No. 21-1064

In the Supreme Court of the United States

LOUISIANA PUBLIC SERVICE COMMISSION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the Federal Energy Regulatory Commission's determination that the express language of a 2009 amendment to the system agreement—a since-terminated tariff that, at the time, set rates for an integrated group of electricity companies operating in Louisiana and several other States—required the companies to exclude certain amortization expenses from a calculation prescribed in the tariff to ensure the rough equalization of production costs among the companies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 10 F.4th 839. The orders of the Federal Energy Regulatory Commission (Pet. App. 20-44, 45-65) that were under review are reported at 169 FERC ¶ 61,247 and 167 FERC ¶ 61,186.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2021. A petition for rehearing or rehearing en banc was denied on October 29, 2021 (Pet. App. 66-69). The petition for a writ of certiorari was filed on January 27, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, provides the Federal Energy Regulatory Commission (FERC or Commission) with jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. 16 U.S.C. 824. The FPA requires FERC to ensure that rates are just and reasonable and not unduly discriminatory or preferential. 16 U.S.C. 824d(a), (b), and (e). To facilitate that review, the FPA requires regulated utilities to file with the Commission and keep open for public inspection a schedule of the rates they intend to charge ratepayers. 16 U.S.C. 824d(c) and (d). Rates actually charged may not exceed those on file with the Commission. 16 U.S.C. 824d(d); see *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577-578 (1981).[1]

A utility that wishes to alter the rates it charges is required to provide 60 days' notice to the Commission and to file new rate schedules "stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect." 16 U.S.C. 824d(d). The Commission may waive, for good cause, the 60-day filing period. *Ibid.* Absent advance notice to ratepayers,

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[1] *Arkansas Louisiana Gas Co.* addressed the Natural Gas Act, 15 U.S.C. 717 *et seq.*, rather than the FPA. But because the "pertinent sections of the two statutes" are "'in all material respects substantially identical,'" this Court's "established practice" is to "cit[e] interchangeably decisions interpreting" the relevant provisions. *Arkansas Louisiana Gas Co.*, 453 U.S. at 577 n.7 (quoting *Federal Power Comm'n* v. *Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956)); see also, *e.g.*, *Hughes* v. *Talen Energy Mktg., LLC*, 578 U.S. 150, 164 n.10 (2016) ("This Court has routinely relied on [Natural Gas Act] cases in determining the scope of the FPA, and vice versa.").

however, "no regulated seller of [power] may collect a rate other than the one filed with the Commission"—a principle known as the "filed rate doctrine." *Arkansas Louisiana Gas Co.*, 453 U.S. at 577. In addition, a "corollary" to the filed rate doctrine, *Towns of Concord, Norwood, & Wellesley* v. *FERC*, 955 F.2d 67, 71 (D.C. Cir. 1992), bars the "Commission itself" from "alter[ing] a rate retroactively," *Arkansas Louisiana Gas Co.*, 453 U.S. at 578; see *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951).

2. Entergy Corporation (Entergy) is a public utility holding company that previously sold electricity at wholesale and retail in Arkansas, Louisiana, Mississippi, and Texas through five operating companies, which Entergy operated as an integrated power pool. Pet. App. 2; see *Entergy Louisiana*, *Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 42 (2003) (describing the "sharing arrangement" among the operating companies); *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 357 (1988) (describing an earlier iteration of the same arrangement). At all times relevant to this case, Entergy allocated costs among the operating companies through a "a tariff approved by FERC," known as the "system agreement." *Entergy Louisiana*, 539 U.S. at 42; see Pet. App. 2-3; *Mississippi Power & Light*, 487 U.S. at 357.[2]

The system agreement required each of the Entergy operating companies to operate its generation facilities for the benefit of the whole system, dispatching electricity systemwide in a way that minimized costs. See

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[2] The system agreement was terminated, effective August 31, 2016, pursuant to a 2015 settlement among Entergy and three state regulators, including petitioner. See *Louisiana Pub. Serv. Comm'n* v. *FERC*, 860 F.3d 691, 694 n.1 (D.C. Cir. 2017).

Louisiana Pub. Serv. Comm'n v. *FERC*, 522 F.3d 378, 383-384 (D.C. Cir. 2008) (per curiam). Likewise, the system agreement required that the cost of producing electricity be "rough[ly] equal[]" among the operating companies. Pet. App. 2 (citation omitted).

In 2005, the Commission determined that the operating companies' production costs were no longer roughly equal and were therefore unjust and unreasonable, in violation of the FPA. Pet. App. 3; see *Louisiana Pub. Serv. Comm'n*, 522 F.3d at 391-393 (upholding that determination). To address the unreasonable disparity in operating costs, the Commission imposed a "bandwidth remedy" on Entergy, under which the production costs for each operating company could not deviate more than 11% above or below the system average. Pet. App. 3. If an operating company's yearly operating costs fell outside the permissible range, the bandwidth remedy required Entergy to reallocate costs among the operating companies "as necessary to bring all five companies within that range." *Ibid.*; see *Louisiana Pub. Serv. Comm'n*, 522 F.3d at 393-394 (upholding that remedy).

Entergy was required to file a report with the Commission each year setting out production-cost data for the preceding year, as well as Entergy's calculation of any necessary payments among the companies to comply with the 11% requirement. Pet. App. 4. Those calculations depended on identifying and distinguishing the operating companies' yearly production costs from other costs, which were not required to be roughly equalized. To specify the costs to be included in the annual calculation, Entergy modified the system agreement tariff to add a formula for comparing and equalizing production costs among the operating companies, "which FERC largely accepted." *Id.* at 3; see *Louisiana*

Pub. Serv. Comm'n v. *FERC*, 341 Fed. Appx. 649, 650-651 (D.C. Cir. 2009) (rejecting petitioner's challenges to the formula as approved by FERC). The formula incorporates cost data from the operating companies' annual reports to the Commission, which classify assets and expenses according to FERC's Uniform System of Accounts. Pet. App. 3.

After it was approved by the Commission, the modified system agreement tariff containing the bandwidth formula became the filed rate under the FPA. See *Louisiana Pub. Serv. Comm'n* v. *FERC*, 771 F.3d 903, 910-911 (5th Cir. 2014) (recognizing that "[t]he bandwidth formula as laid out in * * * the System Agreement is the existing filed rate under the FPA"), cert. denied, 575 U.S. 996 (2015); *Louisiana Pub. Serv. Comm'n* v. *FERC*, 606 Fed. Appx. 1, 4 (D.C. Cir. 2015) (per curiam) (same). The Commission reviewed Entergy's annual bandwidth calculations only for compliance with the formula in the system agreement tariff—*i.e.*, the filed rate. Pet. App. 4; see *Louisiana Pub. Serv. Comm'n*, 606 Fed. Appx. at 4 ("Once [a] rate is approved, the Commission reviews annual filings 'only for compliance with the rate rule.'") (citation omitted).

3. This case concerns Entergy's compliance with one provision of the system agreement tariff in its bandwidth remedy calculations in 2009 and 2010, equalizing productions costs for the prior years. Pet. App. 6. The particular provision at issue was added to the system agreement tariff and became part of the filed rate in 2009, when it was approved by the Commission. See *id.* at 182-188 (Commission's order). The provision governs the treatment in Entergy's annual bandwidth calculation of the operating companies' costs from purchasing power in wholesale markets, *e.g.*, for resale. *Id.* at 4.

Under FERC's Uniform System of Accounts, utilities record purchased-power expenses in Account 555. See 18 C.F.R. Pt. 101, Acct. 555. The Entergy system agreement tariff defined a variable (PURP) for use in the bandwidth formula that included purchased-power expenses recorded in Account 555, subject to several specified exceptions:

> PURP = Purchased Power Expense recorded in FERC Account 555, but excluding payments made pursuant to Section 30.09(d) of this Service Schedule and excluding the effects, debits and credits, resulting from a regulatory decision that causes the deferral of the recovery of current year costs or the amortization of previously deferred costs[.]

Pet. App. 179 (emphasis omitted).

In 2005, Entergy Louisiana, one of the operating companies, incurred a purchased-power expense of $56.3 million. Pet. App. 7. To blunt the impact of the purchase on ratepayers, petitioner ordered Entergy Louisiana to amortize the expense over four years through an accounting device known as a "regulatory asset." *Ibid.* Regulators often require utilities to "spread over many years their recovery of large, nonrecurring costs" to prevent sudden increases in rates. *Id.* at 4. When a cost incurred in one year must be amortized over several years as the result of the action of a regulator, the utility records a "regulatory asset" on its books as a credit, which is then offset by debits chargeable to ratepayers in later periods. *Ibid.*; see 18 C.F.R. Pt. 101, Definitions ¶ 31 (regulatory assets). Here, petitioner required Entergy Louisiana to record a regulatory asset in 2005 for the $56.3 million purchased-power expense and to amortize that asset over the next four years—*i.e.*, from 2006 to 2009. Pet. App. 7.

Entergy accounted for the 2005 regulatory credit and the 2006 and 2007 amortization expenses in its annual bandwidth remedy calculations in 2006, 2007, and 2008, respectively. Pet. App. 7. But Entergy excluded the amortization expenses for 2008 and 2009 when it performed its bandwidth calculations in 2009 and 2010, respectively. *Ibid.* By that time, the system agreement tariff had been amended, as described above, to define the PURP variable as purchased-power expenses recorded in Account 555, "excluding the effects, debits and credits, resulting from a regulatory decision that causes the deferral of the recovery of current year costs or the amortization of previously deferred costs." *Id.* at 179 (emphasis omitted). Entergy concluded that the amortization expenses that petitioner had required Entergy Louisiana to establish to defer the recovery of the $56.3 million purchased-power expense incurred in 2005 constituted "debits * * * resulting from a regulatory decision that causes the * * * amortization of previously deferred costs," *ibid.* (emphasis omitted), and that the 2009 amendment required the exclusion of such expenses from the PURP variable for bandwidth remedy calculations in 2009 and after, see *id.* at 7-8.

Petitioner protested Entergy's exclusion of the 2008 and 2009 amortization expenses in a proceeding before the Commission. In May 2019, the Commission determined that Entergy had complied with the applicable filed rate—the system agreement as amended in 2009—in excluding those expenses from its bandwidth remedy calculations. Pet. App. 45-65. The Commission explained that the 2009 amendment "was part of the bandwidth formula on file and in effect" for 2009 onward, and that the 2009 amendment "required the exclusion of amortization [expenses] associated with the regulatory

asset deferrals recorded in Account 555 from variable PURP." *Id.* at 61-62; see *id.* at 63. The Commission further explained that, because the 2009 amendment "was the filed rate," Entergy had "no discretion to disregard" it. *Id.* at 62; see pp. 2-3, *supra* (discussing the filed rate doctrine).

Petitioner sought rehearing, arguing that the Commission had "arbitrarily adopt[ed] an interpretation of the 2009 Amendment to the bandwidth formula that is at odds with the parties' intent," as allegedly reflected in an earlier settlement agreement that gave rise to the 2009 amendment and in the filing letter accompanying the amendment. Pet. App. 30. Petitioner maintained that the 2009 amendment was not intended to permit exclusion of Entergy Louisiana's 2008 and 2009 amortization expenses, because the corresponding regulatory credits for those expenses had been recorded in 2005—meaning they were not subject to the 2009 amendment and had not been excluded from Entergy's bandwidth calculations for the 2005 period. See *id.* at 34-35 (summarizing petitioner's argument that the Commission's interpretation "disconnects the 'debits' from the 'credits' resulting from a regulatory decision") (citation omitted).

The Commission denied rehearing. Pet. App. 20-44. The Commission observed that the 2009 amendment "expressly states" that the PURP variable excludes regulatory debits resulting from "'the *amortization of previously deferred costs*.'" *Id.* at 33 (citation omitted). In the Commission's view, that "express language" encompasses not only "newly established deferrals beginning in 2008," but also any amortizations "stemming from a previously established deferral," such as the "amortizations that occurred in the 2008 and 2009

bandwidth periods." *Id.* at 35. The Commission also rejected petitioner's reliance on the earlier settlement agreement and filing letter, explaining that neither document provided a basis for Entergy to disregard the unambiguous language of the filed rate. *Id.* at 33-34.

4. Petitioner filed a petition for review in the D.C. Circuit. Pet. App. 2. Entergy Services, LLC—a wholly owned subsidiary of Entergy, acting as its agent—and the Arkansas Public Service Commission intervened in the court of appeals to support the Commission. See *id.* at 1-2; Intervenors' C.A. Br. ii, 3-5.[3]

The court of appeals unanimously denied the petition for review. Pet. App. 1-19. The court agreed with the Commission that the 2009 amendment requires excluding from the bandwidth remedy calculation "costs that are amortized after [the amendment's] adoption," even if the amortizations are the result of "deferral decisions that predate" the amendment. *Id.* at 11. The court observed that "nothing in the amendment turns on the timing" of the regulatory decision that causes the amortization. *Ibid.* Instead, "the amendment applies by its terms" when a "purchased-power expense arises after the amendment's effective date and results from a deferral decision." *Ibid.*

The court of appeals rejected petitioner's argument that the reference to "debits and credits" in the 2009 amendment limited its application to circumstances in which the operating companies "exclude *both* the debits and credits associated with a particular deferral decision." Pet. App. 11; see *id.* at 10 (quoting text of the

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[3] Under Rule 12.6 of the Rules of this Court, Entergy Services, LLC and the Arkansas Public Service Commission are deemed to be respondents in this Court. Both have waived any response to the petition for a writ of certiorari.

amendment, which requires excluding "the effects, debits and credits, resulting from" specified regulatory decisions) (emphasis omitted). The court explained that, as a matter of basic grammar, the commas setting off the phrase "debits and credits" indicate that it functions as an appositive, meant to be equivalent to the preceding term, "effects." *Id.* at 11. The court further explained that "no fair reading" of the term "effects" would "require[] *both* a debit and a credit to constitute an effect." *Id.* at 12. The court therefore concluded that,"[i]n this context," the conjunction "and" in the phrase "debits and credits" assumes a "'distributive sense,'" meaning that both debits and credits can be effects. *Ibid.* (citation omitted).

Like the Commission, the court of appeals also found unavailing petitioner's reliance on the settlement agreement and filing letter preceding the 2009 amendment. Pet. App. 13. The court held that, "because the [2009] amendment 'unambiguously addresses the matter at issue,' its language controls" over any arguably contrary language in those earlier documents, which are not "part of the filed rate." *Ibid.* (citation omitted).

ARGUMENT

The court of appeals correctly determined that the 2009 amendment to the system agreement tariff for the Entergy operating companies unambiguously required the exclusion of certain 2008 and 2009 amortization expenses in calculating purchased-power expenses for purposes of the bandwidth remedy in the tariff. Petitioner contends that the decision below conflicts with the "*Mobile-Sierra* doctrine" established by this Court's precedent. Pet. 21 (capitalization and emphasis omitted); see Pet. 21-27. That argument is not properly before this Court because it was neither pressed nor

passed upon below. It also lacks merit, as the doctrine petitioner belatedly invokes is inapposite where—as in this case—no conflict exists between a utility's rate filings and its prior contracts. Petitioner separately contends (Pet. 27-36) that the court of appeals erred in construing the language of the 2009 amendment. The decision below is correct and, in any event, concerned idiosyncratic language in a tariff that is no longer in force. Indeed, both questions that petitioner seeks to present are highly case-specific and lack any prospective significance in light of the termination of the system agreement. See p. 3 n.2, *supra*. The petition for a writ of certiorari should be denied.

1. a. Petitioner's first question presented concerns this Court's *Mobile-Sierra* doctrine, which generally requires the Commision to "presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement imposed by law." *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 530 (2008). That presumption "may be overcome only if FERC concludes that the contract seriously harms the public interest." *Ibid.*

The *Mobile-Sierra* doctrine derives from a pair of this Court's cases, decided on the same day in 1956, addressing the interaction of the two different ways in which rate-setting may occur under the FPA and its sister statute, the Natural Gas Act, 15 U.S.C. 717 *et seq.* See *NRG Power Mktg., LLC* v. *Maine Pub. Utils. Comm'n*, 558 U.S. 165, 172 (2010). Under one method of rate-setting, regulated utilities file "compilations of their rate schedules, or 'tariffs,' with the Commission," and then provide service "on the terms and prices there set forth." *Morgan Stanley Capital*, 554 U.S. at 531 (citing 16 U.S.C. 824d(c)). Under the other method,

regulated utilities "set rates with individual electricity purchasers through bilateral contracts." *Ibid.* (citing 16 U.S.C. 824d(c) and (d)); see *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 479 (2002) (explaining that the FPA and the Natural Gas Act "departed from [a] scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting").

The *Mobile-Sierra* doctrine addresses "the authority of the Commission to modify rates set bilaterally by contract rather than unilaterally by tariff." *Morgan Stanley Capital*, 554 U.S. at 532. In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*), the Court held that the Natural Gas Act did not empower a utility "to abrogate a lawful contract with a purchaser simply by filing a new tariff" with the Commission. *Morgan Stanley Capital*, 554 U.S. at 532. (citing *Mobile*, 350 U.S. at 336-337).

In *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*), this Court "applied the holding of *Mobile* to the analogous provisions of the FPA, concluding that the complaining utility could not supersede a contract rate simply by filing a new tariff." *Morgan Stanley Capital*, 554 U.S. at 533; see *Sierra*, 350 U.S. at 352-353. The Court also addressed the scope of the Commission's authority to fix a new rate if it finds an existing contract rate to be "unjust, unreasonable, unduly discriminatory or preferential." 16 U.S.C. 824e(a); see *Sierra*, 350 U.S. at 354. The Commission had stated in *Sierra* that a rate to which the utility had agreed in a contract was unreasonable—and therefore unlawful—because the rate provided "less than a fair return on the net invested capital." 350 U.S. at 355. This Court rejected that approach,

explaining that a utility may choose to "agree by contract to a rate affording less than a fair return," and that the utility is not "entitled to be relieved of its improvident bargain" by the Commission. *Ibid.* Instead, the Commission's "sole concern" for rates set by contract should be "whether the rate is so low as to adversely affect the public interest." *Ibid.*

b. Petitioner contends (Pet. 21-25) that the decision below conflicts with this Court's *Mobile-Sierra* doctrine. That contention is not properly before this Court. This Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Petitioner did not press its current *Mobile-Sierra* argument in the court of appeals, and that court did not address the doctrine.

Petitioner contended below that the Commission's interpretation of the 2009 amendment was inconsistent with an earlier contract between the parties—namely, a settlement agreement preceding the amendment. Pet. C.A. Br. 29-30. Petitioner did not, however, contend that the settlement agreement set any rates, such that FERC lacked authority under the *Mobile-Sierra* doctrine to approve any later tariff abrogating the rates to which Entergy had agreed in the settlement. Indeed, the words "*Mobile-Sierra*" appear nowhere in the dozens of pages of briefing that petitioner filed below. Petitioner instead argued, unsuccessfully, that the settlement should be treated as having been incorporated into the 2009 amendment, or at least as extrinsic evidence of the meaning of the amendment. See Pet. C.A. Br. 30-32; Pet. C.A. Reply Br. 4-11; Pet. C.A. Petition for Reh'g 12-14.

Understandably, the court of appeals did not pass on the relevance, if any, of the *Mobile-Sierra* doctrine to the facts of this case, and petitioner offers no compelling reason for this Court to do so in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

c. In any event, the decision below is fully consistent with the *Mobile-Sierra* doctrine. The gravamen of petitioner's newly minted argument to the contrary is that the Commission interpreted the 2009 amendment in a manner that caused the amendment to be inconsistent with the parties' earlier settlement agreement. See Pet. 23-24. Petitioner now contends that the settlement agreement "prescribe[d] a rate input," by requiring Entergy to file an amendment to the system agreement tariff "to provide 'that all purchased power costs will be included in the Bandwidth Calculation in the year the costs are incurred, regardless of whether they are deferred on the individual Operating Company's books.'" Pet. 24 (quoting Pet. App. 197).[4] Petitioner further contends that, under *Mobile-Sierra*, Entergy could not unilaterally abrogate the settlement agreement by filing a tariff amendment "permitting the exclusion of amortizations from a past deferral." *Ibid.*

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[4] The relevant paragraph in the settlement agreement states:

> [Entergy] will make a Section 205 filing amending [the system agreement tariff] starting with the 2009 Bandwidth Calculation (i.e., effective May 31, 2009) to provide that all purchased power costs will be included in the Bandwidth Calculation in the year the costs are incurred, regardless of whether they are deferred on the individual Operating Company's books. The Parties agree to support the Section 205 filing. [Petitioner] agrees to support the amendment, but does not agree that an amendment filing is necessary to correct a change in methodology.

Pet. App. 197.

That theory lacks any sound footing in the language of the settlement agreement. The court of appeals considered the same language—albeit in the context of the different arguments petitioner was making at the time, see Pet. C.A. Br. 29-33—and correctly recognized that the settlement agreement "simply required Entergy to amend the definition of the PURP variable." Pet. App. 13. The settlement agreement did not purport to "alter the bandwidth formula" or to set any rates. *Ibid.*

The language of the settlement agreement on which petitioner focuses confirms, however, that the parties anticipated that Entergy would seek to amend the system agreement to effectuate the settlement. See p. 14 n.4, *supra* (quoting parties' agreement for Entergy to make, and petitioner to support, "a Section 205 filing"). Entergy made the required filing, and petitioner supported it. Pet. App. 163-181. The Commission found the proposed filing just and reasonable and accepted the tariff amendment. *Id.* at 188.

Once approved, the 2009 amendment to the bandwidth remedy formula became part of the filed rate, binding on both the Commission and Entergy. Pet. App. 14, 34; see *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 578 (1981) (explaining that a regulated utility may not "collect[] a rate other than the one filed with the Commission"). Neither the settlement agreement nor the letter accompanying the filing of the 2009 amendment (see Pet. 25) could alter the unambiguous terms of the filed rate, which expressly required the exclusion of the amortization expenses at issue here. Pet. App. 13, 33-34. The decision below is therefore fully consistent with the *Mobile-Sierra* doctrine; the settlement agreement did not purport to set any rate, so giving effect to the plain language of the 2009 amendment

to the system agreement tariff did not abrogate any prior contractual rate. Moreover, as this Court has previously explained, the *Mobile-Sierra* doctrine "does not affect the supremacy of the [FPA] itself, and under the filed rate doctrine, when there is a conflict between the filed rate and the contract rate, the filed rate controls." *Arkansas Louisiana Gas Co.*, 453 U.S. at 582.

The decision below is also consistent with the First Circuit's decision in *Boston Edison Co.* v. *FERC*, 856 F.2d 361 (1988) (cited at Pet. 26). That case concerned the application of a contractual limitation that was part of the filed rate—unlike the settlement agreement on which petitioner relies. See *id.* at 371. Because the contractual limitation was part of the filed rate and therefore "part and parcel of the rate schedule for purposes of the filed rate doctrine," the First Circuit found that the limitation must be given effect. *Id.* at 371; see *id.* at 371-372. Here, by contrast, the settlement agreement was *not* part of the filed rate, nor did it purport to alter the filed rate. Pet. App. 13.[5]

2. Petitioner separately contends (Pet. 27-36) that the court of appeals erred in interpreting the language of the 2009 amendment. That highly case-specific question does not warrant further review.

As explained above (see pp. 7-9, *supra*), the Commission determined that the 2009 amendment "expressly" and "explicitly" required exclusion of the 2008 and 2009 amortization expenses. Pet. App. 33, 37 n.55. The 2009 amendment required excluding from the bandwidth calculation "the effects, debits and credits, resulting from

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[5] In an apparent citation error, petitioner also states (Pet. 19, 26-27) that the decision below conflicts with *Louisiana Public Service Commission* v. *FERC*, 10 F.4th 839 (D.C. Cir. 2021), which is the published version of the panel opinion in this case.

a regulatory decision that causes the deferral of the recovery of current year costs or the amortization of previously deferred costs." *Id.* at 179 (emphasis omitted). The 2008 and 2009 amortization expenses were "effects" of a regulatory decision that caused amortization of previously deferred costs, and the Commission therefore viewed the amortization expenses as falling squarely within the "express language of the 2009 Amendment." *Id.* at 35. The court of appeals "agree[d] with FERC," *id.* at 11, concluding that the 2009 amendment "unambiguously addresses the matter at issue" and must be given effect, *id.* at 13 (citation omitted).

Petitioner therefore errs in arguing that the court affirmed the agency's action on a basis other than the one the agency itself had given. See Pet. 28 (invoking *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943)). Both the court and the Commission relied on the same rationale: the 2009 amendment itself, by its plain terms, requires the exclusions at issue.

Petitioner complains (Pet. 27, 30) that the court of appeals invoked a point of grammar, which the Commission itself had not articulated, in agreeing with the Commission's reasoning. But that passing discussion does not suffice to establish any *Chenery* problem. Basic rules of English grammar are not a matter of "policy or judgment" reserved exclusively for administrative agencies, *Chenery*, 318 U.S. at 88, and a reviewing court may rely on them without improperly substituting its own judgment for that of the agency.

Petitioner also fails to show any error in the court of appeals' discussion of grammar or its overall interpretation of the 2009 amendment. The court explained that the phrase "debits and credits" is set off by commas from the preceding noun, "effects," and therefore

functions as an appositive. Pet. App. 11. A noun phrase placed in apposition to another noun serves as an "explanatory equivalent[]" that clarifies and illustrates the preceding term, *ibid.* (citation omitted)—as, for example, in the statement that "all members of the bar, lawyers and judges, must pay annual dues." In this context, the court explained, the appositive phrase "debits and credits" illustrates that both of those "distinct" kinds of effects are to be excluded, if they satisfy the remaining language of the 2009 amendment. *Id.* at 12.

Petitioner contends (Pet. 30-34) that the court of appeals effectively read "debits and credits" to mean "debits or credits," but petitioner misreads the decision below. As this Court has long recognized, a reviewing court may permissibly construe "and" to mean "or" in some circumstances. *United States* v. *Fisk*, 70 U.S. (3 Wall.) 445, 447 (1866) (emphasis omitted); see, *e.g.*, *Confederated Tribes & Bands of the Yakama Nation* v. *Yakima Cnty.*, 963 F.3d 982, 990-991 (9th Cir. 2020) (collecting examples from case law and plain English), cert. denied, 141 S. Ct. 2464 (2021). But the court of appeals did not go so far here. Instead, the court merely understood the term "and" in the phrase "effects, debits and credits," to carry its "'distributive sense'" in this particular context. Pet. App. 12 (citation omitted). In other words, the exclusion applies to specified expenses that have the effect of a debit to Account 555 and also those that have the effect of a credit to Account 555.

That construction is both correct and unremarkable. Suppose a credit card agreement imposed a surcharge for all "transactions, credits and debits, in a foreign currency." The natural import of that phrasing is that credits and debits are both examples of transactions, and that the surcharge applies to both—not that *only*

those transactions involving both a credit and a debit are surcharged. So too here, the 2009 amendment expressly requires excluding all "effects," both credits "and" debits, resulting from regulatory decisions that cause the amortization of previously deferred costs. See Pet. App. 12.

Petitioner suggests (Pet. 35) that the court of appeals' interpretation is inconsistent with the FERC regulations defining a regulatory asset, which contemplate recording both a credit and corresponding debits. But petitioner overlooks other relevant context for the 2009 amendment. The PURP definition was part of a tariff governing *annual* bandwidth calculations that were only concerned with expenses recorded on the operating company books *for the preceding year*—specifically, purchased-power expenses recorded in FERC Account 555. Pet. App. 4. For a given annual calculation under the tariff, any particular regulatory decision could have created only a debit or only a credit to Account 555 in that year. *Ibid.* Petitioner's 2005 deferral decision, for example, resulted in a credit in 2005 (and no debits in that year) and debits for amortization expenses in years 2006-2009 (and no credits in those years). *Id.* at 7.

As the court of appeals recognized, the text of the 2009 amendment following the "debits and credits" language confirms FERC's interpretation. The amendment refers to regulatory decisions that cause "the deferral of the recovery of current year costs *or* the amortization of previously deferred costs." Pet. App. 12 (citation omitted); see p. 6, *supra*. Both of those effects—credits for new deferrals or debits for current amortization of past deferrals—concern current accounting entries in Account 555. By listing them disjunctively, the tariff confirms that the amendment covers

regulatory decisions that have the effect of causing credits and those that have the effect of causing debits, even if the decisions do not cause both types of effects in the same year. See Pet. App. 12-13. Indeed, petitioner acknowledged in its briefing below that this language "reflects that the deferral (credits) and amortizations (debits) will occur in different periods, with each being excluded in the applicable period." Pet. C.A. Reply Br. 6.

3. At all events, the decision below is highly case-specific and lacks prospective significance, particularly in light of the termination of the system agreement. See p. 3 n.2, *supra*. Petitioner contends (Pet. 38) that the decision below prefigures a significant change in how the court of appeals will interpret the term "and" in other statutes, but the court observed that its interpretation here was informed by the context of this specific language. Pet. App. 12. The decision below also does not create any uncertainty regarding the effect of state deferrals. Contra Pet. 29, 38-39. The tariff provision did not affect state regulators' authority to order the deferral and subsequent amortization of costs to protect ratepayers. See, *e.g.*, Pet. App. 188 (Commission order approving tariff amendment, finding that the amendment did not "limit[] a [state] regulator's discretion to determine when [purchased-power] costs are recovered from an Operating Company's customers"). The 2009 amendment to the system agreement only ever governed whether and how certain deferred costs were to be included in the annual bandwidth remedy calculation, and the system agreement is no longer in effect. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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