No. 08-674

In The

Supreme Court of the United States

NRG POWER MARKETING, LLC, ET AL.,

Petitioners,

v.

MAINE PUBLIC UTILITIES COMMISSION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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QUESTION PRESENTED

Section 206 of the Federal Power Act ("FPA"), 16 U.S.C. § 824e(a), requires that all rates for the transmission and sale of electricity in interstate commerce must be "just and reasonable." Under the *Mobile-Sierra* doctrine, when sellers and purchasers enter into freely negotiated wholesale energy contracts, the Federal Energy Regulatory Commission ("FERC" or "Commission") must presume that the negotiated rate is just and reasonable, and parties to the contract may overcome that presumption only by showing that the contract seriously harms the "public interest." In this case, some but not all parties to a contested FERC proceeding had entered into a settlement agreement in a contested proceeding. The contested settlement purported to apply the restrictive *Mobile-Sierra* presumption to challenges by non-settling parties to rates that will be determined in the future.

The question presented is:

Whether the Commission may deprive non-settling parties of their statutory right under the FPA to challenge rates upon a showing that the rates are not "just and reasonable," by approving a settlement agreement that would require rate challenges brought by non-settling third parties to be evaluated under the much more stringent "public interest" mode of review.

CORPORATE DISCLOSURE STATEMENT

Richard Blumenthal, Attorney General for the State of Connecticut ("CTAG") hereby submits that the Office of the Attorney General is a governmental party exempt from any reporting requirement under Rule 29.6. The CTAG is the chief civil legal officer of the State of Connecticut and has no parent corporation or publicly held stock.

The Maine Public Utilities Commission ("MPUC") hereby submits that it is a governmental party exempt from any reporting requirement under Rule 29.6. MPUC has no parent corporation or publicly held stock.

Martha Coakley, Attorney General for the Commonwealth of Massachusetts ("MassAG"), hereby submits that the Office of the Attorney General is a governmental party exempt from any reporting requirement under Rule 29.6. The MassAG is the chief civil legal officer of the Commonwealth of Massachusetts and has no parent corporation or publicly held stock.

The Industrial Energy Consumer Group ("IECG") is a non-profit trade association incorporated under the laws of the State of Maine. The IECG has no parent company or affiliated companies. The IECG was created and exists to advance the interests of industrial users of electricity in Maine and other interested persons. There are no ownership interests associated with the IECG.

CORPORATE DISCLOSURE STATEMENT – Continued

NEPOOL Industrial Customer Coalition ("NICC") is a continuing ad hoc association of large industrial and commercial end-users of electricity in New England operated for the purposes of representing the interests of industrial energy consumers before regulatory and legislative bodies. NICC does not issue securities to the public and is not owned by any publicly held company.

NSTAR Electric & Gas Corporation is a wholly-owned subsidiary of NSTAR, a public utility holding company which has issued securities to the public. In addition, NSTAR Electric & Gas Corporation's affiliate, NSTAR Electric Company, has issued preferred stock and debt securities to the public. No other affiliates of NSTAR Electric & Gas Corporation have outstanding securities to the public.

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STATEMENT OF THE CASE

This case involves "a comprehensive settlement that redesigned New England's capacity market" for electricity. Pet. App. 1a. A unanimous panel of the D.C. Circuit concluded that eight parties that opposed the agreement are not bound by a provision which purported to impose a stringent public-interest showing on future challenges to future prices for electric generation capacity. The court correctly found that the settlement's opponents did not waive or otherwise lose their rights to challenge the future prices under the ordinary application of the just-and-reasonable standard. That commonsense holding does not conflict with the holding of any other court.

Petitioners' effort to cast this case as a logical follow-up to *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1*, 128 S. Ct. 2733 (2008), is misplaced. The massive multi-layered settlement agreement at issue here is far removed from the prototypical long-term power contracts that were at issue in *Morgan Stanley*. While Petitioners sought panel rehearing and rehearing *en banc* of this matter before the D.C. Circuit Court, that court denied the rehearing petition, with no judges voting to rehear the case. Indeed, FERC itself has not asked this Court to hear the case. The petition should be denied.

I. STATUTORY BACKGROUND

Under Section 205 of the Federal Power Act, all rates filed with the Federal Energy Regulatory Commission must be "just and reasonable." 16 U.S.C. § 824d. Section 206 provides that "upon complaint" the FERC must determine whether a challenged rate is "unjust, unreasonable, unduly discriminatory or preferential." 16 U.S.C. § 824e.

Under the *Mobile-Sierra* doctrine, when sellers enter into freely negotiated wholesale energy contracts with purchasers, the Commission must presume that the negotiated rate is "just and reasonable." *See Morgan Stanley*, 128 S. Ct. at 2737; *see also* 16 U.S.C. §§ 824d, 824e. In wholesale markets, the buyer and seller are often "sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them." *Verizon Commc'ns v. FCC*, 535 U.S. 467, 479 (2002).

In *Mobile* and *Sierra*, the Court recognized that buyers and sellers that have agreed to fix rates by contract do not have the right to seek to modify those rates by regulatory interdiction simply because it is in their private interest to do so. In *Mobile*, the Court held that a supplier does not have the right to change its rate contracts unilaterally by filing a new tariff schedule and that such a filing is a "nullity." *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 336 (1956). In *Sierra*, the Court held that a contract party asking a regulatory authority to modify a contract rate must demonstrate that the existing 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." *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956). The Court explained that:

> [W]hile it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain.

Id.

The Commission and the Courts of Appeals have referred to the much more restrictive mode of review under the *Mobile-Sierra* doctrine as the "public interest standard," as opposed to the ordinary "just and reasonable standard." *Morgan Stanley*, 128 S. Ct. at 2740 (citing *Southern Co. Servs., Inc. et al.*, 39 FERC ¶ 63,026 at PP 65,134, 65,141 (1987); *Kansas Cities v. FERC*, 723 F.2d 82, 87-88 (D.C. Cir. 1983); *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 961 (1st Cir. 1993)). As this Court has observed, however, this "nomenclature" refers to the differing application of the just and reasonable standard to contract rates. *Id.* (citing *Philadelphia Elec. Co.*, 58 F.P.C. 88, 90 (1977)).

Although the public interest showing is the default mode of review of contract modifications sought by a contract party, this Court has held that parties to a contract can agree that the *Mobile-Sierra* presumption shall not apply. *See United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 110-113 (1958). "[I]n the absence of any contractual relationship rates determined ex parte by the seller may be filed under § 4(d) [of the Natural Gas Act]. . . . We perceive no tenable basis of distinction between the filing of such a rate in the absence of contract and a similar filing under an agreement which explicitly permits it." *Id.* at 112-113 (internal citations omitted). Thus, the contract parties can agree that they may challenge the contract rate if it results in an unfair rate of return, not just if it violates the public interest. *See Morgan Stanley*, 128 S. Ct. at 2739 (citing *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 953, 955 (D.C. Cir. 1983); *Louisiana Power & Light Co. v. FERC*, 587 F.2d 671, 675-676 (5th Cir. 1979)). Such provisions are referred to as "*Memphis* clauses."

II. THE CONTESTED SETTLEMENT

This case arose from a highly contested FERC proceeding in which ISO New England, the independent system operator that manages the reliability of the bulk power system in New England, filed changes to its market rules tariff to address deficiencies in the mechanism for procuring generation capacity. Pet. App. 105a. After two years of litigation, 107 parties reached a settlement; eight parties, including the respondents here, opposed the settlement. *Id.* at 110a. Thus, there was no agreement between the settling parties and the respondents. That settlement was subject to approval by the Commission.

The proposed settlement created a forward capacity market, in which annual auctions would determine the market clearing price of electric generation capacity three years in advance of when that capacity would be needed. *Id.* The auctions would procure the generating capacity required to satisfy the installed capacity requirement, which is the minimum level of capacity needed to maintain the reliability of the grid. *Id.* at 112a. Each utility serving end-use customers would be required to pay for a share of the installed capacity requirement, based on its proportional share of peak load. *Id.*

Because there would be a three-year gap between the first auction and the year that the capacity procured through the auction would be provided, the settling parties agreed upon a transition period, during which all qualifying generating capacity resources would receive fixed payments between December 1, 2006 and ending on June 1, 2010. *Id.* at 116a. The cost of these payments similarly would be allocated to utilities based on their proportionate share of peak load. *Id.* at 117a.

The settlement agreement contains a provision (§ 4.C) purporting to impose the *Mobile-Sierra* presumption against challenges to the capacity clearing prices derived from the annual forward capacity auctions and challenges to the transition period payments, whether the challenge is made "by a Settling Party, a non-Settling Party, or the FERC acting *sua sponte*." *Id.* at 193a-194a (quoting § 4.C of the settlement agreement). The settlement agreement also contains a *Memphis* clause exempting all other terms of the settlement agreement from the operation of the *Mobile-Sierra* presumption. *Id.* at 194a.

FERC approved the *Mobile-Sierra* provision, noting that it has permitted the use of similar provisions in the past, citing a string of cases dating back to 2003. *Id.* at 200a-201a. FERC found the provision "reasonable" because FERC still retains authority to protect non-settling parties under the public interest mode of review, and because the settlement agreement permits parties to challenge ISO New England's "informational filings" on the auction results under the just and reasonable mode of review when ISO New England files them under section 205. *Id.* at 78a, 201a-202a. Finally, FERC concluded that it was appropriate to apply the *Mobile-Sierra* presumption to non-settling parties in order to achieve "contractual stability." *Id.* at 202a.

III. THE DECISION BELOW

In the decision below, the D.C. Circuit held that, in approving the settlement agreement, the Commission unlawfully deprived non-settling parties—including the respondents—"of their statutory right" under the Federal Power Act "to challenge rates under the 'just and reasonable' standard." *Id.* at 19a. The court found that "[t]his case is clearly outside the scope of the *Mobile-Sierra* doctrine." *Id.* at 22a. The court stated that *Mobile-Sierra* is invoked when "one party to a rate contract on file with FERC attempts to effect a unilateral rate change by asking FERC to relieve its obligations under a contract whose terms are no longer favorable to that party." *Id.* (quoting *Maine PUC v. FERC*, 454 F.3d 278, 284 (D.C. Cir. 2006)). The court found that "the settling parties are attempting to thrust the 'public interest' standard of review upon non-settling third parties who have vociferously objected to the terms of the settlement agreement." *Id.* The court noted that "[i]t goes without saying that a contract cannot bind a nonparty." *Id.* (quoting *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). The court stated that the purpose of the *Mobile-Sierra* doctrine is to "preserve the terms of the bargain as between the contracting parties." *Id.* (citing *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002). The court held that "when a rate challenge is brought by a non-contracting third party, the *Mobile-Sierra* doctrine simply does not apply; the proper standard of review remains the 'just and reasonable' standard in section 206 of the Federal Power Act." *Id.*

The court rejected FERC's justifications for the *Mobile-Sierra* provision, that the public interest showing will only apply to future challenges to a narrow category of rates or that non-settling parties are adequately safeguarded under the Commission's retained authority under *Mobile-Sierra*, holding that approval of the agreement still deprives non-settling parties of their statutory right to have rate challenges adjudicated under the "just and reasonable" showing. *Id.* at 22a-23a. The court also rejected FERC's argument that the Commission has routinely approved contracts that apply the public interest review to non-contracting parties, noting that the Commission has only done so since 2002 and that none of the decisions to which FERC cited have been subject to judicial review on the *Mobile-Sierra* issue. *Id.* at 23a.

Finally, with respect to the need for contract stability, the court explained that "the *Mobile-Sierra* doctrine is designed to ensure contract stability *as between the contracting parties—i.e.*, to make it more difficult for either party to shirk its contractual obligations." *Id.* at 24a (citing *Atlantic City*, 295 F.3d at 14) (emphasis in original). The court observed that "[i]t makes no sense to say that the values of 'stability' and 'certainty' are furthered by applying the deferential standard of review to the eight parties that *refused* to agree to the terms of the settlement." *Id.* (emphasis in original).

Petitioners and FERC sought rehearing of the decision below after this Court issued its decision in *Morgan Stanley*. Two FERC commissioners dissented from FERC's decision to seek rehearing, arguing that the decision below was consistent with *Morgan Stanley* and does not damage FERC's ability to approve settlements of contested proceedings before the Commission. Pet. App. 224a.

REASONS FOR DENYING THE PETITION

There are no compelling reasons to grant certiorari in this case. This case does not involve the sort of bilateral contract to which the *Mobile-Sierra* doctrine directly applies and with which the *Morgan Stanley* decision was concerned. To the contrary, this case involves a massive, contested settlement agreement regarding the overall structure of New England's power capacity market. It is undisputed that the 107 settling parties and the eight parties that opposed the settlement did not reach an agreement between them. Those opponents did not enter into any bargain, in exchange for any beneficial term of the settlement, to waive their right to challenge any yet-to-be-determined rates resulting from a newly established market mechanism except upon a showing of unequivocal public necessity. This is simply the wrong case through which to address "[w]hether *Mobile-Sierra's* public-interest standard applies when a contract rate is challenged by an entity that was not a party to the contract." Pet. (i).

Moreover, the decision below does not conflict with the decision of another court of appeals on the question presented or with *Morgan Stanley*. No court of appeals has addressed a challenge to a wholesale power contract rate brought by a non-party to the contract—let alone addressed a challenge to a massive settlement agreement to create an entirely new and novel market structure brought by entities that opposed the agreement. And *Morgan Stanley* did not speak to the issue of non-party rights. The D.C. Circuit's well-reasoned decision does not merit this Court's review, as confirmed by FERC's decision not to seek this Court's review.

I. THE SETTLEMENT AGREEMENT DOES NOT FALL WITHIN THE *MOBILE-SIERRA* DOCTRINE

Certiorari should be denied because the facts and posture of this case make it an inappropriate vehicle to test the Petitioners' general question of whether the *Mobile-Sierra* doctrine applies to a challenge by *any* non-party to *any* ordinary wholesale power contract bilaterally agreed to by a seller and buyer. The "contract" that Petitioners seek to impose upon non-contracting third parties is fundamentally different from the privately negotiated bilateral energy contracts that were at issue in *Morgan Stanley*. The settlement agreement was not a privately negotiated contract, but rather "emanated from a highly contested adjudicatory proceeding before the Commission and involves a broad, public matter." Pet. App. 228a. Whereas the *Mobile-Sierra* doctrine assumes that "sophisticated businesses enjoying presumptively equal bargaining power . . .

could be expected to negotiate a 'just and reasonable' rate as between the two of them," *Verizon*, 535 U.S. at 479, "no 'commonsense notion' would hold that the 115 parties to the adjudication of this matter enjoy presumptively equal bargaining power." Pet. App. 228a (quoting FERC Commissioners Kelly and Wellinghoff); *cf. Morgan Stanley*, 128 S. Ct. at 2746.

Moreover, neither the settlement agreement nor the forward capacity market contemplated in the settlement agreement result in rates fixed by negotiated bilateral contracts between buyers and sellers. The settlement provisions for transition period payments and for payments under the forward capacity market were to be implemented through then yet-to-be-developed tariff revisions. *Id.* at 118a. In other words, the settling parties agreed that prices would be set by a tariff-based regulatory process. Although the settling parties certainly could agree amongst themselves that they could challenge the rates resulting from that process only upon a showing that the rates are contrary to the "public interest," the rates set by that tariff-based process remain subject to the ordinary "just and reasonable" mode of review.

Because this case does not present a situation where a bilateral wholesale contract is being challenged by a party or even a non-party to a bilateral wholesale contract, it is inappropriate to grant certiorari on the Petitioners' question in this case. Moreover, the situation here, where the Commission was asked to approve an entirely new and novel market structure, is unlikely to recur frequently, and thus, the interest of justice does not require the Court to address whether the *Mobile-Sierra* doctrine applies in these circumstances.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER UNITED STATES COURT OF APPEALS OR THIS COURT ON THE SAME MATTER

A. There is no Split Between the Courts of Appeals on this Issue

No court has previously addressed whether the *Mobile-Sierra* doctrine applies to a challenge to a contract rate brought by an entity that was not a party to the contract. This is why the D.C. Circuit in the decision below explicitly stated that "[i]n the instant case, we are presented with a question of first impression: may the Commission approve a settlement agreement that applies the highly-deferential public interest standard to rate challenges brought by non-contracting third parties?" Pet. App. 20a. Because the decision below is the first appellate decision addressing this issue, there is no compelling reason to grant the petition for a writ of certiorari. S. Ct. Rule 10(a).

Petitioners cite several cases that they claim support the proposition that courts have previously determined that the *Mobile-Sierra* doctrine "protects contract rates from all challenges—whether by parties or non-parties, including FERC acting *sua sponte*." Pet. 26. Petitioners cite *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937 (1st Cir. 1993), and *Boston Edison Co. v. FERC*, 233 F.3d 60 (1st Cir. 2000), for the proposition that "when FERC—which is not a contracting party—seeks to challenge a contract rate as unjust or unreasonable, FERC too must overcome the Mobile-Sierra presumption." Pet. 26. Petitioners draw the incorrect conclusion from these rulings. In both of those cases, the courts concluded that the FERC must apply the *Mobile-Sierra* presumption as between the parties to a bilateral contract.

Petitioners also cite *Boroughs of Chambersburg v. FERC*, 580 F.2d 573 (D.C. Cir. 1978), *Public Serv. Co. of Indiana, Inc. v. FERC*, 575 F.2d 1204 (7th Cir. 1978), *Town of Norwood v. FERC*, 587 F.2d 1306 (D.C. Cir. 1978), and *Wisconsin Public Power v. FERC*, 493 F.3d 239 (D.C. Cir. 2007), for the proposition that "courts have repeatedly invoked *Mobile-Sierra* to reject the efforts of non-parties to invalidate (as discriminatory or unjust) the contracts of others." Pet. 27-28. These cases also do not stand for the proposition for which they are cited.

As Petitioners acknowledge, these cases involved claims of "undue discrimination" and the question of whether disparities between *Mobile-Sierra* contract rates and rates made available to other non-contracting customers constitute prohibited discrimination. Thus, the decisions in these cases addressed challenges to existing contracts, not on the grounds that the contracts would bind the third-party challengers, but instead upon the grounds that contract counterparties received more favorable terms and conditions of service than those provided to other non-contracting third parties. *See, e.g.*, *Wisconsin Public Power*, 493 F.3d at 269-275. Unlike here, the contracts in question in the cases upon which Petitioners rely did not purport to bind third parties to take service under their privately negotiated terms and conditions. Nor did those contracts and the *Mobile-Sierra* protections afforded their parties purport to deprive any third party of its statutory right to challenge any rate applicable to the third party under the ordinary just and reasonable review.

The remaining cases cited by Petitioners also do not address the issue of applying the *Mobile-Sierra* presumption to non-contracting third parties. For example, Petitioners cite to *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968), for the proposition that because "the regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies[,] it contemplates abrogation of these agreements only in circumstances of unequivocal public interest." Pet. 17. While this is true where, as in *Permian Basin*, the Court was enforcing the terms of a contract as between the counterparties to that contract, it is absolutely irrelevant in the instant case. *Permian Basin* does not stand for the proposition that the same level of review should be applied to challenges by non-contracting third parties, particularly where, as here, the non-contracting third parties would be bound to the contract by force of a settlement agreement to which they objected.

B. Neither *Morgan Stanley* Nor Any Other Decision by this Court Stands for the Proposition That *Mobile-Sierra* Should Apply to Challenges by Non-Signatories to a Settlement Agreement

The D.C. Circuit's decision in no way conflicts with this Court's decision in *Morgan Stanley*. In *Morgan Stanley*, this Court stated that the premise behind the *Mobile-Sierra* doctrine "was grounded in the commonsense notion that '[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate *as between the two of them.*'" *Morgan Stanley*, 128 S. Ct. 2733, 2740 (citing *Verizon*, 535 U.S. 467) (emphasis added). This Court reasoned that "when commercial parties . . . avail themselves of rate agreements, the principal regulatory responsibility [is] not to relieve a contracting party of an unreasonable rate." *Id.* Such a policy would serve to undermine the important role that contracts serve in promoting market stability. As the Court made clear:

> [b]y enabling sophisticated parties who weathered market turmoil by entering long-term contracts to renounce those contracts once the storm has passed, the

> Ninth Circuit's holding would reduce the incentive to conclude such contracts in the future. Such a rule has no support in our case law and plainly undermines the role of contracts in the FPA's statutory scheme.

Morgan Stanley, 128 S. Ct. at 2747.

Contrary to Petitioners' claim, the point in *Morgan Stanley* is that the contracting parties are bound to their agreement; it does not impose the *Mobile-Sierra* doctrine upon those who did not enter into the contract. While the Court made clear that FERC's regulatory responsibility is not to "relieve a contracting party of an unreasonable rate," *Morgan Stanley*, 128 S. Ct. at 2740, that in no way suggests that the FERC may impose that same improvident rate upon a non-contracting third party, who has never agreed to the terms of the settlement and received no concessions in exchange for which the parties traded away their rights to seek review of rates under the ordinary just and reasonable showing.

In its ruling below, the D.C. Circuit correctly applied precisely the same reasoning articulated by this Court. The D.C. Circuit stated that, "[i]n *Mobile*, the Supreme Court stated that 'the relations *between the parties*' may be established by contract, subject only to the 'public interest' review." Pet. App. 21a (citing *Mobile*, 350 U.S. at 339) (emphasis in the original)). It concluded that applying the *Mobile-Sierra* presumption was "premised on the existence of a voluntary contract between the parties." Pet. App.

21a. The D.C. Circuit stated that the "purpose of the *Mobile-Sierra* doctrine is 'to preserve the benefits of the *parties' bargain* as reflected in the *contract*, assuming that there was no reason to question what transpired at the contract formation stage.'" Pet. App. 21a (quoting *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002)) (emphasis added)).

In the instant case, there is no valid contract between the eight non-settling parties and the 107 signatories to the contested settlement agreement in the underlying Commission proceeding. There can be no assumption that those non-settling parties had negotiated a just and reasonable rate or indeed had negotiated any benefits for themselves—the very assumption that is the precondition for the application of the *Mobile-Sierra* doctrine.

III. THERE IS NO COMPELLING REASON FOR THIS COURT TO REVIEW WHETHER THE *MOBILE-SIERRA* DOCTRINE SHOULD APPLY TO NON-CONTRACTING PARTIES IN THIS CASE

A. The Decision Below Was Correctly Decided

Petitioners argue that the decision below "conflicts with decades of settled practice." Pet. 25. They further argue that the court of appeals misunderstood or misapplied the standard of review and that the court mistakenly relied on contract law to support its determination that the *Mobile-Sierra* doctrine does not extend to parties that contested a settlement agreement. As discussed below, however, Petitioners fail to recognize that (1) FERC does not have any long-standing practice of applying the *Mobile-Sierra* doctrine to third parties, (2) the decision below applied the correct standard of review and is consistent with FERC practice relating to approval of contested settlements, and (3) the court properly relied on contract principles in refusing to apply the *Mobile-Sierra* doctrine to non-settling third parties.

The FERC policy of applying the *Mobile-Sierra* presumption to non-contracting third parties is not a "longstanding position." Pet. 12. To the contrary, as the FERC acknowledged to the D.C. Circuit, this policy dates back only as far as 2002. Pet. App. 23a. Petitioners fail to acknowledge this position's recent vintage and make no effort to reconcile FERC's pre-2002 *Mobile-Sierra* policy with their sweeping declaration that the D.C. Circuit decision "conflicts with decades" of practice. That is because they cannot. In fact, FERC's approval of the *Mobile-Sierra* presumption to non-contracting parties, as in the underlying proceeding, is a recent innovation that has never been subject to judicial review.

Until 2002, FERC expressly refused to apply the *Mobile-Sierra* presumption to third parties. For example, in *PJM Interconnection*, 96 FERC ¶ 61,206 at P 61,878 (2001), FERC rejected an argument that parties to a contract may "bind not only one another, but also other entities who are not parties to that contract (and did not receive the contractual benefits in exchange for which the parties traded away their right to seek rate changes)." Thus, the D.C. Circuit's decision below is not a new rule, but rather is in keeping with FERC's rationale prior to 2002.

Even after 2002, FERC continued to reject agreements that applied the *Mobile-Sierra* presumption to non-signatories in contested settlement agreements. *See, e.g., Milford Power Company, LLC*, 119 FERC ¶ 61,167, at P 31 (2007); *Bridgeport Energy, LLC*, 118 FERC ¶ 61,243 at P 41 (2007). Just as in the instant case, FERC observed that the purpose of certain types of agreements with generators to provide reliability service have a "wide applicability" to market participants that are much broader in number than the entities executing the agreements. *Id.* In these cases, FERC determined that it was inconsistent with its duty under the Federal Power Act to be bound to the restrictive public interest mode of review when reviewing such agreements. FERC determined that "any challenges to the . . . agreement by non-parties under section 206 of the FPA shall be reviewed by the Commission under the just and reasonable standard." *Milford Power*, 119 FERC ¶ 61,167, at P 31; *see also Bridgeport Energy*, 118 FERC ¶ 61,243 at P 41 (2007).

Petitioners argue that the D.C. Circuit erred in rejecting the "application of *Mobile-Sierra* to non-party challenges because it would 'deprive th[ose non-parties] of their statutory right to challenge rates under the 'just and reasonable' standard.'" Pet. 23. Petitioners state that this Court's decision in *Morgan Stanley* "held that there 'is only one statutory standard for assessing wholesale electricity rates, whether set by contract or tariff—the just and reasonable standard.'" Pet. 24 (citing *Morgan Stanley*, 128 S. Ct. at 2745). They claim that the decision below was in error, because the Court in *Morgan Stanley* rejected the view that *Mobile-Sierra* departs from the statutory just and reasonable standard. *Id.*

The Petitioners read too much into the D.C. Circuit's references to the "just and reasonable" and "public interest" standards. In *Morgan Stanley*, this Court observed that the Commission and the Courts of Appeals have used this longstanding nomenclature to refer to the two modes of review under the single, statutory "just and reasonable" standard. *Morgan Stanley*, 128 S. Ct. at 2740. There is nothing in the D.C. Circuit's decision below to suggest that the court misunderstood or intended to modify the standard of review.

The D.C. Circuit did not base its decision on whether the *Mobile-Sierra* presumption was either an extra-statutory standard or an application of the "just and reasonable standard in the contract context." Instead, the court correctly determined that the *Mobile-Sierra* presumption only applies when there is a voluntary contract among the parties and not, as here, when there were "non-settling third parties who have vociferously objected to the terms of the settlement agreement." Pet. App. 22a. The court concluded that "it goes without saying that a contract cannot bind a nonparty." *Id.* (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002)).

The policy concerns present in *Morgan Stanley* are not present here. In *Morgan Stanley*, the buyers had "buyer's remorse" after the crisis in the California markets had passed. *Morgan Stanley*, 128 S. Ct. at 2743. The Court was concerned that, in such circumstances, "enabling sophisticated parties who weathered market turmoil by entering long-term contracts to renounce these contracts once the storm has passed . . . would reduce the incentive to conclude such contracts in the future." *Id.* at 2747.

The circumstances in the present case are far different. Respondents do not have buyer's remorse, because they never agreed to the terms of the settlement agreement. FERC can still apply the *Mobile-Sierra* presumption to challenges raised by any of the signatories to the settlement agreement, which would promote contract stability. Applying the *Mobile-Sierra* presumption to rate challenges raised by non-settling parties, on the other hand, could promote uncertainty in energy markets and promote gaming of settlement proceedings, undermining the very market stability that Petitioners claim is essential to industry stability. As Commissioners Kelly and Wellinghoff argued:

> The agreement . . . is a settlement of an adjudication that 107 of 115 parties to the proceeding signed. If the *Mobile-Sierra* standard is applied to this settlement, what does it mean for future settlements? Would it

> apply to any settlement arrived at by the utility with any of the intervening parties? What if the utility achieved the agreement of one party out of 115? How about 50 parties out of 115? How about two parties out of seven? What if the two settling parties were affiliates of the utility? . . . The gaming scenarios this could spawn are countless. The uncertainty would be boundless.

Pet. App. 231a-232a. Applying the *Mobile-Sierra* presumption to non-settling parties would lead to the absurd result that two parties in a complex, multiparty proceeding could settle amongst themselves to fix rates or a mechanism to fix rates and bind all other non-settling parties to take or offer service at those rates absent a showing that the agreement unequivocally harms the public interest.

Applying the *Mobile-Sierra* presumption to non-contracting third parties would create an extraordinary modification of the rights of non-settling parties in contested settlements. This is because, as this Court made clear, the *Mobile-Sierra* presumption applies at every level of review of the contract, including at the FERC's initial review of whether to approve the settlement agreement in the first place. In *Morgan Stanley*, this Court flatly rejected the Ninth Circuit's determination that "all initially filed contracts must be subject to review without the *Mobile-Sierra* presumption," ruling instead that the presumption of reasonableness would apply "regardless of when the contract is reviewed." *Morgan Stanley*, 128 S. Ct. at 2746.

Petitioners explain that this case involves a "disagreement over the standard that would govern *future* challenges" to transition rates or rates that result from the auction process, but maintain that the case "does not concern the standard FERC applied in this case when deciding whether to approve the settlement agreement itself." Pet. 7 (emphasis in original). However, they fail to acknowledge the potentially far-reaching effect of expanding the *Morgan Stanley* holding to apply to non-settling parties.

Since, as discussed above, under *Morgan Stanley*, FERC must presume that a bilateral wholesale contract is just and reasonable as between the parties to the contract, expanding this holding to apply the *Mobile-Sierra* doctrine to parties contesting a settlement brings into question the standard that the Commission is to apply to contested settlements. Currently, when a utility files a tariff change under section 205, the Commission reviews whether it is just and reasonable. Petitioners' invitation to expand *Morgan Stanley's* holding could disturb the Commission's existing ability to determine the reasonableness of contested settlement agreements and would result in significant decision-making authority being transferred from the Commission to the utility and other private parties entering into the settlement agreement. As Commissioners Kelly and Wellinghoff stated in their dissent to the

Commission's decision to request rehearing of the *Mobile-Sierra* portion of the decision below, allowing the Commission to hold a settlement agreement to any standard other than the "ordinary" just and reasonable standard "would cause untold uncertainty in future adjudications before the Commission; would be unduly discriminatory to applicants for tariff changes who do not obtain settlement agreements; and would result in a regulatory morass of utility tariff provisions with differing status." Pet. App. 230a.

Finally, Petitioners' effort to argue that principles of contract law weigh against the decision below is inconsistent with *Mobile-Sierra* precedent. Petitioners take issue with the D.C. Circuit's citation to *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) ("[i]t goes without saying that a contract cannot bind a nonparty."). First, they state "the premise that *Mobile-Sierra* derives from, and is bounded in scope by, contract law is incorrect." Pet. App. 22a. However, Petitioners ignore that the very rationale for *Mobile-Sierra* is rooted in the basic constructs of contract law. As stated in the decision below, "[i]n *Mobile*, the Supreme Court stated that 'the relations *between the parties*' may be established by contract, subject only to the 'public interest' review." Pet. App. 21a (citing *United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 339 (1956)). Petitioners' argument is also inconsistent with the Court's reliance on the role of contract principles in the development of the *Mobile-Sierra* doctrine. As the

Court stated in *Morgan Stanley*, "[b]y enabling sophisticated parties who weathered market turmoil by entering long-term contracts to renounce those contracts once the storm has passed, the Ninth Circuit's holding would reduce the incentive to conclude such contracts in the future. Such a rule has no support in our case law and plainly undermines the role of contracts in the FPA's statutory scheme." *Morgan Stanley*, 128 S. Ct. at 2147. Thus, the fact that *Mobile-Sierra* "comes from the FPA," Pet. 30, says nothing about the incorporation of contract principles into the doctrine. In fact, it is clear that at its core, the application of *Mobile-Sierra* requires a "voluntary contract between the parties." Pet. App. 21a.

Second, Petitioners rely on *Local No. 93 Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), to argue that application of *Mobile-Sierra* to non-settling parties does not "bind" them and therefore is not inconsistent with contract law. Petitioners argue, relying on *Firefighters*, that application of the *Mobile-Sierra* doctrine to future rate challenges by non-settling parties does not impose any legal duties on non-settling parties or resolve any claims they may have.

Contrary to Petitioners' claims, *Firefighters* does not stand for the proposition for which it was cited. In *Firefighters*, the issue was whether a non-settling party's agreement was required before a district court could approve the consent decree at issue. The Court held that agreement was not required because the consent decree *would not affect the non-settling party's rights*. 478 U.S. at 529-30. Of course, in the present case, application of the *Mobile-Sierra* doctrine to non-settling parties would require non-settling parties to make the stringent public interest showing in future rate challenges to transition payments or auction prices resulting from the settlement agreement. Thus, the application of the *Mobile-Sierra* doctrine to non-settling parties would affect their statutory rights under the FPA.

B. The Decision Below Will Not Threaten Industry Stability

Petitioners' claim that the decision below will threaten industry stability is without merit and should be rejected. *See* Pet. 19-23. Petitioners argue that the decision will open the door to "any one of that boundless group of non-parties and potential surrogates [to] ask[ ] FERC to abrogate a contract." *Id.* at 19. The Petitioners claim, therefore, that the "'third party exception' to *Mobile-Sierra's* public interest standard will engulf the rule and destroy the stability it is designed to provide." *Id.*

As discussed, *supra*, FERC previously took the position that the *Mobile-Sierra* doctrine should not be applied to non-contracting parties. Yet, this posed no threat to industry stability. Even under the ordinary just and reasonable review, an entity with standing to challenge a utility's tariff provision must prove that circumstances have changed so dramatically that the tariff provision has become unjust and unreasonable. Overcoming this substantial obstacle "does not happen often." Pet. App. 238a (dissent of Commissioners Kelly and Wellinghoff (Aug. 4, 2008)).

Finally, contrary to Petitioners' claims, the D.C. Circuit's decision below will not occasion the collapse of the electricity infrastructure in New England. As the D.C. Circuit explained, the *Mobile-Sierra* presumption of reasonableness ensures contract stability "*as between the contracting parties*" and "[i]t makes no sense to say that the values of 'stability' and 'certainty' are furthered by applying the deferential standard of review to the eight parties that *refused* to agree to the terms of the settlement." *Id.* at 24a (emphasis in original). If settling parties cannot legally bind non-settling parties to their agreement, they may choose to compromise other aspects of the settlement with the non-settling parties in order to obtain their agreement to limit their rights under Section 206. Alternatively, to the extent that the settling parties value those other aspects of the settlement greater than absolute certainty, they may choose to settle amongst themselves without that certainty. There is no need for the Court to address whether the *Mobile-Sierra* doctrine should apply in this case, because the settling parties remain free to choose whether to reach a settlement with all parties.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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