No. 16-531

In the Supreme Court of the United States

AMEREN SERVICES COMPANY, AS AGENT FOR UNION ELECTRIC COMPANY, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

NOEL J. FRANCISCO
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MAX MINZNER
General Counsel
ROBERT H. SOLOMON
Solicitor
LONA T. PERRY
Deputy Solicitor
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission was required to presume that contractual terms providing rights of first refusal to construct electric transmission facilities, negotiated among owners of such facilities with a common interest in excluding competition, were reasonable.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 16-531

AMEREN SERVICES COMPANY, AS AGENT FOR UNION ELECTRIC COMPANY, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 819 F.3d 329. The orders of the Federal Energy Regulatory Commission (Pet. App. 16-401, 402-797) are reported at 147 F.E.R.C. ¶ 61,127 and 142 F.E.R.C. ¶ 61,215.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2016. A petition for rehearing was denied on June 16, 2016 (Pet. App. 798-799). On September 6, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including October 14, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are utility companies that provide electric transmission services throughout the Midwest. They are members of the Midcontinent Independent System Operator, Inc. (MISO), a non-profit organization that manages petitioners' transmission facilities.[1] Before 2011, the members of MISO had entered into an agreement that gave MISO the authority to determine where within its operating area new transmission facilities should be built and gave the MISO member responsible for servicing that region a "right of first refusal" to construct the facility. In 2011, after a rulemaking proceeding, the Federal Energy Regulatory Commission (FERC or Commission) issued an order concluding that, with some exceptions, such rights of first refusal were unjust and unreasonable and that utilities must open transmission-facility construction to competition.

In making that determination, the Commission did not address whether existing rights of first refusal should be presumed reasonable under this Court's decisions in *United Gas Pipe Line Co*. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*). Those decisions establish what is known as the *Mobile-Sierra* doctrine, under which FERC must presume that a rate established in a contract that was the result of fair, arms-length negotiations is reasonable unless the Commission finds that the rate is contrary to the public interest. In the orders challenged here, the Commission found that the *Mobile-Sierra*

[1] Before 2013, MISO was known as the Midwest Independent Transmission System Operator, Inc. Pet. App. 24 n.3. This brief refers to both entities as MISO.

presumption did not apply to petitioners' right of first refusal. Pet. App. 500-544; see *id.* at 80-117 (denying rehearing). Petitioners filed a petition for review, which the court of appeals denied. *Id.* at 1-15.

1. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, grants FERC jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. See 16 U.S.C. 824(a)-(b). This grant of jurisdiction is comprehensive and exclusive. See generally *FERC* v. *Electric Power Supply Ass'n*, 136 S. Ct. 760, 767 (2016) (*EPSA*); *New York* v. *FERC*, 535 U.S. 1 (2002). All rates for or in connection with jurisdictional sales and transmission services are subject to Commission review to assure they are "just and reasonable" and not unduly discriminatory or preferential. 16 U.S.C. 824d(a) and (e). "Rates may be examined by the Commission, upon complaint or on its own initiative, when a new or altered tariff or contract is filed or after a rate goes into effect." *NRG Power Mktg., LLC* v. *Maine Pub. Utils. Comm'n*, 558 U.S. 165, 171 (2010) (*NRG*) (citing 16 U.S.C. 824d(e), 824e(a)). To facilitate such review, the FPA requires every public utility to file with the Commission, pursuant to rules developed by the Commission, "schedules showing all [jurisdictional] rates and charges * * * together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." 16 U.S.C. 824d(c); see 18 C.F.R. Pt. 35 (filing obligations).

2. Since the 1970s, a combination of technological advances and policy reforms has given rise to market competition among power suppliers. The expansion of vast regional grids and the possibility of long-distance

transmission has enabled electric utilities to make large transfers of electricity in response to market conditions, thereby creating opportunities for competition among suppliers. See *New York*, 535 U.S. at 7-8; see also *EPSA*, 136 S. Ct. at 768 (explaining evolution of competitive markets). In response to these "dramatic changes in the power industry," *New York*, 535 U.S. at 5, the Commission has used its rulemaking authority under the FPA to "break down regulatory and economic barriers that hinder a free market in wholesale electricity," *Morgan Stanley Capital Grp., Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 536 (2008) (*Morgan Stanley*).

This case concerns one such rule, known as Order No. 1000, which the Commission promulgated in 2011 to "address opportunities for undue discrimination by public utility transmission providers" and to "ensure that rates for Commission-jurisdictional service are just and reasonable in light of changing conditions in the industry." 76 Fed. Reg. 49,845 (Aug. 11, 2011). Among other things, the Order directed utilities "to remove provisions from Commission-jurisdictional tariffs and agreements that grant incumbent transmission providers a federal right of first refusal to construct transmission facilities selected in a regional transmission plan for purposes of cost allocation." *Id.* at 49,885. Such provisions "gave incumbent utilities the option to construct any new transmission facilities in their particular service areas, even if the proposal for new construction came from a third party" and even if the third party was capable of building the facility more cheaply. *South Carolina Pub. Serv. Auth.* v. *FERC*, 762 F.3d 41, 72 (D.C. Cir. 2014) (*South Carolina*); see 76 Fed. Reg. at 49,880-49,881.

The Order noted that "it is not in the economic self-interest of public utility transmission providers to expand transmission capacity to allow access to competing suppliers" or "to permit new entrants to develop transmission facilities," and that rights of first refusal were a principal means by which incumbent providers could "discourage new entrants from proposing new transmission projects," even if those projects "would result in a more efficient or cost-effective solution to the region's needs." 76 Fed. Reg. at 49,886; see *ibid.* (noting that rights of first refusal discouraged non-incumbents from identifying regional needs for greater transmission capacity and proposing solutions). The resulting lack of competition, the Commission found, could "result in rates for Commission-jurisdictional services that are unjust and unreasonable or otherwise result in undue discrimination" against non-incumbent providers, to the ultimate detriment of consumers. *Id.* at 49,846, 49,885; see *id.* at 49,881-49,882 (noting conclusion of numerous commenters on proposed rule that increased competition would result in lower costs to consumers).

The D.C. Circuit upheld Order No. 1000, including the prohibition on rights of first refusal, as a lawful exercise of the Commission's authority. *South Carolina*, 762 F.3d at 48-49, 72-81. The court declined to consider whether the *Mobile-Sierra* doctrine applied to existing rights of first refusal because the Commission had deferred deciding that issue in Order No. 1000, leaving it to be resolved in future compliance proceedings. *Id.* at 81.

3. MISO is a non-profit organization, created with FERC approval, that operates the transmission facilities of utility companies throughout the Midwest,

including petitioners. See *Midwest Indep. Transmission Sys. Operator, Inc.*, 84 F.E.R.C. ¶ 61,231, at 62,138 (1998). Petitioners are parties to a contract, known as the Transmission Owners Agreement, which grants MISO functional control over their transmission facilities in exchange for the benefits that come from regional coordination. *Id.* at 62,139; see Pet. App. 3-4. Before 2011, Section VI of that Agreement contained a provision that gave each party the right to construct and own any new facilities developed in MISO's operating area that were connected to that party's system and the right to share in the construction and ownership of any facilities that linked that party's system to another party's system. See Pet. App. 545 (reprinting original language of Section VI with petitioners' proposed modifications to comply with Order No. 1000).

In 2012, petitioners submitted proposed revisions to the Transmission Owners Agreement to comply with Order No. 1000. See Pet. App. 800-827. The compliance filing asserted, however, that the right of first refusal was subject to the *Mobile-Sierra* presumption of reasonableness and thus the Commission could not require that Section VI be changed unless it found that the change was required by the public interest. *Id.* at 806.

4. The Commission concluded that Section VI of the Transmission Owners Agreement was not subject to the *Mobile-Sierra* presumption of reasonableness, for two independent reasons. See Pet. App. 102-115; *id.* at 532-543.

First, the Commission determined that Section VI reflected an agreement among incumbent transmission owners with a common interest in protecting themselves from competition, and thus it "lacked the requisite characteristics of arm's-length bargaining" that *Mobile-Sierra* requires. Pet. App. 106; see, *e.g.*, *id.* at 104-108; *id.* at 537 n.339 (noting that "'the premise on which the *Mobile-Sierra* presumption rests' is 'that the contracts are the product of fair, arm's length negotiations'") (quoting *Morgan Stanley*, 554 U.S. at 554). The Commission explained that, unlike a "typical arm's length transaction involv[ing] an adversarial negotiation in which the parties have independent interests and each tries to obtain the best deal for itself," Section VI reflected an effort by aligned parties to "pursue a single, common, and shared interest" in protecting their monopoly on transmission development within MISO's operating area against possible competitors. *Id.* at 104-105. The Commission concluded that, unlike in the *Mobile-Sierra* cases, there was no reason to presume that such a process would result in a reasonable rate. *Ibid.*

Second, the Commission found that the *Mobile-Sierra* presumption did not apply because Section VI established a rule of general applicability and thus was more akin to a rate, term, or condition in a tariff, not a contract. Pet. App. 108-113; see *id.* at 535-536. Under the FPA, utilities may set rates by filing "compilations of their rate schedules, or 'tariffs,' with the Commission," or they may set rates "with individual electricity purchasers through bilateral contracts." *Morgan Stanley*, 554 U.S. at 531 (citing 16 U.S.C. 824d(c) and (d)); see *NRG*, 558 U.S. at 171 (FPA "allows regulated utilities to set rates unilaterally by tariff; alternatively, sellers and buyers may agree on rates by contract."). The Commission is required to apply the *Mobile-Sierra* presumption of reasonableness only to "rates set bilaterally by contract rather than unilaterally by tariff." *Morgan Stanley*, 554 U.S. at 532; see Pet. App. 533-534.

The Commission noted that, unlike the ten original transmission owners who negotiated the Transmission Owners Agreement, all transmission owners who subsequently joined MISO were required to accept the Agreement, including the right of first refusal, in total. Pet. App. 536. "As a result," the Commission found, "new MISO members are placed in a position that differs fundamentally from that of parties who are able to negotiate freely, like buyers and sellers entering into a typical power sales contract that would be entitled to a *Mobile-Sierra* presumption." *Ibid.*; see *id.* at 110. Thus, the Commission concluded that "the right of first refusal provision in the Transmission Owners Agreement formulates a rule that is a prescription of general applicability rather than a negotiated rate provision" subject to the *Mobile-Sierra* presumption. *Id.* at 83.

5. The court of appeals affirmed the Commission's orders. Pet. App. 1-15. The court agreed with the Commission's finding that, because the right of first refusal provision gave "every member of MISO * * * a protected monopoly * * * regarding the construction of new facilities in its service area," it was not subject to the *Mobile-Sierra* presumption. *Id.* at 6; see *id.* at 9-10.

The court of appeals explained that the *Mobile-Sierra* presumption depends on parties bringing "adverse interests to the table," resulting in a "contract [that] could be assumed to have split the difference" and a rate that may be presumed reasonable. Pet. App. 10; see *id.* at 9 (noting facts of *Sierra*). The court held that the basis for such a presumption is absent where, as here, "the negotiation that led to the provisions at issue" was "among parties with the same interest, namely, protecting themselves from competition in transmission development." *Id.* at 8 (quoting Pet. App. 537) (emphasis omitted); see *id.* at 10 (noting that "cartels are the classic example of such contracts"). In that situation, the court concluded, there is no reason to presume that the parties will reach a just and reasonable outcome. *Id.* at 6-7, 9-10.[2]

ARGUMENT

Petitioners argue (Pet. 18-30) that the court of appeals' decision is inconsistent with the *Mobile-Sierra* doctrine and erroneously "lets stand" the Commission's alternative conclusion that Section VI of the Transmission Owners Agreement is more akin to a tariff than a contract. Those contentions do not merit review: the court's decision is fully consistent with this Court's precedent; the only other court of appeals to have considered the question has reached the same conclusion; and the court did not affirm, or even mention, the Commission's alternative ground in its decision. Petitioners further argue (Pet. 31-35) that the court misapplied administrative law principles by basing its decision on a finding that rights of first refusal are contrary to the public interest, an issue the Commission did not address. The court did not, however, make such a finding, nor would it have affected the judgment. The petition should be denied.

---

[2] The court of appeals consolidated this case with two others that raised different challenges to the Commission's orders. See Pet. App. 10-15. Those cases are not at issue here.

1. The *Mobile-Sierra* doctrine is "grounded in the commonsense notion that '[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them.'" *Morgan Stanley Capital Grp., Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 545 (2008) (quoting *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 479 (2002)). The presumption "rests" on the "premise * * * that the contract rates are the product of fair, arms-length negotiations." *Id.* at 554.

In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), for example, a natural gas supplier agreed to provide gas to a distributor at a "rate substantially lower than" its usual rate. *Id.* at 336. Pursuant to the Natural Gas Act, 15 U.S.C. 717 *et seq.*, the supplier then filed a schedule with the Federal Power Commission (FERC's predecessor) in which it "purported to increase the rate." 350 U.S. at 336. This Court held that the Natural Gas Act "preclud[ed] natural gas companies from unilaterally changing their contracts simply because it is in their private interests to do so." *Id.* at 344. The Court explained that one of the main purposes of the Act was to promote "the stability of supply arrangements" between natural gas suppliers and distributors, which were "essential to the health of the natural gas industry" and would be undermined if every rate were subject to revision at the supplier's whim. *Ibid.* The Court noted, however, that this result did not impair the regulatory powers of the Commission, because contract rates "remain[ed] fully subject to the paramount power of the Commission to modify them when necessary in the public interest." *Ibid.*

FPC v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) involved a similar arrangement between a supplier and distributor of electricity and a similar attempt by the supplier to unilaterally increase the rate. *Id.* at 352. The Commission approved the increased rate and suggested that the contract rate was "unreasonably low and therefore unlawful" because it did not provide the supplier with a fair rate of return. *Id.* at 354 (citation omitted). This Court reversed. It explained that, although "the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain." *Id.* at 355. The Court concluded that the Commission's "sole concern" in such cases was whether the agreed-upon rate would "adversely affect the public interest," such as "where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Ibid.*

More recent cases have confirmed that the *Mobile-Sierra* presumption attaches to "rate[s] set out in a freely negotiated wholesale-energy contract" between buyers and sellers with independent interests. *Morgan Stanley*, 554 U.S. at 530. In *Morgan Stanley*, for example, public utilities that had entered into long-term contracts with suppliers to purchase electricity at high rates during an energy crisis asked FERC to reduce the rates after the crisis had passed. *Id.* at 540-541. The Court reiterated that, when considering an agreement between sophisticated parties reached as a result of "fair, arms-length negotiations," *id.* at 554, the *Mobile-Sierra* doctrine limits the Commission's review to "whether the rates seriously harm the public interest, not * * * whether they are unfair to one of the parties that voluntarily assented to the contract," *id.* at 546-547. The Court noted, however, that when a contract is not the result of fair, arms-length bargaining—if, for example, it is the product of "fraud or duress" or "extensive unlawful market manipulation" that "alter[s] the playing field for contract negotiations"—the Commission has "ample authority" to set the contract aside without applying the *Mobile-Sierra* presumption. *Id.* at 547, 554.

In *NRG Power Marketing, LLC* v. *Maine Public Utilities Comm'n*, 558 U.S. 165 (2010), participants in the New England energy market entered into a FERC-approved settlement agreement that established mechanisms for setting rates and explicitly provided that the resulting rates would be judged using the *Mobile-Sierra* presumption. *Id.* at 169-170. Several parties who had been involved in the negotiations but objected to the agreement challenged that provision, arguing that the *Mobile-Sierra* doctrine does not apply to rate challenges by noncontracting parties. *Id.* at 171. In rejecting that argument, this Court reiterated (again) that the *Mobile-Sierra* doctrine is based on the assumption that "well-informed wholesale-market participants of approximately equal bargaining power generally can be expected to negotiate just-and-reasonable rates." *Id.* at 175 n.4; see *id.* at 168 (noting that the *Mobile-Sierra* doctrine is the method by which "the statutory just-and-reasonable standard" is to be applied "in the context of rates set by contract"). Because "FERC itself must presume just and reasonable a contract rate resulting from fair, arms-length negotiations," the Court held, the presumption applies regardless of whether the entities challenging the rate are parties to the contract. *Id.* at 174-175.

The principle underlying these cases is straightforward. Participants in the wholesale energy market are sophisticated, and when they engage in fair, arms-length negotiations with each other—one seeking to buy electricity at a low rate, and the other wishing to sell it at a high rate—the rate on which they ultimately agree is presumptively a reasonable one. Federal regulators may not second-guess the wisdom of that bargain unless it "seriously harms the consuming public." *Morgan Stanley*, 554 U.S. at 545-546.

2. The right of first refusal at issue in this case does not comport with that principle. Even assuming that the *Mobile-Sierra* doctrine applies to contract provisions that do not explicitly "set out" a rate negotiated between "a party charging the rate and the party charged," *Morgan Stanley*, 554 U.S. at 530, 545 (citation omitted); see *Oklahoma Gas & Elec. Co.* v. *FERC*, 827 F.3d 75, 79 (D.C. Cir. 2016) (reserving decision on that question), Section VI is not the result of "arms-length negotiations" between parties with independent interests. *Morgan Stanley*, 554 U.S. at 554. A presumption of reasonableness makes sense when "parties deal[] at arms' length and in the general and open market, subject to the usual safeguards of bargaining and competition." *Western Distrib. Co.* v. *Public Serv. Comm'n*, 285 U.S. 119, 127 (1932) (addressing authority of state utility commission to investigate reasonableness of gas rates); see *Maine Pub.*

Util. Comm'n v. *FERC*, 625 F.3d 754, 759 (D.C. Cir. 2010) ("A freely-negotiated contract rate * * * [is] presumptive evidence that the rate was just and reasonable because it reflect[s] market forces."). But "[a]n averment of negotiation and effort to procure a reduction in the wholesale rate means little" where "the negotiators are both acting in the same interest"; in that scenario, the parties are not "independent of each other and dealing at arms' length," and their agreement "must necessarily be the subject of inquiry and scrutiny." *Western Distrib.*, 285 U.S. at 126; see Pet. App. 9-10, 104-105; cf. *Interstate Natural Gas Co.* v. *Federal Power Comm'n*, 331 U.S. 682, 693 n.23 (1947) (Commission may consider "reasonableness" of gas distribution costs "when buyer and seller are affiliated corporations and there is evidence that the sales were not made at arms length.").

As the Commission and the court of appeals correctly found, Section VI is the product of a collusive arrangement between parties with a mutual interest in maintaining their monopoly over the construction of transmission facilities within MISO's operating area—an arrangement that allows them to avoid "hav[ing] to bid down the prices at which they will build new facilities in order to remain competitive" and to pass on the costs of any resulting inefficiencies to consumers in the form of higher rates. Pet App. 6; see *id.* at 5-6, 10, 104-105, 537. In those circumstances, non-incumbents have no incentive to invest time and money evaluating an area's energy needs because the incumbent will get a first crack at exploiting any opportunities the non-incumbents identify. *Id.* at 5; see 76 Fed. Reg. at 49,886. The *Mobile-Sierra* doctrine is based on the assumption that sophisticated parties with competing interests and equal bargaining power will usually reach a compromise that is reasonable and fair. The opposite is true when parties collude with one another to restrain competition and maintain a monopoly. Cf. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 52 (1911).

The only other court of appeals to have considered the question has reached the same conclusion. In *Oklahoma Gas & Electric*, *supra*, the D.C. Circuit held that a similar right of first refusal provision was not subject to the *Mobile-Sierra* presumption because that doctrine "does not extend to anti-competitive measures that were not arrived at through arms-length bargaining. In other words, the contract term must be the product of adversarial negotiations between sophisticated parties pursuing independent interests." 827 F.3d at 79-80. Adopting the court's reasoning in this case, the D.C. Circuit held that a right of first refusal allows parties "to protect themselves from competition from third parties" and is thus "a far cry" from the sorts of provisions at issue "in the original *Mobile-Sierra* cases." *Id.* at 80 (citation omitted).

3. Petitioners contend (Pet. 19) that *NRG* and *Morgan Stanley* establish a broad rule applying the *Mobile-Sierra* presumption to all "rights established by valid contracts." As explained, neither of those decisions says what petitioners claim. See *NRG*, 558 U.S. at 175 n.4 (*Mobile-Sierra* doctrine applies to "rate[s] set out in a freely negotiated wholesale energy contract" between "well-informed wholesale market participants of approximately equal bargaining power.") (citation omitted); *Morgan Stanley*, 554 U.S. at 530, 545 (same). See *Oklahoma Gas & Elec.*, 827

F.3d at 79-80 (rejecting argument that *NRG* and *Morgan Stanley* require Commission to apply *Mobile-Sierra* presumption to rights of first refusal).

Petitioners note (Pet. 24) that *Morgan Stanley* recognized an exception to the *Mobile-Sierra* doctrine for rate-setting contracts that are tainted by fraud, duress, unlawful market manipulation, or other wrongful conduct by one of the parties. 554 U.S. at 547, 554. But the Court did not say (or imply) that those were the *only* exceptions that would apply to *any* contract provision, including a provision that does not reflect arms-length negotiations between adverse parties. See *Oklahoma Gas & Elec.*, 827 F.3d at 80. And although it is true (Pet. 26) that *NRG* applied the *Mobile-Sierra* presumption to rate challenges brought by noncontracting parties, 558 U.S. at 175, it did so based on the assumption that "well-informed wholesale market participants of approximately equal bargaining power in general can be expected to negotiate just and reasonable rates" for the market as a whole, subject to the Commission's review of the rates' effect on the public interest, *id.* at 175 n.4. There is no reason to believe that a contract negotiated by parties with a shared interest in excluding third-party competition is similarly just and reasonable. See Pet. App. 5-8.

Petitioners argue (Pet. 21-23) that the court of appeals disregarded *NRG*'s observation that the purpose of the *Mobile-Sierra* doctrine is to promote "the stability of supply arrangements." 558 U.S. at 175 (quoting *Mobile*, 350 U.S. at 344). According to petitioners (Pet. 22-23), Section VI "plays a key role" in the Transmission Owners Agreement and the entire agreement will be less "stabl[e] and certain[]" without it. The court of appeals rejected those factual assertions as unsupported by the record. See Pet. App. 6 (finding that petitioners failed to establish or argue that MISO's operations would be compromised without Section VI); *id.* at 8 (rejecting petitioners' argument that Section VI was necessary to ensure construction of transmission facilities because eliminating that provision would encourage construction by competitors). They are also inconsistent with the Commission's findings. See *id.* at 104-108, 537; see also 76 Fed. Reg. at 49,886. This Court "do[es] not grant * * * certiorari to review evidence and discuss specific facts," *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), and petitioners identify no reason to disregard that rule here.[3]

Petitioners assert (Pet. 29) that the court of appeals also erred by "disregard[ing] the narrower scope of the Commission's authority to deny the applicability of *Mobile-Sierra* when it has previously approved the contract in question." All of the cases petitioners cite for that proposition, however, predate this Court's decision in *Morgan Stanley*, which rejected the proposition that the *Mobile-Sierra* doctrine applies differently "depending on when a contract rate is challenged." *Morgan Stanley*, 554 U.S. at 545. The Court held that *Mobile-Sierra* is not an estoppel doc-

---

[3] Petitioners note (Pet. 22) that the Commission applied the *Mobile-Sierra* presumption to the Transmission Owners Agreement in a 2008 order. See *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 F.E.R.C. ¶ 61,090 n.41 (2008). In the proceedings below, however, the Commission explained that the 2008 order concerned an unrelated provision of the Agreement; it did not suggest that the *Mobile-Sierra* presumption applies to the entire Agreement or to the right of first refusal provision. See Pet. App. 113, 540-542.

trine, "whereby an initial Commission opportunity for review prevents the Commission from modifying the rates absent serious future harm to the public interest." *Id.* at 546. The governing principle is always whether the rate is just and reasonable—subject to the *Mobile-Sierra* presumption where applicable—"regardless of when the contract is reviewed." *Ibid.*

4. Petitioners contend (Pet. 27-29) that the court of appeals' decision "lets stand" the Commission's alternative ground for requiring them to remove the right of first refusal provision, *i.e.*, that the provision is a rule of general applicability that is more akin to a tariff than a contract. See Pet. App. 108-113, 535-536. It is true that the court did not address the Commission's alternative ground. But there is no reason it should have done so: the court's conclusion that the *Mobile-Sierra* doctrine does not apply to Section VI was sufficient to uphold the Commission's orders and eliminated the need to address other possible grounds supporting the Commission's decision. See *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 652 n.11 (1990) (where agency advanced one valid and independent ground for its decision, Court need not address lower court's conclusion that another ground for the decision was flawed); see also *Morgan Stanley*, 554 U.S. at 544-545 (holding that, because FERC's decision was justified under *Mobile-Sierra*, a remand for consideration of an alternative justification would be "an idle and useless formality").

5. Finally, petitioners argue (Pet. 31-35) that the court of appeals improperly based its decision on a finding that rights of first refusal are contrary to the public interest. See Pet. 27 (arguing that the court "injected the public-interest inquiry from the second

step of the *Mobile-Sierra* analysis into FERC's initial step of determining whether the Owners Agreement is entitled to the *Mobile-Sierra* presumption"). Because the Commission did not reach that question, see Pet. App. 543, petitioners contend that reversal is required by *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947). That assertion is incorrect.

Under *Chenery*, "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." 332 U.S. at 196. The court of appeals did not misunderstand that principle. The court expressly adopted the Commission's findings that Section VI of the Transmission Owners Agreement was the product of collusion among MISO members who had a common interest in maintaining their monopoly and excluding potential competitors. Pet. App. 8; see *id.* at 5-8, 104-105, 537. It further agreed with the Commission's findings that the provision effectively prevented non-incumbents from identifying unfulfilled energy needs and entering the market to fill them, resulting in the potential for discriminatory treatment and unjust and unreasonable rates. *Id.* at 5-7; see 76 Fed. Reg. at 49,846, 49,885-49,886. And it concluded—as did the Commission—that Section VI's anticompetitive effects and the lack of arms-length bargaining demonstrated why the *Mobile-Sierra* doctrine was inapplicable. Pet. App. 9-10; see *id.* at 104-108, 537.

Petitioners note (Pet. 33-34) that the court of appeals chided them for "ma[king] no effort to show that the right [of first refusal] is in the public interest" and for not citing record evidence that Section VI had salutary effects. Pet. App. 6, 8. But those observations were merely responses to *petitioners'* arguments that the status quo was in the public interest. See *id.* at 6 (noting petitioners' argument that "MISO benefits consumers and that the transmission owners would not have formed it without a right of first refusal"); *id.* at 7 (noting petitioners' argument "that granting rights of first refusal was intended not to curtail competition"); *id.* at 8 (noting petitioners' argument that "the right of first refusal was negotiated to ensure that [MISO's members] were obligated to construct transmission facilities identified by the MISO planning process") (citation and internal quotation marks omitted); see also Pet. C.A. Br. 13 (reiterating argument before Commission that Section VI had not hindered "significant new, cost-effective transmission that benefits the public"). The court did not suggest that application of the *Mobile-Sierra* presumption depends on whether the public interest is affected, nor did it purport to prejudge what the public interest requires.

In any event, the court of appeals' discussion of the public interest was unnecessary to its decision, which is clearly based on its agreement with the Commission's conclusion that the *Mobile-Sierra* doctrine applies to situations like that in *Mobile* and *Sierra* themselves—where "the parties brought adverse interests to the table and their contract could be assumed to have split the difference"—but not to "a contract in which the parties are seeking to protect themselves from competition from third parties." Pet. App. 9-10; see *Oklahoma Gas & Elec.*, 827 F.3d at 80 (adopting same reading of court's holding). This Court does not "sit [to] decide abstract questions of law * * * which, if decided either way, affect no right" of the parties.

Supervisors v. *Stanley*, 105 U.S. 305, 311 (1882). Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Acting Solicitor General

MAX MINZNER
General Counsel
ROBERT H. SOLOMON
Solicitor
LONA T. PERRY
Deputy Solicitor
Federal Energy Regulatory Commission

FEBRUARY 2017