4 and 5, of the Natural Gas Act (“NGA”)). See Order on Initial Decision n. 46, ER 213. In *Texaco*, the service agreement provided that the pipeline “shall not exercise [its] rights under Section 4 of the [NGA] to change the rates to be paid by the Shipper.” *Id.*, ER 214 (quoting *Texaco*, 148 F.3d at 1095). The Court *rejected* the Commission’s finding that, by expressly prohibiting only unilateral rate changes under NGA § 4 (the equivalent of FPA § 205), the contracts implicitly recognized the Commission’s ability to set aside rates that are unjust and unreasonable under NGA § 5 (the equivalent of FPA § 206). *Texaco*, 148 F.3d at 1095. The Court found instead that the law required the inference to favor application of *Mobile-Sierra*: “[t]he law is quite clear: absent contractual language ‘susceptible to the construction that the rate may be altered while the contract[] subsists,’ the *Mobile-Sierra* doctrine applies.” *Texaco*, 148 F.3d at 1096. See Order on Initial Decision n. 46, ER 214.



The First Circuit followed *Texaco*, finding that “the specification of a rate or formula by itself implicates *Mobile-Sierra* (unless the parties negate the implication). . . .” *Boston Edison*, 233 F.3d at 67. Although the contract in *Boston Edison* did not address changes to rates at all, *id.* at 65, the Court nevertheless found that *Mobile-Sierra* applied in the absence of an express indication that the parties intended to *enlarge* FERC’s authority, *id.* at 66. This finding was based on the Supreme Court’s 1958 decision in *Memphis*, which put parties on notice that they can negate *Mobile-Sierra* protections by expressly providing that the contract rate can be overridden by FERC at any time under the just and reasonable standard. *Boston Edison*, 233 F.3d at 66 (citing *Memphis*, 358 U.S. at 112). Given this knowledge, the failure to include a *Memphis* clause in a contract reasonably leads to an inference that *Mobile-Sierra* was intended to apply.

SCWC argues that -- notwithstanding the absence of any evidence that standard of review was mentioned in the contract negotiations, SCWC Br. 44 (citing Rehearing Order ¶ 22, ER 400) -- the parties assumed that the just and reasonable standard would apply to any § 206 complaints based upon FERC’s December 15 Order. *Id.* 43-45. The December 15 Order adopted a reference price for five-year contracts to supply around-the-clock power to be used in addressing complaints concerning long-term contracts. *See* Rehearing Order ¶ 46, ER 408. However, nothing in the December 15 Order provided a basis to assume either that

contracts exceeding the reference price would be abrogated, Rehearing Order ¶ 46, ER 408, or that review of all forward contracts would be reviewed under the just and reasonable standard, *id.* ¶ 51, ER 409. *See* section II(B)(3), *infra* (discussing December 15 Order benchmark). To the contrary, the Commission could not, by setting a reference price, override the *Mobile-Sierra* doctrine. Rehearing Order ¶ 51, ER 409.

Petitioners' authorities, purporting to show that waiver of the just and reasonable standard must be express, do not support their claims. *Texaco* expressly rejected petitioners' reading of *Union Pacific*, 129 F.3d at 161-62, cited *Nevada Cos. Br. 44*, explaining that *dicta* in *Union Pacific* "inadvertently" suggested *Mobile-Sierra* must be expressly invoked, which "does not represent the law." 148 F.3d at 1096. Each *Union Pacific* contract contained both a *Memphis* clause, preserving the Commission's just and reasonable rate review, and an additional clause providing that neither party shall "seek to change" the modified fixed variable rate design. *Union Pacific*, 129 F.3d at 160-61. *See* Rehearing Order ¶ 26, ER 401. Because the general *Memphis* clause preserved the Commission's just and reasonable rate review, no intent to limit that authority with regard to any particular rate issue could be inferred without it being expressly stated. Accordingly, since the additional clause did not mention the Commission, it was interpreted to preclude only the parties, and not the Commission, from

seeking to change the modified fixed variable rate design. *Id.* at 161-62. As there is no similar *Memphis* clause in the WSPPA, *Union Pacific* does not require that the waiver of the just and reasonable standard be express in § 6.1. Rehearing Order ¶ 26, ER 401.

Likewise, *Sithe Independence Power Partners v. Niagara Mohawk Power Corp.*, 76 FERC ¶ 61,285 (1996), *remanded*, *Sithe/Independence Power Parts., L.P. v. FERC*, 165 F.3d 944 (D.C. Cir. 1999), cited Nevada Cos. Br. 46-47, Nevada PUC Intrv. Br. 32, and *Florida Power & Light Co.*, 67 FERC ¶ 61,141 at 61,395 (1994), cited Nevada PUC Br. 31-32, are factually inapposite. *Sithe* did not concern the applicable standard of review, but waiver of all rights to file a § 206 complaint, *Sithe*, 76 FERC at 62,457-58, and *Florida Power* concerned efforts to preclude the Commission from conducting its initial § 205 just and reasonable review of rates, *Florida Power*, 67 FERC at 61,395-96. In any event, *Sithe* and *Florida Power* predated *Texaco*, 148 F.3d at 1096 and *Boston Edison*, 233 F.3d at 66, and, therefore, if *Sithe* and *Florida Power* could be read as petitioners suggest, those decisions can no longer be considered good precedent.

The Commission's interpretation here is not undermined by its proposed policy statement, applying the public interest standard to market-based rate contracts only where the parties expressly state that intent in language specified by the Commission. Nevada Cos. Br. 47-48, Nevada PUC Intrv. Br. 32 (both citing

*Standard of Review for Proposed Changes of Market-Based Rate Contracts*, 100 FERC ¶ 61,145, 67 Fed. Reg. 51,516 at 51,517 (2002)). As Nevada Companies concede, this proposed policy statement has not even been (and may never be) adopted, and accordingly is not precedent the Commission is bound to follow. Nevada Cos. Br. 48. See Rehearing Order ¶ 34, ER 405. Even if the proposed policy were adopted, it would apply only prospectively to contracts entered into 30 days or more after a future date of issuance. See Rehearing Order ¶ 34, ER 405. Until that time, parties can expressly eliminate *Mobile-Sierra* protections only through a *Memphis* clause, and failing that, *Mobile-Sierra* applies. *Boston Edison*, 233 F.3d at 66. See also *Texaco*, 148 F.3d at 1096.

Nevada Companies argue that § 6.1 only precludes unilateral changes to the base agreement (the WSPPA) under § 205, not challenges to individual transactions under § 206. Nevada Cos. Br. 51-52. See also Nevada PUC Intvr. Br. 33-34; SCWC Br. 48 (contending § 6.1 applies only to the rights of parties to add or remove Service Schedules). However, nothing in § 6.1 evidences any attempt to differentiate between changes to the WSPPA and changes to individual Confirmation Agreements entered into under the WSPPA. Section § 6.1 refers to possible changes in the rates, charges, classification, service, terms, or conditions “affecting WSPP transactions.” Rehearing Order ¶ 24, ER 400. Changes to matters “affecting WSPP transactions” is not limited to amendments to “this

Agreement,” SCWC Br. at 50, nor is it confined to “joint administration of the umbrella WSPP Agreement,” *id.* 46.

Petitioners’ interpretation turns upon viewing the Confirmation Agreements as independent contracts, separate and apart from the WSPPA. *See, e.g.*, SCWC Br. 50-51. But, under the WSPPA, each contract consists of a Confirmation Agreement, the WSPPA and any amendments, which together form a single integrated document. Order on Initial Decision ¶ 27, ER 209. *See* WSPPA § 26, ER 586 (“This Agreement and any subsequent amendments, including the Service Schedules and Exhibits incorporated therein, and any Confirmation Agreement, shall constitute the full and complete agreement of the Parties with respect to the subject matter hereof. . . .”). Additionally, § 35 of the WSPPA states: “The Parties acknowledge and agree that all of their transactions, together with this Agreement and the related Confirmation Agreement(s), form a single, integrated agreement, and agreements and transactions are entered into in reliance on the fact that the agreements and each transaction form a single agreement between the Parties.” Initial Decision ¶ 23.

As defined in the WPSSA, Confirmation Agreements “set[] forth terms and conditions for transactions *that are in addition to, substitute, or modify* those set forth in the [WPSSA].” WPSSA § 4.1b, ER 546 (emphasis added). Thus, the terms of the WPSSA control a transaction, unless a Confirmation Agreement

specifically modifies a provision of the WPSSA as to that transaction. As applicable here, absent modification by agreement, § 6.1 controls changes to any matters “affecting WSPPA transactions.” As the “challenged contracts were entered into under an umbrella WSPP Agreement,” they “incorporate terms and conditions of the WSPP Agreement, including Section 6.1.” Order on Initial Decision ¶ 36, ER 213.

Because the evidence fails to show that the parties intended to allow petitioners to seek unilateral changes to the contracts in question, the Commission affirmed the ALJ’s finding that *Mobile-Sierra* applied. Rehearing Order ¶ 22, ER 400. While petitioners assert that they should not bear the burden of proving the parties’ intent in contracting, *see* SCWC Br. 41-42, Nevada PUC Intvr. Br. 33, Nevada Cos. Br. 45, § 206(b) expressly provides that complainants bear the burden of showing their entitlement to relief. As “absent contractual language ‘susceptible to the construction that the rate may be altered while the contract [] subsists,’ the *Mobile-Sierra* doctrine applies,” *Texaco*, 148 F.3d at 1096, petitioners properly had the burden to show that the parties intended to eliminate *Mobile-Sierra* protections.

## 2. The Commission Properly Interpreted § 39B of the Snohomish Contract.

The Commission properly concluded that the *Mobile-Sierra* public interest standard applied to the Snohomish/Morgan Stanley contract. Rehearing Order ¶ 35, ER 405. Section 39B of the Snohomish/Morgan Stanley contract provides:

Fixed Rates: The rates for service specified in this Agreement shall remain in effect for the term of this agreement and shall not be subject to change through application to FERC pursuant to the provisions of Section 205 or 206 of the Federal Power Act.

*Id.* n. 43.

Snohomish contends this provision only limits its ability to seek changes under FPA § 206 to *rates*, and does not limit its § 206 rights to challenge the contract's *term*. Snohomish Br. 20-25. But the complaint is not about the contract term: “the primary basis for Snohomish’s complaint is the allegation that the rate in its contract with Morgan Stanley is unjust and unreasonable, not that the term of the contract is unjustifiably long.” Order on Initial Decision ¶ 39, ER 215, Rehearing Order ¶ 35, ER 405. Snohomish would not find the contract term “grossly excessive,” *see* Snohomish Br. 20, if it thought the rate being paid were favorable.

Further, § 39B provides that the fixed rates “shall remain in effect for the term of this agreement and shall not be subject to change.” This language clearly evidences the intent to protect the rates *for the term of the contract*. *See, e.g.,*

*Boston Edison*, 233 F.3d at 66 (the period of time during which the rate was subject to *Mobile-Sierra* protection “was obviously the duration of the contract”); *Papago*, 723 F.2d at 954 (contract providing that rates “are to remain in effect for the initial one (1) year term of this contract” prevented any rate changes *during that year* except as required by the public interest). Thus, “the negotiated term is intricately linked to the contract rate,” and the rate is protected for the length of that term. Order on Initial Decision ¶ 39, ER 215; Rehearing Order ¶ 35, ER 405. Snohomish’s own conduct reflects this connection: Snohomish obtained a lower contract price by extending the duration of the contract. Snohomish Br. 25.<sup>9</sup> Thus, the argument, *see* Snohomish Br. 22, that, following the interpretation of WSPPA

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<sup>9</sup> The cases Snohomish cites for the proposition that “this Court has flatly rejected assertions that the term ‘rate’ includes non-rate contract terms,” Snohomish Br. 24, do not support that proposition. *Bell v. BPA*, 340 F.3d 945, 949-50 (9<sup>th</sup> Cir. 2003), and *Ass’n of Public Agency Customers v. BPA*, 126 F.3d 1158, 1178 (9<sup>th</sup> Cir. 1997), both interpreted § 7(i) of the Northwest Power Act, 16 U.S.C. § 839e(i), which prescribes specific procedures that BPA must follow when establishing rates. The BPA defines “rate” as a monetary charge, and provides that “[a] rate may be set forth in a contract; however, other portions of a contract do not thereby become part of the rate for purposes of these rules.” *Ass’n of Pub. Agency Customers*, 126 F.3d at 1177 (quoting Procedures Governing Bonneville Power Administration Rate Hearings § 1010.2(j), 51 Fed. Reg. 7611, 7615 (1986)). Notwithstanding those express provisions, both decisions leave open the possibility that other contractual terms may be so “inextricably linked” with the rate that they trigger the § 7(i) ratemaking procedures. *Bell*, 340 F.3d at 949; *Ass’n of Pub. Agency Customers*, 126 F.3d at 1178. *Cal. Energy Comm’n v. BPA*, 909 F.2d 1298, 1305 (9<sup>th</sup> Cir. 1990), found simply that “the mere fact that an agency action has an indirect effect on revenues does not mean that the action constitutes ratemaking.”



§ 6.1, § 39B must be “read narrowly” to apply only to rates fails. By its own express terms, § 39B protects the contract rate for the term of the contract.

Even if § 39B applied only to rates, the remainder of the contract, including the contract term and the Collateral Annex, would be governed by WSPPA § 6.1, which dictates that the public interest standard of review applies. Order on Initial Decision ¶¶ 40, 119, ER 216, 243; Rehearing Order ¶ 77, ER 416. Snohomish challenges this conclusion, asserting that § 39B conflicts with § 6.1, and therefore, as “Attachment A” governs in the event of a conflict with the WSPPA, § 39B alone should be deemed to govern the parties’ rights to seek changes to the contract. Snohomish Br. 22-23. To the contrary, this situation is like that in *Union Pacific*, 129 F.3d at 161-62. Section 6.1 is an umbrella provision that preserves *Mobile-Sierra* protections, applicable to the entire transaction unless expressly modified through a Confirmation Agreement. *See* WSPPA § 4.1b, ER 546. If § 39B is narrowly construed, as Snohomish urges, to apply only to changes to rates, then the parties have not modified the WSPPA with regard to changes to other terms of the contract. *See Union Pacific*, 129 F.3d at 161-62 (where general *Memphis* clause preserved review of entire contract under just and reasonable standard, provisions invoking *Mobile-Sierra* protections as to specific contract terms were strictly construed). Thus, “[i]f Section 39B were not dispositive in regard to the length of the contract, then Section 6.1 of the WSPP Agreement

would apply,” Order on Initial Decision ¶ 40, ER 216, and would likewise govern challenges to the Collateral Annex. Order on Initial Decision ¶ 119, ER 243; Rehearing Order ¶ 77, ER 416.

**B. Petitioners’ and Intervenor’s Attempts to Evade *Mobile-Sierra* Are Unavailing.**

**1. *Mobile-Sierra* Applies To All Challenges To The Contracts.**

Intervenor Nevada PUC argues that only the parties to contracts can be bound to a public interest standard; third parties to the contract are entitled to a just and reasonable standard of review. Nevada PUC Intvr. Br. 27. “There is no Commission or court precedent that supports a finding that a non-signatory party may challenge a *Mobile-Sierra* contract under the ‘just and reasonable’ standard of review, as opposed to the ‘public interest’ standard of review.” Order on Initial Decision ¶ 41, ER 216. *See also* Rehearing Order ¶ 32, ER 404. Indeed, the First Circuit reversed the Commission for making precisely that finding.

*Northeast Utilities Service Co.*, 50 FERC ¶ 61,266, 61,838 (1990), held that a nonparty, or the Commission, challenging a *Mobile-Sierra* contract under FPA § 206, need show only that the rate is unjust and unreasonable. *Id.* at 61,839. *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 961 (1st Cir. 1993) (“*Northeast Utilities I*”) reversed, ruling that the Commission improperly conflated the “just and reasonable” and “public interest” standards.

The distinction between the “just and reasonable” and “public interest” standards loses its meaning entirely if the Commission may modify a contract under the public interest standard where it finds the contract “may be unjust [or] unreasonable.” The parties' express intent was to avoid review of rate schedules under the just and reasonable standard. *Mobile-Sierra* protects their right to do so, leaving the Commission with the power to modify rates only when required by the public interest.

*Id.* While the *Mobile-Sierra* doctrine “allows for intervention by FERC where it is shown that the interests of third parties are threatened,” the standard to be applied “as formulated by the Supreme Court, is the protection of outside parties from ‘undu[e] discriminat[ion]’ or imposition of an ‘excessive burden.’” *Id.* (quoting *Sierra*, 350 U.S. at 355). In evaluating the contract at issue, “the Commission was bound to follow the *Mobile-Sierra* doctrine as explicated by *Papago*, and therefore should have evaluated the [contract] under the public interest standard, not the just and reasonable standard.” *Id.* at 962.

On remand, the Commission applied the public interest standard. *Northeast Utilities Service Co.*, 66 FERC ¶ 61,332 at 62,081, 62,085, *reh’g denied*, 68 FERC ¶ 61,041 (1994). However, although *Papago* found the public interest standard to be “practically insurmountable,” 723 F.2d at 954, the Commission found a more flexible standard appropriate when presented with an agreement for the first time, considering modifications to protect the interests of non-parties to the contract. 66 FERC at 62,076. The First Circuit affirmed. *Northeast Utilities Service Co. v. FERC*, 55 F.3d 686, 691 (1<sup>st</sup> Cir. 1995) (“*Northeast Utilities II*”).

The authorities cited by petitioners do not contradict the clear holding in *Northeast Utilities I and II* that challenges to *Mobile-Sierra* contracts brought by or on behalf of non-parties to the contract are subject to the public interest standard. See Rehearing Order ¶ 32, ER 404-05. *Pennsylvania Electric Co v. FERC*, 11 F.3d 207, 210 (D.C. Cir. 1993) (Nevada PUC Intvr. Br. 27-28), “speaks in general terms about the Commission’s statutory duty to ensure just and reasonable rates,” Rehearing Order ¶ 32, ER 404, but does not mention, let alone purport to apply, *Mobile-Sierra*. *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C. Cir. 1990) (Nevada PUC Intvr. Br. 29), while citing *Mobile* and *Sierra* for the proposition that the Commission was “justified in according some weight” to the fact of agreement in approving a settlement, did not purport to apply the public interest standard to the settlement agreement.

*Southern Company Services*, 67 FERC ¶ 61,080 at 61,227 (1994) (Nevada PUC Intvr. Br. 26; Nevada BCP Br. 32); *Florida Power & Light Co.*, 67 FERC at 61,398 (Nevada BCP Br. 32); *Carolina Power & Light Co.*, 69 FERC ¶ 61,078 (1994) (Nevada PUC Intvr. Br. 28-29) (Letter Order following *Carolina Power & Light Co.*, 67 FERC ¶ 61,074 at 61,205 n. 11) (1994)); and *PJM Interconnection, LLC*, 96 FERC ¶ 61,206 at 61,878 n. 13 (2001)<sup>10</sup> (Nevada PUC Intvr. Br. 27-29),

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<sup>10</sup> In *PJM Interconnection*, the Reliability Assurance Agreement explicitly permitted PJM to submit filings under Section 206 of the FPA. Rehearing Order ¶ 50, ER 735-36 (citing *PJM*, 96 FERC at 61,878 n.12).

all follow *Northeast Utilities*, 66 FERC ¶ 61,332, which assessed a rate agreement under the public interest, rather than the just and reasonable, standard, notwithstanding that the agreement was newly filed and that the investigation was FERC-initiated.<sup>11</sup> See, e.g., *PEPCO*, 210 F.3d at 408 (finding that *Southern Company*, 67 FERC ¶ 61,080 and *Florida Power*, 67 FERC ¶ 61,141, reaffirmed the position that the public interest standard may not be “practically insurmountable” when the Commission acts *sua sponte* or at the request of nonparties to change rates).

In any event, these cited decisions predate the subsequent caselaw finding that third parties, or the Commission acting on their behalf, cannot challenge *Mobile-Sierra* contracts under a just and reasonable standard. See *Northeast Utilities II*, 55 F.3d at 691-93 (finding *Mobile-Sierra* public interest standard applicable to contract modification where the contract was being reviewed for the first time and modified in the interests of third parties); *Boston Edison*, 233 F.3d at 63, 65, 68 (reversing Commission for failure to apply the *Mobile-Sierra* public interest standard, notwithstanding that the Commission itself initiated the § 206 investigation, and determined the contract rates to be unjust and unreasonable).

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<sup>11</sup> See *Northeast Utils. Serv. Co.*, 68 FERC ¶ 61,041 at 61,136-37 (1994) (on remand “[t]he Commission has done what the First Circuit directed the Commission to do: reconsider the modifications to the Seabrook Power Contract under a public interest standard of review”).

Following these decisions, any pre-existing Commission cases supporting application of the just and reasonable standard to third-party claims could no longer stand as precedent, and the Commission could not be faulted for declining to follow them.

Petitioners urge application of the *Northeast Utilities* “more flexible” version of the public interest test, “to safeguard the interests of third parties, notably the buyer’s customers.” Nevada BCP Br. 48 (citing *Northeast Utilities I*, 993 F.2d at 961). *See also* Snohomish Br. 32; Nevada Cos. Br. 60; Nevada PUC Intr. Br. 34-36. There is no basis for applying a more flexible public interest standard here because the record did not show that third-parties, *i.e.* the ratepayers, were adversely affected by the contracts at issue. Rehearing Order ¶¶ 32-33, ER 404-05. *See id.* ¶¶ 36-44, ER 405-07. Further, this was not the initial review, as the contracts were previously approved as lawful under FPA § 205 pursuant to market-based rate authorization awarded the sellers. *Id.* ¶ 29, ER 402-03. Without the presence of those prerequisites, the “more flexible” public interest test could not apply, and the Court need not address it. *See PEPCO*, 210 F.3d at 409 and n. 2 (finding no need to address the more flexible public interest standard where PEPCO failed to demonstrate burden on its ratepayers or that the contract was newly filed or previously unapproved).

It is argued that considering customer impact to determine whether the more flexible public interest standard applies, in effect, already holds petitioners to the “practically insurmountable” *Mobile-Sierra* standard, because one of the three *Sierra* prongs is “excessive burden” on consumers. Nevada BCP Br. 53, Nevada PUC Intvr. Br. 37. However, adverse effect on non-parties (customers) to the contract is a prerequisite to invoking the more flexible standard, *see Northeast Utilities II*, 55 F.3d at 692, and thus the impact on customers must be shown, as it was not here, before applying the more flexible standard.

**2. The Commission Properly Evaluated The Three *Sierra* Factors.**

Petitioners contend, Nevada Cos. Br. 58-61; Nevada BCP Br. at 30, 47-51; SCWC Br. 32-34; Snohomish Br. 31, that the three-prong *Sierra* public-interest test<sup>12</sup> is inapplicable here because petitioners are complaining that the rates are too high, unlike *Sierra*, where the utility was complaining that the rates were too low. Nevada Cos. Br. 58-60; Nevada BCP Br. 49-50. Just as a seller’s attempt to raise improvidently-bargained rates will be disallowed, so, too, purchasers may be held to bargains that later prove improvident. “In our view, the policies enunciated by

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<sup>12</sup> In *Sierra* the Court stated that: “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.” 350 U.S. at 355.

Congress are in no way demeaned by requiring primary energy distributors and their wholesale customers alike to exercise reasonable self-interested vigilance and to act promptly to protect their respective positions.” *Boston Edison Co. v. FERC*, 858 F.2d 361, 372 (1<sup>st</sup> Cir. 1988).

Accordingly, courts have ruled *Mobile-Sierra* applies to buyer complaints that their rates are too high. Order on Initial Decision ¶¶ 7-8, ER 203-04 (citing *Pub. Serv. Comm’n of the State of New York v. FPC*, 543 F.2d 757 (D.C. Cir. 1974); *PEPCO*, 210 F.3d 403); Rehearing Order ¶ 30, ER 403. *PEPCO* applied the three-prong *Sierra* test in affirming dismissal of the buyer’s complaint that its rate was too high. 210 F.3d at 409. “While FERC retains the statutory authority and duty to correct or prevent an electric rate schedule that ‘might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory,’” FERC “acted within its discretion to conclude from the face of the complaint that the rates in the previously approved agreement that PEPCO fully supported and claimed was justified were not contrary to the public interest.” *Id.* at 412 (quoting *Papago*, 723 F.2d at 953).

Similarly, *Northeast Utilities I* directed that the *Sierra* factors be evaluated in assessing the claim that the contract at issue adversely impacted third parties. “[T]he *Mobile-Sierra* doctrine allows FERC to modify the terms of a private



contract when third parties are threatened by possible ‘undue discrimination’ or the imposition of an ‘excessive burden.’ We invited FERC to demonstrate such a threat upon remand.” *Northeast Utilities II*, 55 F.3d at 691 (citing *Northeast Utilities I*, 993 F.2d at 961-62).

Nevada BCP contends “there is no logic to requiring a wholesale customer challenging a contract rate as excessive to show that the high rate threatens its financial ability to continue service in order for contract modification to be consistent with the public interest.” Nevada BCP Br. 50. Likewise SCWC contends that this factor has “no relation to the statutory zone of reasonableness” because a rate may be unjust and unreasonable, even if the utility is able to continue service. SCWC Br. 32.

However, the issue here is not whether the contract rates were unjust and unreasonable. Parties may agree to contract terms that might be found unjust and unreasonable, but such arrangements may nevertheless not be contrary to the public interest, and thus are allowed. *Boston Edison*, 233 F.3d at 68. The fact that a contract has become uneconomic to a buyer does not suffice to establish an adverse impact on the *public* interest. *PEPCO*, 210 F.3d 409. *Sierra* limited the Commission’s FPA § 206 power over a *Mobile-Sierra* contract to protection of public, not private, interests. 350 U.S. at 354-55. Where a utility has agreed to what proves to be an improvident bargain, “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 355. Accordingly, to show a contract contrary to the public interest, the buyer must demonstrate that any adverse impact on itself will necessarily adversely impact third parties through excessive rates or a cessation of business. *PEPCO*, 210 F.3d at 412. Thus, demonstrating that rates are so high as to threaten service to third parties is one means of demonstrating that the challenged rates are contrary to the public, as opposed to the utility’s, interest.

Similarly, alleged undue burden or discrimination are proper considerations in evaluating a buyer’s claims under *Mobile-Sierra*. *PEPCO*, 210 F.3d at 409. Although petitioners allege that public interest is not adequately defined, *see, e.g.*, SCWC Br. 32-33, 54; Nevada BCP Br. 51, the courts have found no difficulty in its application. *See id.* As the First Circuit recognized, “nowhere in [*Mobile*] is the term ‘public interest’ defined,” and, “[i]ndeed, the Court seems to assume that the Commission decides what circumstances give rise to the public interest.” *Northeast Utilities II*, 55 F.3d at 690. *Accord Metropolitan Edison*, 595 F.2d at 859 (determination of the public interest is in FERC’s discretion).

In sum, the Commission properly looked to the three-prong *Sierra* test as one measure for evaluating the public interest here, but the Commission did not

treat it as the sole measure of the public interest. The Commission expressly also considered the totality of the circumstances surrounding the contracts in evaluating petitioners' claims. Rehearing Order ¶ 11, ER 395-96. Petitioners' claims were not rejected because the public interest test was inadequately or restrictively applied, but because Petitioners did not satisfy their burden under any possible public interest measure. Rehearing Order ¶ 68, ER 413.

**3. The Challenged Contracts Were Previously Found Lawful Under FPA § 205 in Granting The Sellers Market-Based Rate Authorization.**

Petitioners assert that the Commission has not previously opined on justness and reasonableness of the rates in these contracts. Nevada Cos. Br. 26-28, 59; Snohomish Br. 14, 18-19; Nevada BCP Br. 32-33; SCWC Br. 28-29, 35. *See also* Nevada PUC Intvr. Br. 16-26. This contention fails to acknowledge that the contracts were lawfully entered into pursuant to prior findings and authorization under FPA § 205. Rehearing Order ¶ 16, ER 397-98. Upon a showing that a seller lacks, or has mitigated, market power in the relevant market, the Commission authorizes as just and reasonable under FPA § 205 the seller's future sales at market-based rates.<sup>13</sup> In effect, the Commission makes a "blanket" just and reasonable determination to cover subsequent market-based sales made by the seller. *Id.*

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<sup>13</sup> *Id.*, ER 398 (citing *Louisiana Energy*, 141 F.3d at 365; *Elizabethtown*, 10 F.3d at 870).

The evaluation undertaken in granting sellers market-based rate authorization constitutes the initial rate review required by the FPA. *Id.* ¶ 19, ER 399. *See also id.* ¶ 17, ER 398. “Prior review consists, however, not of the particular prices agreed to by willing buyers and sellers. Rather, it consists of analysis to assure that the seller lacks or has mitigated market power so that its prices will fall within a zone of reasonableness.” *Id.* ¶ 18, ER 399 (quoting *Lockyer*, 99 FERC at 62,063). This review is different from that conducted for cost-based rates because “[t]he availability of genuine alternatives provides a sufficient basis . . . to conclude that ‘market discipline’ will be sufficient to keep the prices that sellers charge within the statutorily-prescribed just and reasonable zone.” *Id.* ¶ 19, ER 399 (quoting *Lockyer*, 99 FERC at 62,063, quoting *Elizabethtown*, 10 F.3d at 871)).

Nevada BCP states that FERC has an ongoing obligation, where it permits market-based pricing, “to ensure that the markets remain functional enough to restrain market prices to a just and reasonable level.” Nevada BCP Br. 33-35 (citing *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984) and *Elizabethtown*, 10 F.3d 866). *See also* SCWC Br. 26-28, 37-38; Nevada Cos. Br. 28-30; Nevada PUC Intvr. Br. 18-19, 22-23. The Commission fulfills its monitoring obligation by imposing conditions on sellers with market-based rate authority that include sellers’ filing Quarterly Transaction Reports, which are made

available for public review, and submitting data on a triennial basis to confirm the continued lack (or mitigation) of market power. *See* Order No. 2001 ¶ 111.

Contrary to Snohomish's contention, Snohomish Br. 17 and n. 21, *Lockyer*, 99 FERC at 62,063-67, did not find that the quarterly reports fail to provide adequate information to monitor the market. To the contrary, the Commission found that the "current reporting requirements" provide "an efficient and adequate means" of monitoring the market. *Id.* at 62,063. The only deficiency in information arose because some sellers failed to comply with the reporting requirements. *Id.* at 62,065.

Nor did the Commission conclude that its market-based rate program "has not produced just and reasonable rates," Snohomish Br. 16, in the development of a new screen for generation market power, *AEP Power Marketing, Inc.*, 97 FERC ¶ 61,219 (2001), *on reh'g*, 107 FERC ¶ 61,018 (2004), and new market rules, *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003). Improvements in market monitoring appropriately respond to a continuously dynamic situation; they do not constitute admissions that the prior regime failed to uncover unjust and unreasonable rates. *See* Snohomish Br. 16-17. To the contrary, *Investigation*, 105 FERC ¶ 61,218 at ¶ 45, provided that the new market rules "will not supersede or replace parties' rights under Section 206 of the FPA to file a complaint contending that a contract should

be revised by the Commission (pursuant to either the ‘just and reasonable’ or ‘public interest’ tests as required by the contract).” Similarly, the new generation market screen introduced in *AEP* applies only to pending and future, not past, market-based rate applications. 107 FERC ¶ 61,018 at ¶ 205.

Nevada Companies contend that monitoring of market-based rates will be ineffective unless FERC evaluates FPA § 206 challenges to market-based rates under the just and reasonable standard to “ensure that rates remain within the zone of reasonableness.” Nevada Cos. Br. 29, 31-32. *See also* Nevada PUC Intvr. Br. 23-24. However, the Commission’s initial review of *cost or market-based* rates cannot assure that the approved rates will remain just and reasonable under all subsequent circumstances. In both situations, the utility has the burden under FPA § 205 to show during initial review that its rates -- whether cost-based or market-based -- will be just and reasonable. For market-based rates, this determination has to be made before the authorization for market-based rates is granted. Rehearing Order ¶ 20, ER 399. These initial determinations that authorized rates will remain just and reasonable rests on a factual determination tied to specific circumstances that may, over time, change. *See Lockyer*, 99 FERC at 62,064 and n. 39.

Where the circumstances that gave rise to the initial rate approval have allegedly changed, FPA § 206 sets the procedures to change the rates authorized under either a cost-based or market-based rate regime. “If those same rates later

appear to be excessive, they can be changed only (assuming the [seller] does not file new rates) through FPA § 206 procedures, which place the burden on the moving party, not the [seller].” *Lockyer*, 99 FERC at 62,064 and n. 39. If rates, whether cost-based or market-based, subsequently become unjust and unreasonable and the contract at issue is subject to the *Mobile-Sierra* standard of review, the Commission is bound to a *Mobile-Sierra* public interest standard to support modification of such contracts. Rehearing Order ¶ 20, ER 399.

Nevada Companies argue that the Commission’s pre-determination that market-based rates are just and reasonable is inconsistent with the orders granting sellers market-based rate authority, which state that accepting the proposed market-based rate schedules “does not constitute approval of any service, rate, charge, classification, or any . . . contract . . . affecting such rate or service . . . nor shall such action be deemed as recognition of any claimed contractual right or obligation affecting such service or rate.” Nevada Cos. Br. 31 (quoting ER 1298, 1301, 1310). *See also* Nevada BCP Br. 40-41 (same). The quoted language is standard boilerplate, used in both market-based and cost-based settings, to reiterate the general proposition that a FERC order “permit[ting] a rate schedule or any part thereof . . . to become effective shall not constitute approval by the Commission of such rate schedule or part thereof . . . .” 18 C.F.R. § 35.4. Indeed, the orders accepting the contracts challenged in *Mobile* and *Sierra* contained substantively

identical language. *See Pacific Gas & Elec. Co.*, 7 FPC 832 (1948) (accepting contract challenged in *Sierra* for filing and stating that “[n]othing contained in this order shall be construed as constituting approval by the Commission of any service, rate, charge, classification, or any rule, regulation, contract or practice.”); *United Gas Pipe Line Co.*, 5 FPC 770 (1946) (accepting the contract challenged in *Mobile* for filing and stating that “[n]othing contained . . . shall [] be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract or practice”).

Nevada Companies claim the decision here is inconsistent with the refund obligation imposed in the spot markets. Nevada Cos. Br. 34-35 (citing November 1 Order, 93 FERC at 61,350 and December 19 Order, 97 FERC at 62,217-18). There is no inconsistency. In the November 1 Order, the Commission determined that the spot market rates were unjust and unreasonable, and may continue to be unjust and unreasonable until remedied. November 1 Order, 93 FERC at 61,370. As a market mitigation measure, the Commission *prospectively* conditioned market-based rate authorizations of sellers in the CAISO and CalPX spot markets with a continuing refund obligation until longer-term remedies were in place. *Id.* Any refunds ordered with respect to these spot market sales would be “pursuant to the sellers’ continuing market-based rate authorizations, not Section 206(b).” December 19 Order, 97 FERC at 62,220. In contrast, here, the Commission made



no finding that the forward market rates were unjust and unreasonable, and therefore no market mitigation measures, including imposing a refund condition on market-based rate authority, were imposed in this market. *See id.* at 62,245. Accordingly, there is no basis for the Nevada Companies' claim of inconsistency.

Snohomish points to Order No. 2001,<sup>14</sup> in particular to footnote 30, Snohomish Br. at 13, as evidence that FERC has held that contracts entered into pursuant to market-based rate authorization are not pre-determined to be just and reasonable, and FERC will not be bound by *Mobile-Sierra* provisions in contracts that FERC has not approved. Unfortunately for Snohomish, the discussion in footnote 30 was vacated on rehearing of Order No. 2001. *See* Order No. 2001-A, 100 FERC ¶ 61,074 at ¶ 5 (“The Commission is vacating its discussion in footnote 30 of Order No. 2001 . . . .”)

Snohomish also argues that the market-based rate program is inconsistent with *Prior Notice and Filing Requirements*, 64 FERC ¶ 61,139 at 61,984 (1993), *clarified*, 65 FERC ¶ 61,081 (1993). Snohomish Br. 14. In *Prior Notice*, the Commission found that permitting a utility to commence transmission service in advance of filing a service agreement entered into under an umbrella tariff was

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<sup>14</sup> *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002), *reh'g denied*, Order No. 2001-A, 100 FERC ¶61,074, *reconsideration denied*, Order No. 2001-B, 100 FERC ¶61,342 (2001).

“not in any way a declaration that such service is just and reasonable as extended to a particular customer.” *Prior Notice*, 64 FERC at 61,984. This holding is not inconsistent with the Commission’s holding here. Here, the contracts involve sales of electricity for which market-based rate authorization is allowed. Contracts for transmission service are subject to cost-based Open Access Transmission Tariff requirements. While transmission service agreements must be filed in the latter situation to permit the Commission to evaluate the justness and reasonableness of the tariff rate as applied to a particular customer, in the market-based rate context for sales of electricity, Commission examination of each service agreement is unnecessary because a just and reasonable determination has, in effect, already been made in the acceptance, and continuing effectiveness, of the sellers’ market-based pricing.

As the Commission recently explained in *El Paso Electric Company*, 105 FERC ¶ 61,131 at ¶ 27 (2003) (quoting *Prior Notice*, 64 FERC at 61,984) (footnotes omitted):

The two situations are different. When the Commission grants market-based rate authority and accepts a market-based rate tariff, it is saying that individual service agreements under the utility’s market-based rate tariff will not be subjected to the same level of scrutiny when they are filed; the individual transactions (which occur at market-driven prices) are reasonable because the Commission has determined that the utility seller does not possess market power. In contrast, for a cost-based OATT and the service agreements thereunder, while the OATT is a tariff of general applicability, as the Commission explained in *Prior Notice* the Commission still needs to ensure that the rate for

service to a particular customer is reasonable and “that determination can be made only after the service agreement is filed . . . , and only after the Commission has had the opportunity to evaluate the justness and reasonableness of the tariff rate applied to a particular customer.”

Snohomish relies on *Southern Power Company*, 104 FERC ¶ 61,041 (2003), and *Entergy Services, Inc.*, 103 FERC ¶ 61,256 (2003), Snohomish Br. 18, to show that utilities with market-based rate authority must show their contract rates are just and reasonable. These decisions are inapposite as they involve affiliate dealings. *See Southern* ¶ 3; *Entergy* ¶ 3. The Commission requires additional safeguards for affiliate transactions because, contrary to arms-length transactions, in which “the buyer will be able to protect itself against excessive charges or unreasonable contract provisions and thus, in turn, similarly protect ultimate consumers,” in affiliate transactions “the buyer has less incentive to bargain for the lowest possible rates.” *Northeast Utilities*, 66 FERC at 62,089.

Nevada Companies assert that their due process rights were violated because they had no notice of the “future effects” of market-based rate authority when it was originally granted. Nevada Cos. Br. 32-33. *See also* SCWC Br. 38. This assertion ignores that the grant of market-based rate authority “preauthorizes the seller to engage in market-based sales and *puts the public on notice that the seller may do so.*” *Lockyer*, 99 FERC at 62,063 (emphasis added). Accordingly, there is no “retroactive rule” in effect, Nevada Cos. Br. 33, as the public was placed on

notice at the time market-based rate authority was granted that the seller was thereafter authorized to sell at market-based rates without further approval.

Nevada Companies also contend FERC's decision is contrary to its "pledge" in the December 15 Order to use a \$74/MWh reference point to assess complaints concerning the justness and reasonableness of long-term contracts. Nevada Cos. Br. 35-37 (citing 93 FERC at 61,982). SCWC contends that it relied upon the "availability of redress" under the December 15 Order reference point in agreeing to its contract with Mirant. SCWC Br. 43-45.

Although the December 15 Order declined to extend the California spot market mitigation measures to forward-contract markets, the Order adopted \$74/MWh, for five-year contracts for supply around-the-clock, as a reference point to be used in addressing any complaints regarding the pricing of contracts negotiated in forward markets. Rehearing Order ¶ 46, ER 408. While this was expected to be helpful in assessing possible complaints challenging forward prices, the Commission never suggested that exceeding \$74/MWh would be sufficient grounds to abrogate a contract. *Id.* Quite to the contrary, the Commission expected that "buyers may elect to negotiate above [the reference point] to the extent they believe the particular contract or supplier brings value which suits their needs (*e.g.* shorter-term contracts, favorable terms and conditions, assignment of

the risk of variable cost exposure, the particular characteristics of the supplier or its resource portfolio, etc.).” *Id.* (quoting December 15 Order, 93 FERC at 61,995).

The reference point does not, moreover, provide an appropriate comparison for Nevada Companies’ contracts. The \$74/MWh was chosen as a suggested price for five-year contracts for supply around-the-clock, whereas all Nevada Companies’ contracts are for twelve months or shorter for standard on-peak 6x16 blocks of power. Rehearing Order ¶ 49, ER 409. Twelve-month supply would generally be priced higher than five-year supply, as would peak power as opposed to around-the-clock power, so the \$74/MWh reference point would have to be adjusted to fit the instant purchases. Nevada Companies provided no calculations adjusting the \$74/MWh reference point to reflect the terms of their specific contracts. *Id.*

Further, although FERC announced the reference point prior to execution of their contracts, neither SCWC nor Snohomish’s request for proposals ever specified a target price of \$74/MWh. Rehearing Order ¶¶ 47-48, ER 408-09. There is no record evidence that any representative from SCWC told Mirant that it sought a price of \$74/MWh. *Id.* See Initial Decision n. 445. Nonetheless, SCWC claims that, in entering into the contract, “Mirant disregarded the risk that SCWC would file a complaint under [the December 15 Order].” SCWC Br. 58. As the ALJ found, SCWC’s failure to propose a \$74/MWh rate, coupled with its intent

after the fact to file a complaint to obtain that rate, calls into question SCWC's good faith at the time it signed this contract. Initial Decision n. 445.

In any event, the December 15 Order never mandated the application of the \$74/MWh (or any other price) as the just and reasonable standard to review forward contracts. Rehearing Order ¶ 51, ER 409. While use of a reference point helps to spot problems, it cannot override *Mobile-Sierra*, and therefore the petitioners were required to show that the contract price was contrary to the public interest, a showing they failed to make. *Id.* The Commission could not, and did not attempt to, trump the mandates of that long-standing doctrine by using a reference point in assessing the validity of a complaint. Thus, the reference point was a tool to use in assessing the justness and reasonableness of contracts. *See* December 15 Order, 93 FERC at 61,995. But that it not the issue here; rather, the issue is whether the contracts are contrary to the public interest. The reference point cannot be dispositive of that issue.

### **III. PETITIONERS FAILED TO SHOW THAT THE PUBLIC INTEREST REQUIRED CONTRACT MODIFICATION.**

The Commission's function in applying the *Mobile-Sierra* test is "not only to appraise the facts and draw inferences from them but also to bring to bear upon the problem an expert judgment and determine from analysis of the total situation on which side of the controversy the public interest lies." *Metropolitan Edison*, 595 F.2d 851. Here, the Commission properly considered the totality of the circumstances and concluded that petitioners failed to show that contract modification was required in the public interest. Rehearing Order ¶ 72, ER 414.

#### **A. Petitioners Failed to Show Effects Of The Dysfunctional California Spot Markets On The Long-Term Contract Market Sufficient To Require Modification In The Public Interest.**

Pointing to the dysfunctional California spot market, petitioners contend the public interest standard is either inapplicable, or satisfied, here because the bargaining process for these forward contracts was not the product of a functionally competitive market. Nevada BCP Br. 41-46, 60-61; Nevada Cos. Br. 37-40, 53-56, 59, 61-65; SCWC Br. 34-35; Snohomish Br. 28-30. *See also* Nevada PUC Intvr. Br. 19-20, 29-30. It is further argued that the dysfunctional spot market rebuts the presumption that the market-based rate forward contracts at issue were just and reasonable, and provides a "reason to question what transpired at the contract formation stage." Nevada Cos. Br. 37-38, 53-56 (quoting *Atlantic City*

*Elec. Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002); SCWC Br. 34-37. *See also* Nevada PUC Intvr. Br. 29-30.

The Commission rejected assumptions that the spot market dysfunctions necessarily resulted in unjust and unreasonable rates *in the forward contract markets*. Notwithstanding the fact that, as a result of spot market dysfunctions, “[s]ellers will certainly be aware that supplies of power are tight and that the IOUs are now aggressively seeking to avoid the exposure of the spot markets,” two factors offset sellers’ ability to take advantage. December 15 Order, 93 FERC at 61,994. First, “suppliers also benefit from the stable revenue stream of forward markets and have every bit as much incentive to avoid the volatility of the spot markets as do purchasers.” *Id.*<sup>15</sup> Second, suppliers who bargained for forward contracts during the relevant period knew “that the spot market's size [would] be greatly reduced [by more forward purchasing] and that next summer's spot prices [would] therefore not be fueled by frenzied buyers whose over-reliance on last minute purchases have forced them to bid up the prices to obtain needed supply.” *Id.* Accordingly, the Commission denied requests to extend market mitigation measures designed for spot markets to the forward contract market. December 19,

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<sup>15</sup> *See id.* n. 33 “While suppliers clearly benefit on the upside of price volatility, the risks of price swings move in both directions. A supplier that relies exclusively on spot markets is exposed to the risk that, due to favorable weather or supply conditions, prices will be too low to cover its costs.”



2001 Order, 97 FERC at 62,245. Although the spot market dysfunction led to unjust and unreasonable rates, the Commission did not find the forward contract markets to be similarly flawed.

During the relevant time period, spot and forward markets were driven by changes in market fundamentals and competitive conditions, including, in particular, significantly increased power production costs combined with increased demand, due to the unusually high temperatures and a scarcity of generation resources through the West, and particularly in California. Initial Decision ¶¶ 65-66 (citing November 1 Order at 61,254 and 61,358-59). The December 15 Order noted that projections or estimates of future market fundamentals, in particular, natural gas and NOx emission allowance prices, “will heavily influence forward prices more than anything else.” December 15 Order, 93 FERC at 61,994.

Notwithstanding these factors, the Commission set for hearing “whether the dysfunctional California spot markets adversely affected the long-term bilateral markets, and, if so, whether modification of any individual contract at issue is warranted.” April 11 Order at 14, ER 14. At hearing, petitioners failed to show a connection. Order on Initial Decision ¶ 44, ER 217-18. Specifically, petitioners inadequately analyzed what impact market fundamentals had on forward prices. *Id.*, ER 217-18. Petitioners’ analysis measured only one factor, rather than attempting to account for all of the changing market fundamentals that impacted

forward prices. *Id.*, ER 218. Petitioners also failed to show that the CalISO and CalPX spot market prices drove the spot prices throughout the West, and failed to undertake any survey or study to determine market participants' expectations concerning the continuation of spot market dysfunctions. *Id.* Petitioners did not explain what role any factors, including market fundamentals, had in the development of any forward price curves. *Id.*

Snohomish cites the testimony of Dr. Timothy Mount and Mr. Robert McCullough as evidence that spot market dysfunctions impacted forward contracts. Snohomish Br. 30. The ALJ, however, fully considered but gave little weight to the testimony of both. While McCullough found a correlation between certain bilateral spot and forward markets during June 2000 to June 2001, the ALJ found that correlation does not establish causation between the CalISO and CalPX spot markets and the forward prices relevant to this proceeding. Initial Decision ¶¶ 90-91. This is significant because the CalISO and CalPX spot markets were subject to price caps and break points from December 2000 to June 2001 and the bilateral spot markets were not subject to these bid caps. *Id.* His regression analysis also failed to include market fundamentals as variables affecting spot and forward prices, and the claimed correlation might not have existed had market fundamentals been taken into account. *Id.* ¶ 92. Indeed, when McCullough's

study was adjusted for these shortcomings, no significant correlation was found. *Id.* ¶ 93.

Likewise, Dr. Mount contended that the spot price at Palo Verde was a statistically significant determinant of the forward price, concluding that high forward prices for electricity can largely be attributed to high spot prices during the relevant period. *Id.* ¶ 94. His study was flawed in that it failed to analyze the statistical relationship, if any, between the CalISO or CalPX spot prices and forward bilateral prices at Palo Verde or in the relevant markets. *Id.* “This witness acknowledged that there were no econometric studies in this proceeding demonstrating an econometric relationship between the CalISO spot markets and bilateral spot or forward markets anywhere in the West.” *Id.* “Moreover, Dr. Mount admitted that he never included Cal ISO prices in his model of the relationship among Western spot markets and that his analysis did not show that bilateral spot prices could be predicted by changes in Cal ISO or PX spot prices.” *Id.* Thus, Dr. Mount and Mr. McCullough’s analyses hardly constitute “overwhelming evidence,” Snohomish Br. 29, that California spot market dysfunctions resulted in unjust and unreasonable rates in the contracts at issue.

SCWC’s assertion that “[b]oth sides’ expert witnesses confirmed that long-term contract prices are based on expected spot-market prices,” SCWC Br. 36, relies on non-existent pages of the excerpts of record, ER 1524-25. SCWC’s

witness Taylor testified that inflated spot market prices “cause” inflated prices in the long-term market, based on the bald assertion that, as energy can be sold in either market, revenues available from selling in the spot market are an “opportunity cost” of selling instead in the long-term market. ER 737. The ALJ, however, afforded little weight to Mr. Taylor’s testimony, which was based on no econometric or statistical studies. Initial Decision ¶ 96. Further, Mr. Taylor agreed that prices in the long-term markets were affected by market fundamentals, but failed to conduct any studies to determine how the market fundamentals might themselves have impacted long-term contract prices. *Id.*

Thus, the Commission reasonably rejected petitioners’ expert testimony purporting to show a connection between the CalISO and CalPX spot market dysfunctions and the forward contract market. The Commission and the ALJ are entitled to deference in their assessment of competing expert opinions and the weighing of evidence. *Bear Lake*, 324 F.3d at 1077. *See also Sierra Pacific*, 793 F.2d at 1088; *Ash Grove*, 577 F.2d at 1379.

Petitioners also point to the Staff Report as evidence of the connection between the spot and long-term markets. *See, e.g., Nevada Cos. Br.* 62-63 (citing Staff Report findings regarding Enron trading strategies); *Nevada PUC Intrv. Br.* 45 (citing Staff Report at 1234-37 on Enron’s impact on “market outcomes”); *Snohomish Br.* 29 (arguing Staff Report is evidence that contracts at issue were

“strongly affected” by California market dysfunctions). The Staff Report stated that many spot market trading strategies undertaken by certain sellers violated the anti-gaming provisions of the CalISO and CalPX tariffs. Order on Initial Decision ¶ 22, ER 208. The Staff Report also stated that spot prices influenced forward contract prices negotiated during the January 1, 2000 through June 21, 2001 period, and the influence was greatest for contracts with one to two year terms. *Id.* The Staff Report did not, however, find that forward prices in the 1-2 year class of contracts were unjust and unreasonable as a result of spot market dysfunction or market manipulation. *Public Utils. Comm’n of the State of Cal. v. Sellers of Long Term Contracts*, 105 FERC ¶ 61,182 at ¶ 83 (2003) (“The Staff Report did not make any findings regarding the justness and reasonableness of any contract rates. . . .”). Further, the Staff Report conclusions were contested. Order on Initial Decision ¶ 94, ER 234.

In any event, even if the Staff Report had found one-to-two year forward contracts unjust and unreasonable, and the Commission assumed those findings to be true, those findings still would not suffice to satisfy petitioners’ public interest burden. *Id.*, ER 234. “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.* See, e.g.,

*Boston Edison*, 233 F.3d at 68 (recognizing that unjust and unreasonable rates may not be so high as to be contrary to the public interest). Nevada PUC contends, Nevada PUC Intvr. Br. 42, that the Commission has considered whether rates were just and reasonable under the public interest standard, citing *Northeast Utilities*, 66 FERC ¶ 61,332 at 62,078. However, on the cited page the Commission is quoting, as background, its earlier decision in *Northeast Utilities*, 50 FERC at 61,838-39, which the First Circuit *reversed* for improperly conflating the just and reasonable and public interest tests. *Northeast Utilities I*, 993 F.2d at 961.

Thus, petitioners failed to make a sufficient showing that the dysfunctional spot markets adversely affected all long-term contracts to justify generically modifying those contracts under *Mobile-Sierra*. Contract abrogation under *Mobile-Sierra* ordinarily requires findings specific to the challenged contract and its impact on the public interest. “FERC’s rulemaking authority requires only that it point to a generic public interest in favor of a proposed rule; the public interest necessary to override a private contract, however, is significantly more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract’s deleterious effect.” *Texaco*, 148 F.3d at 1097. *See also TAPS*, 225 F.3d at 709 (recognizing that *Mobile-Sierra* determinations are usually made on a case-by-case basis).

While FERC has under extraordinary circumstances made generic *Mobile-Sierra* determinations, such findings are appropriate only where the circumstances relied upon “affect an entire class of contracts in an identical manner.” *TAPS*, 225 F.3d at 710, 711 (cited *Snohomish Br.* 29). For example, generic modification was permitted when Order No. 888<sup>16</sup> (cited *Snohomish Br.* 28) “fundamentally change[d] the regulatory environment in which utilities operate, . . . and affect[ed] all utilities in a similar way.” *Id.* See also *United Distribution Companies v. FERC*, 88 F.3d 1105, 1126-27 (D.C. Cir. 1996) (cited *Snohomish Br.* 31 n.54) (generic modification permitted as a result of “sweeping changes” in the gas industry related to mandatory unbundling of pipeline sales and transportation services).

*El Paso Natural Gas Co.*, 99 FERC ¶ 61,244 (2002), *on reh'g*, 104 FERC ¶ 61,045 (2003), cited *Snohomish Br.* 30-31, follows the same approach: “only in extraordinary circumstances, and only where the public interest so requires, will the Commission order contract modification.” Rehearing Order ¶ 68, ER 744 (quoting *El Paso*, 99 FERC at 62,005 (footnotes listing citations omitted)). *El*

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<sup>16</sup>*Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Service by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom.*, *TAPS*, 225 F.3d 667, *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

*Paso* restructured all firm requirements contracts (guaranteeing delivery of a customer's full requirements each day) into contract demand contracts (providing specific delivery rights up to a specified maximum at specified points) to remedy oversubscription, which prevented existing contract demand customers from receiving the firm service for which they had paid. Again, the generic public interest finding was one that affected a class of customers identically.

Here, petitioners failed to show that the spot market dysfunctions adversely affected all, or even any, relevant forward contract markets so as to render all forward contracts negotiated during the spot market dysfunctions contrary to the public interest. Thus, as in most cases, a generic public interest finding is unavailable. This means the circumstances here relevant to the public interest determination are unique to the affected contract. *TAPS*, 225 F.3d at 710.

Snohomish's authorities (cited *Snohomish Br. 29* and n. 51) do not support the availability of a generic *Mobile-Sierra* finding here. *Atlantic City*, 295 F.3d at 14-15, *reversed* the Commission for modifying a contract based on generic *Mobile-Sierra* findings instead of making findings specific to the contract at issue. The contract reforms in *Northeast Utilities* and *Town of Norwood* were not based on generic market dysfunctions, but, rather, on the fact that the parties to the contracts were potential or actual merger partners, leading to concern that the contracts were not at arms-length and may discriminate against or unduly burden



third parties. *See Town of Norwood v. FERC*, 587 F.2d 1306, 1313 (D.C. Cir. 1978) (discussing allegations of a “sweetheart” deal between two companies engaged in merger discussions); *Northeast Utilities I*, 993 F.2d at 961 (no arms-length bargain because the contracting entities were about to merge). Thus, the authorities cited do not support petitioners’ claims that a generic *Mobile-Sierra* finding was warranted. *See PEPCO*, 210 F.3d at 410 (FERC appropriately did not extend Order No. 888 generic public interest finding, based on market power of sellers over requirements customers, to nonrequirements contracts because “in the majority of circumstances, such long-term supply contracts are voluntary arrangements in which neither party had market power.”) (citation omitted).

Petitioners also failed to present evidence of any manipulation by the sellers complained against which impacted the forward markets generally, or any forward contract at issue specifically. Order on Initial Decision ¶ 45, ER 218. While petitioners point to findings that Enron and others manipulated the spot market, Nevada Cos. 38-40, 54, 59, 62-63; Nevada BCP Br. 38-39, 42-46; Nevada PUC Intrv. Br. 43-44, the sellers’ witnesses refuted the contention that such manipulation in the CalISO and CalPX spot markets inflated prices in the forward markets. Order on Initial Decision ¶ 45, ER 218 (citing Initial Decision ¶ 102). For example, allegations of withholding in the CalISO and CalPX markets were not accompanied by studies proving withholding in either the spot or forward

markets by any seller in the contracts here. *Id.* Further, no evidence was presented that any seller actually engaged in discriminatory pricing regarding the contracts at issue in this proceeding. *Id.*

Thus, the Commission never regarded the allegations of spot market dysfunction as “irrelevant” to whether these contracts could be modified or abrogated under the *Mobile-Sierra* doctrine. Nevada Cos. Br. 55. Rather, the Commission set for hearing whether the spot market dysfunctions “adversely affected the long-term bilateral markets, and, if so, whether modification of any individual contract at issue is warranted.” April 11 Order at 14, ER 14. Petitioners failed at hearing to prove that the dysfunctional spot markets adversely affected the long-term bilateral contract markets. Order on Initial Decision ¶ 44, ER 217-18.

Lacking evidence of actual causation, Nevada BCP argues that a “fraud on the market” theory should be employed to provide the missing causal link to allow contract modification. Nevada BCP Br. 45-46. The “fraud on the market” theory rests on the reasonable assumption that material misinformation about a stock influences reasonable investors. In contrast, here, the Commission rejected the assumption that spot market dysfunctions necessarily would cause forward contract rates to be unjust and unreasonable, see December 15 Order, 93 FERC at 61,994, let alone contrary to the public interest. Thus, here, there is no basis to assume a

causal link between the spot market dysfunctions and the forward contracts at issue.

**B. Petitioners Failed to Show Their Challenged Contracts Were Contrary to the Public Interest.**

**1. Nevada Companies' Inadequate Showing.**

The Commission properly determined that the Nevada Companies failed to show that their contracts were contrary to the public interest. *See* Rehearing Order ¶ 1, ER 393. Turning to the *Sierra* factors, the Nevada Companies failed to show that the contracts imposed an excessive burden on their ratepayers. Order on Initial Decision ¶¶ 67, 98, ER 226, 235. Indeed, Nevada Companies' projections assumed that they would file for a rate decrease in excess of 20 percent in November 2002 in their base tariff energy rate cases. *Id.* Nevada BCP asserts that this decrease turned out to be less than anticipated, as the rate proceedings actually resulted in a rate decrease for Nevada Power consumers of 6.3 percent, and a rate decrease for Sierra Pacific customers of 1.4 percent, increasing by an additional 2.7 percent in June 2004. Nevada BCP Br. 54-55. Nevertheless, even if less than anticipated, a rate decrease is hardly evidence of an excessive burden on the Nevada Companies' ratepayers.

Nevada BCP points to the testimony of Nevada Companies' witness Steven Oldham, *see* Nevada BCP Br. 54, who testified that the dysfunctional California spot markets had "profound effects on all stakeholders in the Western Systems

Coordinating Council,” and that retail customers of Nevada Power and Sierra Power received significant rate increases “in less than two years.” ER 646. Although Mr. Oldham does not even identify the years in which these alleged rates increases occurred, the increases could not have been caused by the contracts at issue here. At the time of Oldham’s testimony the Nevada PUC had not yet even determined whether the Nevada Companies would be allowed to recover for these contracts in their rates. *See Nevada PUC Br. at 38-39.* Thus, this evidence did not demonstrate the impact of the contracts at issue on Nevada Companies’ customers. Rehearing Order ¶ 36, ER 405-06.

Intervenor Nevada PUC seeks to excuse the Nevada Companies’ failure to show ratepayer burden based on the fact that Nevada PUC had not yet determined whether the costs of the contracts at issue could be recovered from Nevada Companies’ ratepayers. *Nevada PUC Intvr. Br. 38-39. See also Nevada BCP Br. 55-56.* Uncertainty as to the ratepayer impact, however, does not relieve Nevada Companies from meeting their burden of proof to justify contract modification under *Mobile-Sierra*.

As for the financial impact on the Nevada Companies, the Nevada PUC concedes that the Nevada Companies’ cash flow projections showed positive cash balances for each of the next several years. *Nevada PUC Intvr. Br. 39* (citing *Order on Initial Decision ¶ 67, ER 226*). Indeed, the Nevada Companies’ own

witness, Oldham, testified that the Nevada Companies' financial situation was not a sufficient basis to justify contract modification. ER 653. Nevada PUC faults this focus on the Nevada Companies' financial stability, arguing that the focus should instead have been on the purported "mountain of evidence" of spot market dysfunction. Nevada PUC Intvr. Br. 40. As discussed above, *see* Section III (A) *supra*, petitioners failed to show the causal connection between the dysfunctional spot market and long-term contracts generally or the specific contracts here, and thus Nevada PUC's argument is unavailing. The Commission considered all of the evidence presented of both impact on Nevada Companies' financial condition and the burden on ratepayers, and found neither sufficient to render contract modification required in the public interest. *See, e.g.*, Order on Initial Decision ¶¶ 67, 68, ER 226-27.

Looking at the totality of the circumstances, there was little, if any, room for fraud or manipulation during negotiations because Nevada Companies' contracts were standard products arranged through independent third-party brokers. Order on Initial Decision ¶ 102, ER 237. This meant the sellers were price-takers, not price-makers. *Id.* Rather than being forced to buy power to meet demand, the Nevada Companies were trying to buy as much power as possible in the relevant time period before sellers discovered the Companies' already-precarious financial position. *Id.*, ER 237-38. The Nevada Companies' aggressive procurement

strategy led to more power purchases than necessary to serve their native load, doubling their wholesale power purchases from the previous year, and selling more than four times as much wholesale power as they did in 2000. *Id.*, ER 238.

In undertaking this strategy, the Nevada Companies failed to hedge for the risk that spot market prices might fall, and did not pursue portfolio diversification to reduce the risks associated with market volatility through portfolio diversification. *Id.* ¶ 103, ER 238. The Nevada Companies rejected longer-term transactions that were offered, and rejected three proposals at prices substantially lower than the challenged contract rate. *Id.* As Nevada Companies made wholesale purchases from 39 providers in 2000 and 2001, and Sierra Pacific reported purchases from at least 45 providers in the same time frame, the Commission reasonably concluded that Nevada Companies were free to reject offers and turn to better alternatives. *Id.* ¶ 104, ER 239. Thus, the contracts at issue resulted from choices voluntarily made by Nevada Companies, including possibly leaving themselves open to unnecessary risks. *Id.* ¶ 108, ER 240.

The Nevada BCP challenges the focus on the Nevada Companies' purchasing practices, contending that "the Commission does not explain how the fact that the Nevada Companies were 'not induced' to enter into the contracts is relevant to the public interest analysis." Nevada BCP Br. 57. *See also* Nevada PUC Intvr. Br. 41, 47. The presence of better alternatives makes it less likely a

buyer would be forced into a deal not to its liking, or would be as susceptible to fraud or manipulation:

The availability of other alternatives and the Complainants' buying practices are indicative of circumstances under which the transactions in question were executed. The availability of more competitively priced products demonstrates that the Complainants were not induced to enter into the transactions at issue. They were free to reject offers that led to execution of the contracts in question, and turn to other suppliers.

Rehearing Order ¶ 53, ER 409. *See, e.g., PEPCO*, 210 F.3d at 410 (finding the existence of available supply options at the time of contracting sufficient to outweigh claims that a contract was the product of the seller's market power).

Proof "which go[es] to the fairness and good faith of the parties at the contract formation stage" is entirely relevant in assessing the applicability of *Mobile-Sierra*. *Town of Norwood*, 587 F.2d at 1312 (allegations of alleged "sweetheart" deal negotiated when the parties were in merger discussions raised undue discrimination concerns with regard to *Mobile-Sierra* contract). *See also Northeast Utilities I*, 993 F.2d at 962 (alleged lack of arms-length bargaining among parties to contract gives Commission grounds to evaluate *Mobile-Sierra* contract on behalf of third parties). The Commission, therefore, did not review evidence of Nevada Companies' contracting circumstances to determine whether the contracts were prudent, Nevada BCP Br. 58-59; Nevada PUC Intvr. Br. 47-49, but rather to determine whether unfairness, bad faith or duress by the sellers in

negotiating the contracts at issue could provide a basis for contract modification under *Mobile-Sierra*. Rehearing Order ¶ 68, ER 413.<sup>17</sup>

Further, the rejection of more competitively-priced alternatives undermines the claim, Nevada BCP Br. 57, that the Nevada Companies were forced to pay exorbitant long-term contract prices as a result of the dysfunctional spot market. Rehearing Order ¶ 53, ER 409; Order on Initial Decision ¶ 108, ER 240. Nevada BCP asserts that “FERC never explained why the fact that the Nevada Companies could have managed their exposure to the crisis through more lower-priced *alternatives* renders the rates in the *challenged* contracts consistent with the public interest.” Nevada BCP Br. 58 (emphasis in original). The Commission is not required to prove that the challenged contracts are consistent with the public interest. Rather, the Nevada Companies bear that burden, which possibly could be met by a showing of no alternatives and fraud or manipulation during negotiations. Record evidence of rejected competitive alternatives shows voluntary assumption of risk regarding rates, which negates an attempted showing that the contracts are inconsistent with the public interest.

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<sup>17</sup> Indeed, Nevada BCP elsewhere in its brief argues that the Commission failed to consider “what transpired at the contract formation stage.” Nevada BCP Br. 41-42 (citing *Atlantic City*, 295 F.3d at 14; *Town of Norwood*, 587 F.2d at 1312).



## 2. Snohomish's Inadequate Showing.

Snohomish's contention that the Snohomish/Morgan Stanley contract is contrary to the public interest relies on claims that the California spot market crisis resulted in a "nearly 60% rate increase to Snohomish's ratepayers," which forced the poorest customers to "forego essentials," Snohomish Br. 32, increased Snohomish's power supply costs by \$300 million, causing job losses, "enormous suffering and economic dislocation," *id.* 33, and caused the highest rate of service disconnections in Snohomish's history, *id.* 36. The impact of the spot market crisis on Snohomish does not speak to the pertinent issue -- whether the Morgan Stanley forward contract imposed an excessive burden on Snohomish's ratepayers or was otherwise contrary to the public interest. *See* Order on Initial Decision ¶¶ 94-95, ER 233-34.

The evidence did not show that the Morgan Stanley contract imposed an excessive burden on Snohomish ratepayers. The rate increase that allegedly so burdened Snohomish ratepayers, Snohomish Br. 32-33, 36, occurred *prior to* Snohomish even negotiating its contract with Morgan Stanley. Order on Initial Decision ¶ 100, ER 237. In October of 2000, the Snohomish Board authorized Snohomish to contract for up to 107 MWh of power for periods as long as ten years. Initial Decision ¶ 139. On December 13, 2000, the Snohomish Board raised retail rates an average of thirty-five percent, allowing Snohomish to purchase up to

100 MW of power at a melded cost of up to \$125/MWh. *Id.* ¶ 140. The request for proposals to which Morgan Stanley responded was not issued until December 22, 2000. Initial Decision ¶ 140. Thus, Snohomish's testimony from ratepayers regarding the impact of Snohomish's rate increase, see Snohomish Br. 32-33, 36, is not relevant to the impact of the Morgan Stanley contract on ratepayers, as the rate increase predated the Morgan Stanley contract. Initial Decision ¶ 219.

Snohomish contends that the December rate increase paid for the Morgan Stanley contract, and therefore, the effect of the rate increase can be attributed to the Morgan Stanley contract. Snohomish Br. 35-36. But that puts the cart before the horse: the rate increase set the parameters for power purchases, not vice versa. The Morgan Stanley contract with a \$105/MWh price fit within those parameters. No grounds exist for finding the Morgan Stanley contract contrary to the public interest based on the effects of a preceding rate increase. Rehearing Order ¶ 42, ER 407.

Far from causing an adverse effect, Snohomish profited from reselling the Morgan Stanley power. Order on Initial Decision ¶ 106, ER 239. Snohomish sold more than one million megawatt-hours of electricity in 2001 (an 86.4% increase in the volume of resales over the prior year), at an average price of \$134/MWh, at the same time that it was purchasing power from Morgan Stanley at \$105/MWh, producing a net profit of over \$17 million in the first five months of 2001. Initial

Decision ¶ 221; Order on Initial Decision ¶ 106, ER 239. Snohomish's revenue exceeded expenses by more than \$21 million in the year ended December 31, 2001. *Id.* Because Snohomish is a non-profit entity, all of its revenues from wholesale power sales go to the benefit of its customers. ER 82.

Further, the December 13, 2000 rate increase allowed Snohomish to purchase up to 100 MW of power at a melded cost of up to \$125/MWh. Initial Decision ¶ 140. The \$125/MWh price acted as a "placeholder" to cover the costs of any subsequent request for proposals, so that any price, \$125/MWh or below, paid for power would not require a rate increase. *Id.* n. 374. As the Morgan Stanley contract rate of \$105/MWh was well *below* the rate level the Snohomish rates were designed to cover, the contract arguably actually resulted in rate relief. *Id.* ¶ 221.

The Morgan Stanley contract represented no more than five percent of Snohomish's portfolio costs, constituted only three percent of Snohomish's load, and resulted in an eight percent increase over 2001 rates. Order on Initial Decision ¶ 100, ER 236; Rehearing Order ¶ 39, ER 406. Other contracts accounted for the remaining 51% of Snohomish's claimed 60% increase in rates as a result of the market crisis. Order on Initial Decision ¶ 100, ER 236-37; Rehearing Order ¶ 39, ER 406. Snohomish does not dispute these facts, Rehearing Order ¶ 39, ER 406, but contends that even a small amount over a just and reasonable rate is unlawful,

Snohomish Br. 34 and cases cited n. 58, and the Commission has found rate impacts of 5% or more to be significant, Snohomish Br. 34 and FERC decisions cited n. 59.

However, the authorities cited all address whether a rate is just and reasonable. As the Morgan Stanley contract was already found lawful by virtue of Morgan Stanley's market-based rate authority, the only issue is whether the rates in the Morgan Stanley contract are so high as to offend the public interest. Rehearing Order ¶ 20, ER 399. The Commission was well within its discretion in concluding that the demonstrated impact of the Morgan Stanley contract rates did not rise to that level. Order on Initial Decision ¶ 100, ER 236; Rehearing Order ¶¶ 32, 39, ER 404, 406.

Snohomish contends the Morgan Stanley contract was unduly discriminatory because the term is longer and the rate charged higher than Morgan Stanley contracts with other purchasers. Snohomish Br. 36-37. Assuming this is discrimination, this would not render a contract contrary to the public interest under *Mobile-Sierra* because the discrimination claim concerns Snohomish's private interests. Order on Initial Decision ¶ 101, ER 237 (citing *Papago*, 723 F.2d at 953 n.4). "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. . ." *Sierra*, 350 U.S. at 355. Thus, in *Sierra* undue discrimination "means

unduly discriminatory or preferential to the detriment of purchasers who are not parties to the contract. Discrimination or preference that operates against the contracting purchaser can presumably be waived – just like unreasonableness – up to the point where it produces some independent harm to the public interest.” *Papago*, 723 F.2d at 953 n. 4. This is illustrated by *Town of Norwood*, 587 F.2d at 1313, cited *Snohomish Br.* 37 n. 62, where third parties who also had contracts with the seller, but *who were not parties to the challenged contract*, alleged that they should be entitled to the lower rate in the *Mobile-Sierra* contract because the contract was an unfair, “sweetheart” deal between companies engaged in merger discussions and therefore the rate disparity was unduly discriminatory.

Snohomish argues that it had no meaningful alternatives to the Morgan Stanley contract because the Western forward market was illiquid and only three suppliers were willing to supply 25 MW each to fill Snohomish’s need for 75 MW, and accordingly, Morgan Stanley was able to exercise market power. *Snohomish Br.* 38-39. *See* Rehearing Order ¶ 54, ER 410. The Commission rejected this argument, finding that the evidence indicated otherwise. Rehearing Order ¶ 55, ER 410. Snohomish’s request for proposal, containing three bid “options,” was sent to seventeen entities based on their credit ratings, performance, payment history and a general trading relationship with Snohomish. Initial Decision ¶ 140. Snohomish reserved the right to reject any and all bids. *Id.* Five entities responded to the

request, with Morgan Stanley offering to supply power for periods of one, two or three years with gradually decreasing prices respectively. *Id.* ¶ 141. Snohomish rejected this bid and requested that Morgan Stanley rebid for an unspecified term, at a rate of \$ 100/MWh. *Id.* Snohomish specifically requested Morgan Stanley to bid "for however many months" to permit Snohomish to purchase power for approximately \$ 100/MWh. *Id.* Morgan Stanley complied, submitting a bid for 50 MW for an approximately ten-year term, at a price of \$ 100/MWh. *Id.* In response to a bid from a competitor, Snohomish requested Morgan Stanley to shorten its offer term by one year, and to extend the delivery commencement date. *Id.* Snohomish informed Morgan Stanley that a price "slightly over" \$ 100/MWh, might be acceptable for the year shorter term. *Id.* Morgan Stanley complied, submitting an approximately nine-year bid at a price of \$ 105/MWh for 25 MW. *Id.*

Snohomish and Morgan Stanley then negotiated the terms of the contract. *Id.* ¶ 142. Throughout the negotiations, Snohomish's goal was to keep the price of the contract below the \$ 125/MWh "placeholder" established by the Snohomish Board in December 2000, long before the request for proposals was announced. *Id.* Shorter terms at market rates were available to Snohomish, but rejected. *Id.* Morgan Stanley offered to enter into an alternative arrangement of two separate

deals, one for five years (at above market prices) and another for five-seven years (at below market prices), but that too was rejected. *Id.*

Thus, the record showed that Snohomish chose to pass the risk of price volatility to Morgan Stanley and to gain a below-market rate of \$ 105/MWh for the first five years, even if the contract had to be for a longer term. *Id.* Witness Herrling for Snohomish testified that, in January 2001 (when the contract was being negotiated) Snohomish expected spot prices to remain high for no more than a year or two. *Id.* This was corroborated by witness Adam who testified that it was reasonable to conclude that spot prices would decline to \$ 25/MWh by 2003, once supply and demand fundamentals were corrected. *Id.* The inference from this testimony was that the primary goal was to get a below market rate at any cost. *Id.* Thus, the evidence shows that Snohomish voluntarily chose the term of its contract. *Id.*

The negotiations took place by telephone and electronic mail. *Id.* ¶ 143. Snohomish, represented by counsel during the negotiations, dictated the deadlines to complete negotiations and several of the contract terms. *Id.* Morgan Stanley witness Hamdan testified that Morgan Stanley valued its business relationship with Snohomish, and thus felt significant pressure to enter into the deal by Snohomish's deadline. *Id.* The evidence also demonstrated that, shortly after entering into the contract, Snohomish touted to its customers that the Morgan Stanley and other

long-term contracts "give us a lot of security against the uncertainty of market fluctuations," and that the contracts insulate the ratepayers from market volatility. *Id.* Snohomish expected, based on its forward curve (April 2001), that its contract with Morgan Stanley would provide Snohomish with power at a price far below market for at least two years. *Id.*

Snohomish argues that the Morgan Stanley contract was "tainted" by the dysfunctional spot market because Morgan Stanley used spot market prices, and Enron Online, as a basis for its offer price. Snohomish Br. 38 (citing ER 132 and 1065). This evidence demonstrates nothing more than that Morgan Stanley's witness Funk testified Enron Online was "one source of information amongst many sources of information." ER 132. See also ER 1065 ("MSCG used data from its own transactions and from a variety of market sources – including Enron Online – to project the price curve for the first few years of the MSCG contract."). This hardly establishes grounds for finding the Morgan Stanley contract "tainted."

Snohomish now seeks to show that spot market dysfunctions caused increases in long-term contract rates by relying on evidence that is not part of the record in this case, but came from another proceeding. See Snohomish Br. 39 (citing 1209-15). The evidence was filed in FERC Docket Nos. EL02-60 and EL02-62, in an entirely separate FERC proceeding, *Public Utils. Comm'n of the State of California v. Sellers of Long Term Contracts*. Snohomish improperly



attempts to get the document before the Court by erroneously claiming that it was from the 100 Day Discovery Proceeding. Snohomish Br. 39.

The orders under review incorporated by reference into the record in this proceeding, Docket No. EL02-28, evidence adduced in the so-called 100 Day Discovery Proceeding. *See, e.g.*, Order on Initial Decision ¶¶ 3, 133, ER 202, 248. The 100 Day Discovery Proceeding was assigned FERC Docket Nos. EL00-95 and EL00-98. Those are, of course, different dockets from EL02-60 and EL02-62, where Snohomish's purported record evidence was filed. Snohomish's proffered evidence, therefore, was not incorporated into this record by the Commission. As it is "well-settled that judicial review of agency action is limited to a review of the administrative record," *Black Construction Corp. v. INS*, 746 F.2d 503, 505 (9<sup>th</sup> Cir. 1984), Snohomish's arguments based on evidence filed in a different proceeding, not part of this record, should be disregarded.

The evidence cited at ER 1205, *see* Snohomish Br. 39, was filed in the 100 Day Discovery Proceeding, EL00-95, but it does not aid Snohomish. Snohomish relies on the statement that "at least two suppliers sought to spike real time market prices in order to boost prices they would receive for longer term forward contracts." This statement says nothing regarding any exercise of market power by Morgan Stanley, and, indeed, proves nothing regarding any effect on the long-term contract market.

Likewise, ER 1046, Snohomish Br. 39, is nothing more than testimony by one witness purporting to summarize conclusions reached in a study done by someone else. See ER 1046. Not only did that approach prevent testing the study through cross, but also the summary vaguely states that the exercise of market power accounted for a “large percentage” of price increases during the California market crisis, including a “substantial portion” of costs preserved in long-term contracts signed in the Spring of 2001. *Id.* Such vague and untested testimony does not invalidate the ALJ’s conclusion that petitioners failed to prove that the dysfunctional CalISO and CalPX spot markets adversely affected the long-term bilateral markets. Order on Initial Decision ¶ 44, ER 217-18.

Snohomish’s purported evidence of Morgan Stanley’s alleged bad faith was largely stricken by the ALJ as incompetent testimony. Snohomish cites to the direct testimony of Karin A. Bulova, SNO-4 at 10:19-13:6, ER 832-35, Snohomish Br. 41, as purportedly evidencing negative comments by Morgan Stanley traders about the Snohomish contract. This testimony was stricken by order of October 3, 2002, finding that Ms. Bulova was not competent to testify to the fact or meaning of conversations in which she did not participate. See *Nevada Power Co. v. Enron Power Marketing, Inc.*, Order Confirming Rulings, Docket No. EL02-28, ¶ 1(f) (October 3, 2002) (striking Direct Testimony of Karin Bulova, SNO-4, 10:20-13:6). For the same reason, the ALJ struck the Rebuttal Testimony of John P.

White, SNO-46, at 36:3-18, ER 1006, which Snohomish used purportedly to show that Morgan Stanley planned to “liquidate” the contract if it became uneconomic. *See* Snohomish Br. 41. *See Nevada Power Co. v. Enron Power Marketing, Inc.*, Order Confirming Rulings, Docket No. EL02-28, ¶ 1(f) (October 3, 2002) (striking Rebuttal Testimony of John P. White, SNO-46, 36:3-18). While Snohomish made an Offer of Proof, the ALJ’s decision to strike the evidence was never overruled, and Snohomish has not challenged the evidentiary ruling on appeal (Snohomish does not even mention that the evidence was stricken). As stricken testimony subject to an Offer of Proof is not in the record as substantive evidence, *see, e.g., New England Power Pool*, 87 FERC ¶ 63,004 at 65,024 (1999), it cannot support Snohomish’s claims.

The remaining evidence does not support Snohomish’s claims of bad faith. ER 529, cited Snohomish Br. 40, shows that Snohomish told Morgan Stanley that they were negotiating with someone else in competition with Morgan Stanley. The Commission rejected the argument that Morgan Stanley’s “refreshing” of its offer evidenced the exercise of market power. Rehearing Order ¶¶ 69-70, ER 413-14. The evidence shows that Morgan Stanley refreshed its offer “to reflect the changing market price,” which Snohomish permitted. ER 522, cited Snohomish Br. 40. Morgan Stanley was unable to hold the price indefinitely due to the market volatility. ER 859, cited Snohomish Br. 41.

Snohomish contends, Snohomish Br. 42, that the Commission’s finding that it could have entered into shorter term contracts is contrary to *Puget Sound Energy, Inc. v. All Jurisdictional Sellers*, 103 FERC ¶ 61,348 ¶¶ 15, 40 (2003). However, *Puget Sound* ¶¶ 15 and 40 simply found that Pacific Northwest utilities could have mitigated spot market volatility by “assembling a portfolio of long-, medium-, and short-term contracts.” This statement in no way contradicts the point that Snohomish had the option of entering into a contract with a shorter term. Further, Snohomish contends that it could only enter into two separate agreements that together total the term of the challenged contract at a price “equivalent to” the value of the single contract. Snohomish Br. 42. The evidence cited, ER 111-16, does not support that contention, as the two separate agreements would have the benefit of reducing the credit risk of supplying Snohomish. ER 114. Rather, Snohomish made it clear in negotiations that their main goal was to obtain a below-market price in the early years of the contract. ER 115.

Snohomish also challenges the Collateral Annex to its contract with Morgan Stanley, arguing that the expense of maintaining the collateral is unreasonable and therefore the Annex is not in the public interest. Snohomish Br. 44-46. As the Commission found, the Collateral Annex, like the rest of the Snohomish/Morgan Stanley contract, can only be modified under the public interest, not the just and reasonable, standard. Rehearing Order ¶ 77, ER 416. Nor can the Annex be

analyzed separately, given that it is integral to the entire contract, and the Commission “extensively analyzed all of the evidence pertaining to the Snohomish-Morgan Stanley contract and concluded that Snohomish failed to present sufficient evidence showing that its contract with Morgan Stanley is contrary to the public interest.” *Id.*

Even if the collateral requirement were unreasonable as to Snohomish, that would not render it contrary to the public interest, Snohomish Br. 45, nor unduly discriminatory under *Sierra*, *id.* 46. *Mobile-Sierra* addresses the public interest, not Snohomish’s private interests. Order on Initial Decision ¶ 101, ER 237 (citing *Papago*, 723 F.2d at 953 n.4). “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. . . .” *Sierra*, 350 U.S. at 355. Although Snohomish contends FERC must reconcile its decision here with *Duquesne Light Co.*, 103 FERC ¶ 61,227 (2003); *New York Independent System Operator, Inc.*, 98 FERC ¶ 61,077 (2002); and *Pacific Gas & Elec. Co. v. California Power Exchange Corp.*, 95 FERC ¶ 61,020 (2001), Snohomish Br. 47 and nn. 79, 80, those cases dealt with fact-specific issues relating to collateral requirements not present here, in the context of the just and reasonable standard. Those cases do not speak to the application of the public interest standard in this factual context.

### 3. SCWC's Inadequate Showing.

In evaluating the SCWC/Mirant contract under the *Sierra* factors, the Commission found no evidence that the Mirant contract placed SCWC in financial distress threatening its ability to continue service. Order on Initial Decision ¶ 99, ER 236. By entering into the contract with Mirant, SCWC avoided the risk of price volatility and obtained rate certainty, and SCWC achieved savings of \$13.26 million from its forward contracting and marketing strategy. *Id.* The Commission found that, in fact, SCWC realized a profit when it sold power purchased under the SCWC/Mirant agreement at \$95/MWh back to Mirant at \$173/MWh. *Id.* and n. 147, ER 236.

SCWC argues reliance on the so-called profit requires remand because, after determining that SCWC resold the power to Mirant at market-based rates without obtaining market-based rate authority, the Commission ordered SCWC to refund the amounts received in excess of the \$95/MWh SCWC paid for the power. SCWC Br. 56. *See Southern California Water Co.*, 106 FERC ¶ 61,305 ¶¶ 15-17 (2004), *reh'g pending*. The fact that SCWC had to pay back its profit because it made an unauthorized market-based sale provides no basis for a remand. The payback, which restored the *status quo ante*, did not upset the fundamental finding that the Mirant contract did not place SCWC in financial distress; and, indeed, the substantial cost savings finding remains unchallenged. *See Rehearing Order* ¶ 60,

ER 411. SCWC had the burden to show that SCWC suffered financial hardship that would adversely affect its customers as a result of its contract with Mirant, which it failed to do. *Id.* ¶ 61, ER 412.

SCWC likewise failed to show that the SCWC/Mirant contract imposed an excessive burden on its customers. Rehearing Order ¶ 38, ER 406. Pursuant to the terms of a settlement between SCWC and the CPUC, there was no rate increase for SCWC's ratepayers who are permanent residents of SCWC's service territory. *Id.* The other group of SCWC's ratepayers, owners of second homes in SCWC's service area, faced an average monthly electric bill of \$35.13. *Id.* Further, the weighted average cost of energy used to reach the CPUC settlement was \$77/MWh, only \$3/MWh more than the \$74/MWh advisory benchmark that SCWC argued would be a just and reasonable price. *Id.*

SCWC contends the purchased-power costs component in its retail rates increased 38% as a result of the Mirant contract. SCWC Br. 53-54. This contention does not demonstrate adverse rate impact on customers. Rehearing Order ¶ 38, ER 406. *See PEPCO*, 210 F.3d at 409 (affirming dismissal of buyer's complaint seeking to lower rates where buyer failed to show ratepayers were adversely affected by the existing rates). Whatever the purchased power component effects, there was no rate increase for permanent residents, and owners of second homes paid an average monthly electric bill of \$35.13. Rehearing Order

¶ 38, ER 406. While SCWC asserts permanent residents' rates remained the same only if they did not exceed 130% of their baseline usage, SCWC Br. 54, SCWC does not explain how *no* rate increase, up to 130% of baseline usage, is so burdensome on customers that the contract must be found contrary to the public interest. Further, SCWC attributes the low bills of its second-home owners to "small monthly usage and not low rates." SCWC Br. at 55. Whatever the reason for the low bills, the fact remains that SCWC has not shown that the Mirant contract unduly burdened ratepayers.

Further, in considering the totality of the circumstances, the Commission found no evidence of unfairness, bad faith or duress at the inception of the contract. Order on Initial Decision ¶ 107, ER 240. While SCWC complains that the "totality of the circumstances" was ill-defined, SCWC Br. 63, it was treated expansively to permit petitioners to present evidence of *any* circumstances preceding or following the execution of the challenged contracts that they felt could bear on the issue of the public interest. Order on Initial Decision ¶ 102, ER 237; Rehearing Order ¶ 67, ER 413. The Commission's "review of a broader range of evidence concerning the circumstances surrounding formation of the contracts at issue imposed no harm on the complainants. However, the complainants failed to make this showing; they also failed to meet the *Sierra* three-



prong test or demonstrate the contract abrogation is justified based on the totality of circumstances.” Rehearing Order ¶ 68, ER 413.

Here, the evidence showed that the Mirant contract was not the product of unfairness, bad faith or duress. SCWC chose to wait until March 2001, when the energy prices were at their peak, to start a bid solicitation process to replace its Dynegy contract, set to expire in May 2001. Order on Initial Decision ¶ 107, ER 240. SCWC’s request for proposals indicated a preference for fixed price offers for terms ranging from one to seven years at a price within the range of \$90/MWh. *Id.* Despite the restrictive nature of the SCWC bid solicitation process, it received three different responses with varying options, *id.*, which belies SCWC’s claim, *see* SCWC Br. at 60, that it had no options other than the Mirant contract. Rehearing Order ¶ 57, ER 410-11.

As to SCWC’s contention that it had no more competitively-priced options, SCWC Br. 60, in October 2000, SCWC rejected an offer by Dynegy to extend its contract on a “blend and extend” rate of between \$46.50 MWh to \$54.50/MWh, depending on the length of the proposed contract. Rehearing Order ¶ 59, ER 411. At that time, SCWC knew that prices had risen substantially above historical levels, and were well above the \$35.50/MWh price in its one-year contract with Dynegy. *Id.* Nevertheless, SCWC rejected the offer and waited to act to secure supply until March 2001 when prices were at their peak. *Id.*

SCWC asserts that it rejected Dynegy's offer because Dynegy would have required SCWC to replace the last six months of its \$35.50 contract with the higher-priced contract. SCWC Br. 61. Although SCWC recognized cost-savings from keeping the remaining six months of its Dynegy contract at the \$35.50/MWh rate, SCWC Br. 63, Dynegy's proposed blend and extend contract, even with a higher last six months, would still have been significantly lower than the Mirant contract. SCWC's rejection of the Dynegy proposal does not erase that proposal as a lower-priced option for fulfilling its need for continuing supply. While the Dynegy offer was off the table by March 2001, SCWC Br. 61, it could have been accepted prior to that and avoided the need to choose the Mirant contract.

At the time of contract execution, SCWC admitted that it expected prices to drop, yet accepted a fixed rate. Order on Initial Decision ¶ 107, ER 240. SCWC was in fact willing to enter into a contract of considerable length to get the fixed price it wanted, notwithstanding its expectation that high prices would fall shortly due to changes in the market. Rehearing Order ¶ 63, ER 412. As the rate agreed upon in the SCWC/Mirant contract was lower than the expected future spot market price, Order on Initial Decision ¶ 107, ER 240, SCWC chose to avoid price volatility by shifting the risk onto Mirant. Rehearing Order ¶ 63, ER 412. Only after spot market prices fell below the level SCWC expected did SCWC become dissatisfied with the bargain. *Id.* SCWC's dissatisfaction with its bargain does not

suffice as grounds to abrogate its contract in the public interest. *See PEPCO*, 210 F.3d at 409.

Fundamentally, SCWC argues that the Commission's factual findings do not support a determination that the Mirant contract is just and reasonable. *See, e.g.*, SCWC Br. 54 (arguing that Mirant contract is unjust and unreasonable and therefore imposes "excessive" burden on consumers); *id.* 55 (arguing that the fact that SCWC's \$77/MWh weighted average cost of power exceeds the \$74/MWh benchmark by only \$3/MWh does not demonstrate that the Mirant contract is just and reasonable); *id.* 56 (arguing that the just and reasonable rate for the Mirant contract may well be lower than the \$74/MWh benchmark); *id.* 59 (complaining that the Commission "made no finding that the Mirant contract rate was within a zone of reasonableness"); *id.* 60 (contending that consistency with its target price in the request for proposals was "irrelevant to show the contract price was lawful"); *id.* 62 (arguing that SCWC's choice to wait until March 2001, when prices were at their peak, to start its bid solicitation process does not justify the conclusion that the Mirant contract is just and reasonable).

The issue is not, however, whether the SCWC/Mirant contract was just and reasonable, but rather whether SCWC bore its burden to show that the Mirant contract imposed an excessive burden on consumers, threatened SCWC's ability to continue in business, was unduly discriminatory, or was the product at inception of

unfairness, bad faith, or duress. SCWC's attempt to abrogate a *Mobile-Sierra* contract by asserting that it is unjust and unreasonable conflates the just and reasonable and public interest standards in precisely the manner the First Circuit rejected. *Northeast Utilities I*, 993 F.2d at 961. As SCWC failed to adduce any evidence showing that the Mirant contract offended the public interest, Rehearing Order ¶ 51, ER 409, its arguments must be rejected.

Thus, petitioners failed to meet their burden to show that the public interest requires modification of their contracts. Much of the proffered evidence either went to the issue of whether the rates were just and reasonable, which does not address the issue here, or was discounted or stricken by the ALJ at hearing. Absent clear error, this Court defers to the ALJ's determination of the weight and inference to be accorded disputed evidence. *Ash Grove*, 577 F.2d at 1379.

#### **IV. SNOHOMISH'S CLAIMS OF DUE PROCESS VIOLATIONS ARE WITHOUT MERIT.**

##### **A. The Commissioners Did Not Violate *Ex Parte* Rules or the Sunshine Act, Nor Did They Prejudge Their Decision-making.**

Snohomish contends that the participation of Chairman Wood and Commissioner Brownell in a March 26, 2003 conference call with Wall Street analysts, following the release of the Commission's Final Staff Report on the Western Markets, violated the Commission's rules against *ex parte* communications, Snohomish Br. 49 (citing 18 C.F.R. § 385.2201(b)), and

constituted official agency action because the discussion “predetermine[d] official actions” under the Government in the Sunshine Act, 5 U.S.C. § 552b, Snohomish Br. 58. Snohomish asserts that, during that call and a subsequent teleconference held on March 28, 2003, Commission Brownell made statements committing herself and Chairman Wood to reject complaints seeking to abrogate long-term contracts as a result of the California spot market crisis. Snohomish Br. 48-51.

The Commission rejected Snohomish’s characterization of these events. April 23 Order ¶ 2. The telephone conference was part of “an ongoing outreach effort to the financial community, to states, to Congress, and others regarding major issues affecting energy customers and the energy industry.” *Id.* ¶ 4. Briefings, such as the telephonic conference, are not prohibited by the mere fact that a matter is pending before the Commission. *Id.* ¶ 5. Only off-the-record communications that are relevant to the merits of a contested on-the-record ongoing proceeding are prohibited. *Id.* (citing 18 C.F.R. § 385.2201(b)(4) & (5)). Other communications are not prohibited. *Id.* (citing *PATCO*, 685 F.2d at 563).

During the telephone conference, the Commissioners offered only information or viewpoints already discussed at the open meeting on the record. *Id.* ¶ 6. Accordingly, the Commissioners did not engage in any prohibited off-the-record communications under Rule 2201, nor did they taint any proceeding or cause any procedural unfairness. *Id.*

Nevertheless, to allay concerns, the Commission directed its staff to place a summary of the telephone conference in the decisional record, including a list of those invited to participate. *Id.* ¶ 8. Disclosure of the summary cured any possible prejudice by providing notice of these non-public communications. *Id.* (citing 5 U.S.C. § 557(d)(1)(C) & (D); *PATCO*, 685 F.2d at 565 and n. 36; *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981)). Therefore, the Commission found no merit in Snohomish’s request that Chairman Wood and Commissioner Brownell recuse themselves. *Id.*

Based on the assertion that the Commissioners stated how they intended to vote, Snohomish claims that the Commissioners’ communications were “relevant to the merits” of this proceeding, and therefore violated the *ex parte* rules, Snohomish Br. 55, and evidenced prejudgment prior to reviewing the record and issuing a formal decision, Snohomish Br. 49-53. The weight of the evidence, however, indicates otherwise.

The summary of the telephone conference showed no prejudgment. April 23 Order ¶ 7. Chairman Wood’s opening comments stated that the Commission had not yet taken official action on the contract abrogation cases, but was “still looking at the additional evidence that was submitted on March 3<sup>rd</sup> and the responses thereto filed March 20<sup>th</sup>.” ER 1367. Commissioner Brownell stated that

while the Commission is still uncovering and reviewing new evidence in the contract cases that it was her opinion, based on a wealth of

information about these contracts and the conversation from the bench today, that at this point in time she was probably the most fervent in her view that what she has looked at so far would not cause her to abrogate contracts.

*Id.* The author of the Summary, the Director of FERC's Office of External Affairs, closed the Summary with the statement that: "I listened to the discussion at the open meeting, the press conference and the conference call with the investment community. At no time did I hear the Chairman or Commissioner Brownell say anything substantively different in any of those three meetings." ER 1368.

Snohomish points to portions of an April 8, 2003 news article claiming that participants in the conference call stated that Commissioner Brownell said she and Chairman Wood would vote to uphold the contracts. Snohomish Br. 49-50 (citing ER 1358-59). The Commission rejected this evidence. Rehearing Order ¶ 84, ER 418. Contrary to what Snohomish gleaned from the news article, nothing particularly new was discussed in the approximately 45-minute conference call. *Id.* See ER 1366-68. Moreover, neither the article nor the Summary intimated that anyone tried to influence the decision in this proceeding. Rehearing Order ¶ 84, ER 418. See also ER 1377-78 (Commissioner Brownell's subsequent statement in the March 28, 2003 conference call reiterated that orders had not been issued in the long-term contract cases because of the "work that has to be done in developing

that,” and, while she had read all the evidence, and believed it unlikely that she would change her mind, “[i]t’s not final until we actually vote”).<sup>18</sup>

The Inspector General of the Department of Energy, who investigated these allegations, “did not identify evidence, based on the available record, substantiating the allegation that the conduct of the call violated any Commission procedural rule.” *Id.* (citing U.S. Department of Energy Office of Inspector General Special Inquiry, DOE/IG – 0610 June 2003, ER 1370). The Inspector General interviewed seventeen Wall Street representatives from twelve companies, nine of whom acknowledged participating in some or all of the conference call. *Id.* “None of the 17 Wall Street representatives [] interviewed who participated stated that Chairman Wood or Commissioner Brownell explicitly indicated, during the conference call, how they would vote on the contract cases.” *Id.* (citing U.S. Department of Energy Office of Inspector General Special Inquiry, DOE/IG – 0610 June 2003, Results of the Inquiry at 3, ER 1371).

Thus, the evidence demonstrates that the call was an effort to brief the financial community on action taken by the Commission that same day at its public meeting with respect to important and controversial cases involving the California

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<sup>18</sup> Snohomish also cites a purported statement by Commissioner Brownell concerning Enron market manipulation schemes. Snohomish Br. 50 (citing ER 199M). Assuming that the statement of a columnist referring to a month-old remark reflects what was actually said, the reported remark in no way evidences any “prejudgment” on the Commissioner’s part in this or any other case.



and Western energy markets. Rehearing Order ¶ 83, ER 417-18. Such briefings do not constitute a communication on the merits capable of influencing a decision, the prerequisite for an *ex parte* violation. *Id.* (citing 18 C.F.R. § 2201(c)(5)).

The cases cited, Snohomish Br. 51-53, are inapposite, because they involved public statements by decision makers of how they would vote, made prior to examining the evidence. *Id.* ¶ 85, ER 418-19 (citing *Antoniu*, 877 F.2d at 724; *McClure*, 228 F.3d 1205; *Staton*, 552 F.2d 908; and *Cinderella*, 425 F.2d 583). Here, Chairman Wood and Commissioner Brownell stated repeatedly they had examined the record, were still examining some evidence, and had not made a final decision. *Id.*

While the Commissioners may have had views on the law and policy involved in the case, that is not surprising considering that they had been reviewing for months the massive record that had already been compiled. April 23 Order ¶ 7; Rehearing Order ¶ 85, ER 419. The record included by the time of the conference call numerous pleadings, trial testimony, exhibits, initial and reply briefs, an ALJ initial decision, and briefs on and opposing exceptions. *Id.* The filing of briefs opposing exceptions normally closes the record in an adjudication. Rehearing Order ¶ 85, ER 418-19. But here, an oral argument was held after the time of the conference call, and evidence submitted in the separate 100 Day Discovery Proceeding was considered. *See* Snohomish Br. 54. Consequently, no final

decision had yet been made. *Id.* This special treatment explains the apparent inconsistency between the Commission’s statements that it was “still examining the evidence” when the “record was complete and reviewed, and the Commission was poised to act.” Snohomish Br. 53-54 (citing Rehearing Order ¶ 85, ER 419). The fact that the Commissioners stressed that they were still examining the evidence shows impartiality, which is reinforced by their subsequent decision to hold oral argument. April 23 Order ¶ 7.

Accordingly, Snohomish has shown no prejudgment by Chairman Wood or Commissioner Brownell. *Id.* Even if the conference call were a prohibited off-the-record communication, that violation has already been appropriately remedied, and no grounds are present for recusal. *Id.* ¶ 86, ER 419. *Ex parte* communications may be remedied administratively by disclosing the communication and its contents. *Id.* (citing 5 U.S.C. § 557(d)(1)(C)&(D); *PATCO*, 685 F.2d at 565 n.36). Placing summaries in the decisional record apprised parties “of any argument that may have been presented privately, thereby maintaining the integrity of the process and curing any possible prejudice that the contacts may have caused.” *Id.* (citing *Louisiana Ass’n*, 958 F.2d at 1112).

In addition, recusal is not necessarily desirable even where there may have been *ex parte* communications. *Id.* ¶ 87, ER 420. *See Louisiana Ass’n*, 958 F.2d at 1112 (citing *Cement Inst.*, 333 U.S. at 702) (“It is expected that administrative

officials will build up expertise through experience with recurring issues”); *Laird*, 409 U.S. at 837 (“Such expertise should not lightly be tossed aside”). Recusal here, therefore, would be an extraordinary and unwarranted remedy. *Id.* (citing *Power Authority*, 743 F.2d at 110) (“The mere existence of such communications hardly requires a court or administrative body to disqualify itself”). The court further explained, 743 F.2d at 110, that:

recusal would be required only if the communications posed a serious likelihood of affecting the agency’s ability to act fairly and impartially in the matter before it. In resolving that issue, one must look to the nature of the communications and particularly to whether they contain factual matter or other information outside of the record, which the parties did not have an opportunity to rebut.

Recusal of two Commissioners here would have rendered the Commission unable to take the action here because only one Commissioner would have remained eligible and FERC cannot act on the vote of one Commissioner.

Snohomish’s claim that the May 26 conference call violated the Sunshine Act similarly is without merit. The Sunshine Act applies only to a “meeting of an agency.” *Id.*, ER 423 (citing 5 U.S.C. § 552(b); 5 U.S.C. § 552 b(a)(2), *ITT World Communications, Inc.*, 466 U.S. at 469) (“None of the Sunshine Act’s requirements is triggered, however, “unless the gathering in question is a ‘meeting’ of that agency”). Section 552b(a)(2) defines a Sunshine Act “meeting” as “the deliberations of at least the number of individualized agency members required to take action on behalf of the agency where such deliberations determine or result in

the joint conduct or disposition of official agency business." *Id.* (citing *Natural Resources*, 216 F.3d at 1182).

*ITT World Communications, Inc.*, 466 U.S. at 470, cited Rehearing Order ¶ 96, ER 423, expressly found that the Sunshine Act requires that a quorum of the agency be present to constitute a "meeting" subject to the Act. "Section 552b(a)(2) therefore limits the Act's application to meetings 'where at least a quorum of the agency's members . . . conduct or dispose of official agency business.'" *ITT World Communications*, 466 U.S. at 470 (quoting S.Rep. No. 94-354, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess.. at 2 (1975)). *See also Natural Resources*, 216 F.3d at 1184 ("The Act states that the term 'meeting' means the deliberations of a quorum of an agency"); *Johnston v. NRC*, 766 F.2d 1182, 1183 (7<sup>th</sup> Cir. 1985) (A "meeting" subject to the Sunshine Act requirements occurs "[w]hen a quorum of individuals belonging to the collegial body heading the agency meet to conduct official agency business"); *Common Cause v. NRC*, 674 F.2d 921, 930 n. 26 (D.C. Cir. 1982) (recognizing that the House report, like the Senate report, declared that meetings covered by the Sunshine Act "include not only sessions at which formal action is taken, but also those at which a quorum of members deliberates regarding the conduct or disposition of agency business'") (quoting H.R. Rep. No. 94-880 (part 1), 94<sup>th</sup> Cong., 2d Sess. 2 (1976)).

The Commission's Sunshine Act regulations reflect this law: "the deliberations of at least a quorum of the Commission" are required for the Sunshine Act to apply. 18 C.F.R. § 375.202(a)(1). Congress set a FERC quorum as at least three members of the Commission. *See* 42 U.S.C. § 7171(e) (for the Commission "a quorum for the transaction of business shall consist of at least three members present"). *See also* 16 U.S.C. § 792 ("[t]hree members of [FERC] shall constitute a quorum for the transaction of business"); 18 C.F.R. § 375.101(e) (defining a FERC quorum as consisting of "at least three members present"). Because only two Commissioners (Chairman Wood and Commissioner Brownell) participated in the call, there was no quorum to constitute a Commission "meeting" subject to the Sunshine Act.

Snohomish argues that the presence of a "quorum" was "irrelevant" since, at the time, the Commission had only three sitting Commissioners, and two were sufficient to take action on behalf of the agency. *Snohomish Br. 57*. This confuses the number required to be present for action to be taken – the quorum – with the majority vote of that quorum necessary to approve action. Thus, while Snohomish is correct that in those circumstances the vote of two Commissioners could determine how FERC would act, this does not change the fact that statute and regulation specify that three Commissioners are required to constitute a quorum, and a quorum is necessary to constitute a "meeting" subject to the Sunshine Act.

*ITT World Communications*, 466 U.S. at 470. Snohomish’s claim must therefore be rejected.

Furthermore, the Sunshine Act claim is jurisdictionally barred. Snohomish did not assert its Sunshine Act claim until July 28, 2003, as part of a so-called “supplemental” request for rehearing. Rehearing Order ¶ 95, ER 422. The FPA makes no provision for supplemental rehearing after the statutory deadline has passed. As a July 28 “supplement” is well past the 30 days allowed for rehearing of the April 23 Order, it was untimely. *Id.* ¶ 95 n. 90, ER 422 (citing 16 U.S.C. § 825I(a) and (b)). Pursuant to 16 U.S.C. § 825I(a) and (b), judicial review is limited to those issues timely urged before the Commission on rehearing. Thus, Snohomish’s failure to satisfy the statutory prerequisite bars this Court from considering those issues on review.

In any event, Snohomish’s claim that “official agency business” occurred during the March 26 conference call because it was a “discussion[] which effectively predetermine[s] official actions,” Shohomish Br. 58, depends on its argument that the Commissioners prejudged this matter. As no prejudgment occurred, Snohomish’s claims are without merit. The conference call did not involve any “deliberations” that “determine or result in the joint conduct or disposition of official agency business.” Rehearing Order ¶ 96, ER 423 (citing 5 U.S.C. § 552b(a)(2)). *See also* ER 1366-68 (discussion repeated views expressed

at open meeting). Even if the Commissioners did express their views regarding this proceeding, no “official agency business” was disposed of or conducted during the conference call. *Id.* Therefore, the Commission, treating it as a motion for reconsideration, rejected Snohomish’s claim that the conference call violated the Sunshine Act. *Id.*

**B. The Commission Did Not Violate Snohomish’s Due Process Rights By Relying on the Staff Report and 100 Day Discovery Proceeding Evidence.**

Snohomish complains that its due process rights were violated by its inability to address or rebut conclusions in the Staff Report and the evidence from the 100 Day Discovery Proceeding. Snohomish Br. 60. Snohomish also argues that the Commission failed to identify particular evidence from these proceedings that supports its conclusions. Snohomish Br. 61.

Snohomish’s arguments here contravene its position at FERC, where Snohomish filed a motion to reopen the record to admit the Staff Report and evidence from the 100 Day Discovery Proceeding, or in the alternative, to take official notice of that evidence. Order on Initial Decision ¶¶ 126, 133, ER 246, 248. Thus, “[i]n deciding this case, the Commission considered the Staff Report findings and the evidence submitted in the 100-Day Discovery Proceeding upon the Complainants’ request.” Rehearing Order ¶ 73, ER 415. Having gotten what it sought, Snohomish should not be heard now to object to it. When Snohomish

made its motion, it was well aware that the findings and allegations in the Report and the Proceeding were contested. *Id.*

Further, Snohomish's contention that the Commission should be required to identify specific evidence on which its conclusion rests is not well taken here. Snohomish sought inclusion of the evidence to show manipulation in the spot markets. The Commission noted that the Staff Report and the 100 Day Discovery Proceeding "suggest that the California ISO and PX markets were subjected to market manipulation and gaming." Order on Initial Decision ¶ 94, ER 234. For purposes of this proceeding, the Commission *assumed those allegations to be true. Id.* Thus, the very point Snohomish sought to establish through this evidence was assumed to be true for purposes of this proceeding. Further argument or rebuttal of contrary evidence in the Report or the Proceeding would have been superfluous.

Snohomish's real problem, assuming there to be spot market manipulation, resulted from its failure to link that manipulation with the necessary public interest showing for modification of its forward contracts. *Id.*

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. As fully discussed below, we conclude that the Complainants failed to make such a showing.

*Id.*



Granting Snohomish's own request to admit the Staff Report and 100 Day Discovery Proceeding evidence into the record, and then assuming the contentions of market manipulation in that evidence to be true, were far from depriving Snohomish of its due process rights. Rather, the Commission gave Snohomish every benefit of the doubt, but Snohomish was still unable to meet its burden of proof.

**C. The ALJ Did Not Violate Snohomish's Due Process Rights During The Hearing.**

Snohomish contends that certain of the ALJ's procedural and evidentiary rulings during the hearing violated its due process rights. Snohomish Br. 62-64. Snohomish fails to substantiate these claims. First, Snohomish complains that the ALJ limited Snohomish's cross-examination of certain witnesses to one hour, *id.* 62-63, but Snohomish failed to demonstrate any prejudice from this ruling. The ALJ is obligated to "assure that the taking of evidence and subsequent matters proceed with all reasonable diligence and with the least delay practicable." 18 C.F.R. § 385.504(a)(4). Snohomish makes no proffer of what it was unable to establish on cross due to the ruling. Accordingly, no basis exists to overrule the ALJ's conduct of the hearing.

Snohomish also complains of the ALJ's rejection of Snohomish's proffered evidence of manipulation in the spot markets. Snohomish Br. 63. Rejection was based, however, on a Commission investigation of such alleged manipulation that

was being conducted in a separate proceeding. April 11 Order at 13-14 n. 12, ER 13-14. *See* ER 121; 130 (cited Snohomish Br. 63) (ALJ ruling that evidence pertinent to the investigation into manipulation in the Western spot markets is relevant to the investigation proceeding and not this proceeding).

Snohomish claims that sellers were allowed to cross-examine on market power abuse issues, but Snohomish was not. *See* Snohomish Br. 63. However, a review of the referenced pages shows that the sellers' cross-examination concerned alleged manipulation evidence introduced by complainants specific to the sellers in this case. *See* ER 54-55 (Morgan Stanley and Mirant market conduct); ER 57-59 (Mirant market conduct); ER 66 (whether there are findings that any individual entity manipulated the market); ER 67-69 (Enron market conduct); ER 70 (Morgan Stanley conduct). On the other hand, Snohomish's disallowed cross-examination concerned generic market manipulation not specific to the sellers involved here. *See* ER 103 (whether the market was manipulated); ER 106 (the existence of market manipulation generally and its impact on spot and forward markets); ER 139 (transactions being investigated in the separate proceeding); ER 145-49 (exercise of market power by market participants not a party to this proceeding).

Similarly, on Snohomish's contention regarding the admission of public evidence, Snohomish Br. 63, the ALJ agreed to consider on brief the proffer of evidence from another proceeding concerning the terms of a particular agreement,

in rebuttal to an expert's testimony that there was no information available concerning that agreement's terms. *See* ER 78. This hardly qualifies as a "promise" to accept the world of public "evidence" Snohomish wished to present "demonstrating the extent of market power abuse occurring across the West," Snohomish Br. 63, which was, again, the subject of the separate investigatory proceeding.

"An agency enjoys broad discretion in determining how to handle related, yet discrete, issues in terms of procedures." *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1990) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978)). The Court has expressly approved agency decisions to treat related issues separately "where a different proceeding would generate more appropriate information and where the agency was addressing the question." *Id.* Here, the Commission reasonably concluded that the complex issues involved in its investigation of alleged manipulation of the spot markets were better addressed in a separate proceeding, a determination well within the Commission's discretion.

This manner of ordering the proceedings did not, moreover, prejudice Snohomish. As discussed above, the Commission assumed for purposes of this proceeding that the allegations concerning spot market manipulations were true. Order on Initial Decision ¶ 94, ER 234. Under these circumstances, there was no

error in excluding spot market manipulation evidence and no prejudice to Snohomish from the exclusion.

### **CONCLUSION**

For the reasons stated, the Commission's orders should be affirmed in all respects.

### **STATEMENT OF RELATED CASES**

Respondent has no related cases to add to those listed by Petitioners.

Respectfully submitted,

Dennis Lane  
Solicitor

Lona T. Perry  
Attorney

Federal Energy Regulatory  
Commission  
Washington, DC 20426  
TEL: (202) 502-6600  
FAX: (202) 273-0901

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