

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 Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

**BRIEF OF AMICI CURIAE
AMERICAN PUBLIC POWER ASSOCIATION
AND NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION
IN SUPPORT OF RESPONDENTS**

SCOTT H. STRAUSS
Counsel of Record
JEFFREY A. SCHWARZ
SPIEGEL & MCDIARMID LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 879-4000

[Additional Counsel Listed On Inside Cover]

SUSAN N. KELLY
*Vice President of Policy
Analysis and General
Counsel*
AMERICAN PUBLIC POWER
ASSOCIATION
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20009
(202) 467-2933

WALLACE F. TILLMAN
General Counsel
RICHARD MEYER
Senior Regulatory Counsel
NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION
4301 Wilson Boulevard
Arlington, VA 22203
(703) 907-5811

*Counsel for Amici Curiae
American Public Power
Association and National
Rural Electric Cooperative
Association*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 9

I. AS FERC CONCEDES, NEW ENGLAND’S CAPACITY RATES ARE TARIFF RATES TO WHICH *MOBILE-SIERRA* DOES NOT APPLY. 9

 A. As this Court, Petitioners, and their amici have recognized, *Mobile-Sierra* applies only to contract rates, not tariff rates imposed on unwilling customers. 10

 B. The use of Memphis clauses illustrates why non-contracting customers face no *Mobile-Sierra* presumptions. 18

 C. The transition-period capacity rates are tariff rates to which *Mobile-Sierra* does not apply. 20

D. ISO-NE’s post-transition capacity rates are tariff rates to which <i>Mobile-Sierra</i> cannot apply.....	22
1. ISO-NE’s post-transition capacity rates are not contract rates.....	23
2. Because <i>Mobile-Sierra</i> is contract-based and ISO-NE’s capacity rates are tariff-based, FERC lacked “discretion” to apply <i>Mobile-Sierra</i>	27
II. THE PUBLIC-INTEREST TEST DOES NOT ADEQUATELY PROTECT NON-CONSENTING WHOLESALE CUSTOMERS.....	31
III. WHETHER AND HOW <i>MOBILE-SIERRA</i> SHOULD APPLY TO “INDIRECTLY-AFFECTED” THIRD PARTIES DEPENDS ON THE FACTS.	35
IV. <i>MAINE PUBLIC</i> DOES NOT CONFLICT WITH <i>MORGAN STANLEY’S</i> HOLDING THAT THERE IS ONLY ONE STATUTORY STANDARD.....	38

CONCLUSION 39

TABLE OF AUTHORITIES

FEDERAL COURT CASES

<i>Ark. La. Gas Co. v. Hall</i> , 453 U.S. 571 (1981).....	32
<i>Conn. Dep't of Pub. Safety v. Doe</i> , 538 U.S. 1 (2003).....	9
<i>Conn. Dep't of Pub. Util. Control v. FERC</i> , 569 F.3d 477 (D.C. Cir. 2009), <i>peti-</i> <i>tion for cert. filed</i> , No. 09-277 (U.S. Sept. 3, 2009).....	24-25
<i>Consol. Gas Supply Corp. v. FERC</i> , 606 F.2d 323 (D.C. Cir. 1979), <i>cert.</i> <i>denied</i> , 444 U.S. 1073 (1980).....	17
<i>FPC v. Sierra Pac. Power Co.</i> , 350 U.S. 348 (1956).....	<i>passim</i>
<i>Kelley ex rel. Mich. Dep't of Natural Res. v.</i> <i>FERC</i> , 96 F.3d 1482 (D.C. Cir. 1996).....	17
<i>Laclede Gas Co. v. FERC</i> , 997 F.2d 936 (D.C. Cir. 1993).....	3, 17
<i>Me. Pub. Utils. Comm'n v. FERC</i> , 520 F.3d 464 (D.C. Cir. 2008).....	11, 38-39

<i>Mobil Oil Corp. v. FPC</i> , 417 U.S. 283 (1974).....	3, 16-17, 20
<i>Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County</i> , 554 U.S. ___, 128 S. Ct. 2733 (2008).....	<i>passim</i>
<i>Ne. Utils. Serv. Co. v. FERC</i> , 55 F.3d 686 (1st Cir. 1995).....	32
<i>N. Ind. Pub. Serv. Co. v. Carbon County Coal Co.</i> , 799 F.2d 265 (7th Cir. 1986).	28
<i>NSTAR Elec. & Gas Corp. v. FERC</i> , 481 F.3d 794 (D.C. Cir. 2007).	37
<i>Papago Tribal Util. Auth. v. FERC</i> , 723 F.2d 950 (D.C. Cir. 1983), <i>cert. denied</i> , 467 U.S. 1241 (1984).	32
<i>Permian Basin Area Rate Cases</i> , 390 U.S. 747 (1968).....	32-33
<i>Placid Oil Co. v. FPC</i> , 483 F.2d 880 (5th Cir. 1973).	16-17
<i>Potomac Elec. Power Co. v. FERC</i> , 210 F.3d 403 (D.C. Cir. 2000).	33
<i>Tejas Power Corp. v. FERC</i> , 908 F.2d 998 (D.C. Cir. 1990).	17

<i>United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div., 358 U.S. 103 (1958)</i>	18, 19, 32
<i>United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956)</i>	<i>passim</i>
<i>Verizon Commc'ns Inc. v. FCC, 535 U.S. 467 (2002)</i>	11, 12

FEDERAL AGENCY CASES

<i>Bridgeport Energy, LLC, 118 F.E.R.C. ¶ 61,243 (2007)</i>	37
<i>Carolina Power & Light Co., 67 F.E.R.C. ¶ 61,074 (1994)</i>	35
<i>ISO New England Inc., 106 F.E.R.C. ¶ 61,280, PP 128-30, corrected by 107 F.E.R.C. ¶ 61,051 (2004), petition for review denied sub nom. Me. Pub. Utils. Comm'n v. FERC, 454 F.3d 278 (2006)</i>	37
<i>ISO New England Inc., 127 F.E.R.C. ¶ 61,142 (2009)</i>	24
<i>Milford Power Co., LLC, 119 F.E.R.C. ¶ 61,167 (2007)</i>	37-38
<i>PJM Interconnection, LLC, 96 F.E.R.C. ¶ 61,206 (2001)</i>	35

PSEG Power Co., LLC,
119 F.E.R.C. ¶ 61,168 (2007).....37

FEDERAL STATUTES

Federal Power Act,
16 U.S.C. §§ 791a-825r11
§ 205, 16 U.S.C. § 824d19
§ 206, 16 U.S.C. § 824e.....19

**BRIEF OF AMICI CURIAE
AMERICAN PUBLIC POWER ASSOCIATION
AND
NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION**

INTEREST OF AMICI¹

The American Public Power Association (APPA) represents the nation's more than 2,000 not-for-profit, publicly-owned electric utilities, which do business in every state except Hawaii. Public power systems own roughly 10 percent of the nation's electric generating capacity, and provide more than 15 percent of all kilowatt-hours of electricity sold to ultimate customers. Sixty-six New England public power systems are APPA members.

The National Rural Electric Cooperative Association (NRECA) represents the nation's 930 not-

¹ Counsel of record for all parties received notice at least 10 days prior to this brief's due date of the amici curiae's intention to file a brief, and the parties consented to the filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

for-profit, customer-owned rural electric cooperatives serving more than 40 million end users in 47 states. Of those 930 cooperatives, 64 are generation and transmission cooperatives that are owned by and sell power to their member distribution cooperatives. NRECA has 7 members in New England.

The members of both associations participate in wholesale power markets as buyers *and* sellers.

SUMMARY OF ARGUMENT

Contrary to Petitioners' rhetoric, this case is not about the application or scope of the *Mobile-Sierra* doctrine.²

In the proceeding below, ISO New England (ISO-NE) filed a tariff establishing market-wide rates, which FERC suspended and set for hearing. ISO-NE and a subset of intervenors subsequently reached a settlement purporting to set capacity rates for all market participants, whether or not they agreed to the settlement. Over the objections of some litigants, FERC approved the settlement, which included a *Mobile-Sierra* provision purporting to govern future rate challenges by *any* market

² See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.* (*Mobile*), 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.* (*Sierra*), 350 U.S. 348 (1956).

participant, whether or not it signed the settlement.

Mobile-Sierra holds that freely negotiated contracts between sophisticated parties with presumptively equal bargaining power are presumed just and reasonable “as between the two [contracting parties].” *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County (Morgan Stanley)*, 554 U.S. ___, 128 S. Ct. 2733, 2746 (2008) (internal quotation omitted). New England’s capacity rates are not set through bilateral contractual arrangements to which *Mobile-Sierra* applies. Instead, these rates are set pursuant to a unilaterally-filed tariff whose terms were disputed and subsequently resolved in a Commission-approved, contested settlement.

Both Petitioners and FERC have acknowledged that the contested settlement created no initial presumption of reasonableness as to non-parties. Pet. for Writ of Cert. 7-8; FERC Br. 32-33. They concede, as they must, that FERC correctly reviewed the settlement under the ordinary just-and-reasonable standard. *E.g.*, *Mobil Oil Corp. v. FPC (Mobil)*, 417 U.S. 283, 313-14 (1974); *Laclede Gas Co. v. FERC (Laclede)*, 997 F.2d 936, 944 (D.C. Cir. 1993). As no *Mobile-Sierra* presumption attached to the contested settlement, the question whether the presumption would apply to third parties is not at issue.

Petitioners and FERC advance different theories as to how and why a contract-based *Mobile-Sierra* presumption could apply to ISO-NE's tariff rates, but neither holds.

FERC argues that, in approving the settlement, it had the discretion to adopt a *Mobile-Sierra* provision and make it applicable to both settlement signatories and non-signatories. This contention is flawed because, as *Morgan Stanley* explained, the *Mobile-Sierra* presumption arises from the consent of parties to contract rates, not from FERC's approval of those rates or from its determination that unilaterally-filed tariff rates are just and reasonable. Thus, the same absence of consent that precluded the application of a presumption during FERC's review of the contested settlement also bars its application to subsequent non-party challenges.

While FERC may accept contested settlements and implement disputed rates if it independently finds those rates to be reasonable, the resulting rates are tariff rates, not contract rates, at least as to the non-consenting wholesale customers.³

³ The settling parties' agreement may operate to waive their rights to seek changes to ISO-NE's tariff rates, but it does not transform those tariff rates into contract rates that FERC must presume to be reasonable as against non-consenting customers.

The application of *Mobile-Sierra* through FERC's approval of a contested settlement of a disputed, market-wide tariff would be a judicially-unprecedented and unwarranted expansion of the contract-based *Mobile-Sierra* doctrine.

Petitioners take a different and less deferential tack in defending the agency's decision. Instead of claiming that FERC had discretion to decide whether to apply *Mobile-Sierra* to New England's post-"transition period" capacity rates, Petitioners argue that FERC is required to do so because of the nature of those rates. In Petitioners' view, the incorporation of a pseudo-auction mechanism in ISO-NE's tariff-based process for setting post-transition capacity prices means that each annual rate must be considered a "contract" rate to which *Mobile-Sierra* would apply independent of the contested settlement. Pet'rs' Br. 20-21.⁴ While FERC disagrees with that characterization, it nonetheless argues that the market-based features of ISO-NE's tariff rates justified FERC's exercise of discretion to presume their reasonableness. FERC Br. 36-37.

Both positions are incorrect. Although Petitioners refer to New England's post-transition ca-

⁴ Petitioners can find no similar, independent basis for applying *Mobile-Sierra* to the transition-period capacity rates established specifically by the contested settlement.

capacity rates as “auction” rates, the operation of ISO-NE’s tariff rules for calculating those rates exhibits none of the hallmarks of bargaining and consent from which *Mobile-Sierra* presumptions derive. ISO-NE determines administratively the amount of capacity to be procured overall, assigning a proportional share to each load-serving entity (LSE). LSEs cannot opt out of that obligation. They may attempt to “self-supply” the required capacity, but ISO-NE may determine administratively that the proffered resources do not “qualify” to satisfy their obligations. LSEs then must pay the prices established through ISO-NE’s tariff for the difference between their capacity obligations and any qualified self-supply resources.

LSEs make self-supply decisions in advance of the “auction” and have no means to establish a price above which they would prefer to self-supply capacity rather than pay ISO-NE’s tariff prices. Suppliers have more flexibility to attempt to opt out of the market, but even their decisions are subject to extensive administrative controls. The “auctions” afford buyers and sellers no ability to alter the non-price terms and conditions of the products at issue and no opportunity to bargain or trade concessions. The prices resulting from this process also are subject to both a floor and ceiling established in the contested settlement.

Consequently, no *Mobile-Sierra* presumption applies here because any cause for confidence in

the reasonableness of ISO-NE's capacity rates derives from faith in the reasonableness of the applicable tariff rules, not the "consent" of buyers and sellers. Phrased differently, if merely purchasing service under tariff rates were sufficient to support a *Mobile-Sierra* presumption, then *all* rates—whether established by contract or tariff—would be subject to such presumptions. Neither this Court nor any other has suggested that result. On the contrary, *Morgan Stanley* itself—and the distinction it drew between tariffs and contract rates—renders such a result untenable.

Petitioners ask the Court to avoid addressing whether New England's capacity rates are contract rates to which *Mobile-Sierra* applies. Instead, they urge consideration of a question not presented: how the *Mobile-Sierra* doctrine, *once triggered*, applies to various third parties. Petitioners point to the purported evils of permitting indirectly-affected third parties to challenge bilateral power sales agreements free of the *Mobile-Sierra* presumption that applies to the contracting parties themselves. But such concerns are not at issue in this case, and the Court should reject this gambit.

If the Court nonetheless addresses this issue, it should tread cautiously, recognizing the widely varied circumstances in which parties sign contracts. Contracts through which independent system operators, such as ISO-NE, procure services

from generators and transmission owners are of particular concern. Independent system operators like ISO-NE are non-profit corporations without any shareholders and are virtually guaranteed to recover whatever costs they incur from ratepayers. In such circumstances, APPA and NRECA submit, FERC may not simply presume that the rates that such entities agree to incur and pass on will be reasonable.

Finally, the Court should reject Petitioners' remaining arguments. The decision below does not violate *Morgan Stanley's* holding that the just-and-reasonable standard is the only statutory standard for reviewing public utility rates. Nor would application of the public-interest version of the just-and-reasonable standard adequately protect dissenting wholesale customers just because those customers are "members of the public." Pet'rs' Br. 24. Petitioners well understand that the *Mobile-Sierra* public-interest test not only protects different interests than ordinary just-and-reasonable review, but also typically requires a materially greater showing of harm to those interests to justify rate changes. That the public-interest test is "much more restrictive" than the ordinary just-and-reasonable standard is exactly why Petitioners seek to impose it on both contracting and non-contracting parties.

This case should be easily decided. Respecting freedom of contract means honoring dissenting customers' *refusals* to contract on par with the set-

ting parties' decisions to contract. Even if FERC accepts tariff rates upon making an independent finding that they are reasonable, subsequent requests for rate changes—at least by the non-consenting wholesale customers—must be subject to ordinary just-and-reasonable review.

ARGUMENT

I. AS FERC CONCEDES, NEW ENGLAND'S CAPACITY RATES ARE TARIFF RATES TO WHICH *MOBILE-SIERRA* DOES NOT APPLY.

Petitioners' arguments notwithstanding, this is not a *Mobile-Sierra* case. Petitioners argue that the Court need not address whether New England's capacity rates are contract rates, urging that the question be left to the D.C. Circuit in the first instance. That puts the cart before the horse. If New England's capacity rates are not contract rates, as we demonstrate below and as FERC concedes,⁵ then *Mobile-Sierra* is inapplicable and the question of whether or how it applies to third parties does not arise. As the Court generally does not decide unnecessary questions, e.g., *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003), it should not

⁵ FERC Br. 30.

reach Petitioners' arguments about restrictions upon third parties.⁶

A. *As this Court, Petitioners, and their amici have recognized, Mobile-Sierra applies only to contract rates, not tariff rates imposed on unwilling customers.*

From *Mobile* to *Morgan Stanley*, this Court has not wavered in distinguishing contract rates from tariff rates. Contract rates establish the rates to be charged “to particular customers” who agree to them. *Mobile*, 350 U.S. at 338. Tariff rates are rates of general applicability established without customer consent. The distinction is crucial for *Mobile-Sierra* purposes. As Petitioners themselves acknowledge, “this Court has repeatedly grounded

⁶ In any case, as explained in Section III below, the answer to Petitioners' question—whether *Mobile-Sierra* applies to third parties—should be “it depends.” Whether FERC must presume a contract to be reasonable under *Mobile-Sierra* depends on whom the contract affects, how directly, and whether the directly-affected parties agreed to the rates, rejected them, or were absent from the negotiations. If a categorical answer is required, the answer must be that where, as here, parties directly and substantially affected by a contract were not present at its negotiation or refused to sign it, FERC may not presume that contract to be reasonable in the context of challenges brought by non-signatories.

Mobile-Sierra in the sensible notion that a rate agreed upon by a buyer and seller—as opposed to a tariff dictated unilaterally by the seller—can be expected to be reasonable.” Br. 34 (emphasis added). In contrast, “[t]he *Mobile-Sierra* doctrine does not apply when rates offered to prospective customers are established unilaterally through *ex parte* filings.” Elec. Power Supply Ass’n Br. 22 (citing *Morgan Stanley*, 128 S. Ct. at 2746 n.3).⁷

The decision below⁸ is consistent with *Mobile-Sierra*’s contractual foundations, while Petitioners’ view conflicts with them. The Federal Power Act (FPA), 16 U.S.C. §§ 791a-825r, “departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting.” *Morgan Stanley*, 128 S. Ct. at 2738 (quoting *Verizon Commc’ns Inc. v. FCC (Verizon)*, 535 U.S. 467, 479 (2002)). The FPA thus permits utilities to set rates “with individual electricity purchasers” through bilateral contracts, *id.* at 2738 (citation omitted), and, when they do so, *Mobile-Sierra* requires FERC to presume that “the rate[s]

⁷ See also *Morgan Stanley Capital Group* Br. 5 (“The degree of latitude possessed by FERC to modify an existing rate . . . varies depending on whether the rate was established unilaterally by tariff or instead by a negotiated contract.”).

⁸ *Me. Pub. Utils. Comm’n v. FERC (Maine Public)*, 520 F.3d 464 (D.C. Cir. 2008).

set out in [such] freely negotiated wholesale-energy contract[s] meet[] the ‘just and reasonable’ requirement” *Id.* at 2737.

But while sophisticated buyers and sellers can look out for their own interests and trade other benefits in exchange for rights to mount later challenges—giving rise to a presumption that the resulting agreement is reasonable “as between the two of them,” 128 S. Ct. at 2746 (quoting *Verizon*, 535 U.S. at 479)—their agreement establishes no presumption as to other entities. *See Verizon*, 535 U.S. at 479 (“[T]he principal regulatory responsibility [is] not to relieve *a contracting party* of an unreasonable rate”) (citing *Sierra*, 350 U.S. at 355) (emphasis added).

Petitioners praise the Court’s “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.*”” Pet’rs’ Br. 7 (quoting *Morgan Stanley*, 128 S. Ct. at 2746, and *Verizon*, 535 U.S. at 479) (emphasis added). However, Petitioners acknowledge that the expectation’s *limits* are “why [*Mobile-Sierra*] applies to rates ‘set bilaterally by contract’ but not those set ‘unilaterally by tariff.” *Id.* at 23 (citing *Morgan Stanley*, 128 S. Ct. at 2738).

For these reasons, the fate of Petitioners' challenge hinges on whether ISO-NE's capacity rates are contract rates, not tariff rates. Their position that ISO-NE's capacity rates are contract rates depends in turn on viewing *some* parties' agreement to the settlement as sufficient to require FERC to treat the settlement and the resulting rates as presumptively-reasonable contract rates with respect to *all* of the customers who will pay them. *Cf.* Pet'rs' Br. 19, 35 (“[C]ontract rates negotiated by sophisticated parties can be expected to be reasonable even insofar as they affect third parties.”).

Amici Colin C. Blaydon *et al.* (collectively, “Economists”) assert that wholesale contracts that are “presumptively reasonable as between the parties because of the ‘superior efficiency of private bargaining’” must also be deemed “presumptively reasonable as to third parties.” Econ. Br. 9-10 (quoting Pet'rs' App. 19a). In their view, “[c]ontract law and economic theories of contract rest on the common understanding that, because of the efficiency of private bargaining, buyers and sellers are able to negotiate contracts that maximize gains not only for themselves but also for society as a whole.” *Id.* (quoting Pet'rs' App. 22a). But the *reason* why private bargaining purportedly produces gains for “society as a whole” is that buyers and sellers negotiate prices based on the unique value each ascribes to the relevant goods or services, and each receives

something they value more highly than what they give. In contrast, forcing unwilling purchasers to buy prescribed amounts of a product at prices they consider to be excessive is not an efficient market outcome. Nor is it rendered efficient by the fact that *other* purchasers deemed the prices reasonable.

Elsewhere, the Economists seem to admit as much, noting that *Mobile-Sierra* “is premised on the agreement of willing and sophisticated parties,” *id.* at 14, and “would not be interpreted to permit one party to ‘thrust’ unilaterally upon others terms to which they ‘have vociferously objected.’” *Id.* at 14-15 (quoting Pet’rs’ App. 22a). But that is exactly what happened here. In fact, the Economists do not appear to criticize the D.C. Circuit for its resolution of the case before it, involving a “cram-down[] ... where agreement is only reached by a subset of the negotiating parties.” *Id.* 15 n.8. They merely object that “[t]he D.C. Circuit made no effort to confine its holding to the situation before it.” *Id.* at 19.

FERC and Petitioners seek to paint a different picture of the facts by focusing on what appears, superficially, to be overwhelming support for the contested settlement with only a few objectors.⁹

⁹ The Commission states (Br. 7) that of “the 115 parties participating in the settlement proceedings, only eight parties

Assuming a headcount were relevant, however, the truth is otherwise. Of the 115 votes cast on the proposed settlement, only 61 supported it. Another 46 were cast by parties who remained neutral, neither opposing settlement approval nor signing the agreement, and 8 votes formally opposed the settlement. Moreover, of the 61 “signatory votes,” 22 were cast by 6 groups of affiliated entities, including 5 votes cast by Petitioners.¹⁰

As these data reveal, although only one load-serving entity actively opposed it, misgivings about the settlement were far more widespread. And the one distribution company that formally opposed the settlement, Respondent NSTAR Corporation, serves much of the Boston, MA metropolitan area and accounts for approximately 25 percent of New England’s electrical load.¹¹ The decision by sophis-

formally opposed the agreement.” Petitioners go further, reciting the same math (Pet’rs’ Br. 9), and observing that “[i]f the agreement of *two* parties (a single buyer-seller pair) creates a presumption of reasonableness, the agreement of *dozens* of buyers and sellers creates a stronger presumption still.” *Id.* at 53 & n.15.

¹⁰ Attach. A to Reply Comments of New England Power Pool Participants Committee in Support of Settlement Agreement, Docket No. ER03-563 (Sept. 5, 2006), *available at* FERC eLibrary Accession no. 20060405-5083 (<http://elibrary.ferc.gov/IDMWS/common/opennat.asp?fileID=10992290>).

¹¹ Respondents’ Br. 8, 20.

ticated parties *not* to join the settlement undercuts any attempt to extrapolate a general presumption of reasonableness from other parties' decisions to settle.

No decision of this Court or any lower Court of Appeals suggests that rates to all wholesale customers may be established (and subjected to a reasonableness presumption) by contract between only some buyers and sellers. On the contrary, decisions of this Court and lower courts expressly hold otherwise. In 1974, this Court established the "correct legal principles," *Mobil*, 417 U.S. at 313, governing the Commission's assessment of "settlement proposal[s] that lack[] unanimous agreement" *Id.* at 312. That some parties agreed to the deal "did not, of course, establish without more the justness and reasonableness of its terms." *Id.* at 312-13. Instead, the Court explained:

If a proposal enjoys unanimous support from all of the immediate parties, it could certainly be adopted as a settlement agreement if approved in the general interest of the public. But even if there is a lack of unanimity, it may be adopted as a resolution on the merits, if FPC makes an independent finding supported by "substantial evidence on the record as a

whole” that the proposal will establish “just and reasonable” rates

Id. at 314 (quoting *Placid Oil Co. v. FPC*, 483 F.2d 880, 893 (5th Cir. 1973), *aff’d*, *Mobil*) (underlined emphasis added).

Thus, the Court affirmed the Fifth Circuit’s inquiry into “whether, viewing the terms of the proposal not as a traditional settlement but as a result of an administrative decision, it falls within that ‘zone of reasonableness’ which is supported by ‘substantial evidence on the record as a whole.’” *Placid Oil*, 483 F.2d at 894. Numerous D.C. Circuit cases are in accord.¹²

¹² *E.g.*, *Kelley ex rel. Mich. Dep’t of Natural Res. v. FERC*, 96 F.3d 1482, 1489-90 (D.C. Cir. 1996) (“[A] settlement that is forced onto a party is effectively converted into a decision ‘on the merits’” (citing *Mobil*, 417 U.S. at 314)); *Laclede*, 997 F.2d at 946 (“reject[ing] the notion that any settlement, solely because of its status as such, is reasonable” (citing *Tejas Power Corp. v. FERC*, 908 F. 2d 998, 1003 (D.C. Cir. 1990))); *Tejas Power Corp.*, 908 at 1003-04; *Consol. Gas Supply Corp. v. FERC*, 606 F.2d 323, 330 (D.C. Cir. 1979) (“The standard for judicial review of [a FERC order on] a contested settlement proposal is ... whether the Commission has made an independent rate determination supported by substantial evidence ... ”), *cert. denied*, 444 U.S. 1073 (1980). In making its independent determination, FERC may accord “some weight” to the number of customers supporting or not opposing the agreement, but a headcount is not dispositive. *Laclede*, 997

Contested settlements create no presumption of reasonableness because the element essential to that presumption—consent of the directly-affected parties—is missing. Because that consent is missing, FERC must make an “independent finding ... that the proposal will establish ‘just and reasonable’ rates,” *Mobil*, 417 U.S. at 314 (internal quotation omitted). FERC is therefore correct to concede that “the rates covered by the settlement’s public-interest review provision are not themselves contract rates to which the Commission was required to apply *Mobile-Sierra*.” FERC Br. 15 (emphasis omitted).

B. The use of Memphis clauses illustrates why non-contracting customers face no Mobile-Sierra presumptions.

The role of *Memphis*¹³ clauses in *Mobile-Sierra* jurisprudence further illustrates the absurdity of Petitioners’ position that contested settlements entered into by some wholesale customers

F.2d at 946.

¹³ *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div. (Memphis)*, 358 U.S. 103 (1958); see also *Morgan Stanley*, 128 S. Ct. at 2739.

can establish *Mobile-Sierra* presumptions running against all wholesale customers.

As the Court has explained, *Mobile-Sierra* is a restriction on the use of the FPA's rate-change procedures to evade or to void valid contract obligations, unless the public interest requires it. As stated in *Mobile*, "[a]bsent the Act, a unilateral announcement of a change to a contract would ...be a nullity," and nothing in the Act affected that result. 350 U.S. at 339. *Sierra* reached a similar conclusion, holding that FERC could relieve a contracting party of its valid contract obligations only when the public interest so required. *Sierra*, 350 U.S. at 355. Yet contracting parties may preserve their rights to make rate changes under FPA Section 205, 16 U.S.C. § 824d, or to seek changes under FPA Section 206, 16 U.S.C. § 824e, by including such rights expressly in so-called *Memphis* clauses.

Such savings clauses are needed, however, only to preserve rights that the contracting parties otherwise would be deemed to bargain away by entering into the contract. Where an entity has not bargained away any rights, there is neither a need nor an opportunity for it to negotiate any savings clause.

This structure puts the lie to Petitioners' claims that *Mobile-Sierra* "applies" to non-contracting parties and that it precludes application of the ordinary just-and-reasonable standard

when non-settling parties challenge rates imposed upon them by a contested settlement and subsequent tariff filing. It makes no sense to say that settling parties may avoid the *Mobile-Sierra* presumption by negotiating a savings clause preserving their right to seek changes under an ordinary just-and-reasonable standard, but non-settling parties—who never agreed to the deal in the first place and never bargained away any rights—must satisfy the “much more restrictive” (Pet’rs’ App. 19a (internal citations omitted)) public-interest test.

C. *The transition-period capacity rates are tariff rates to which Mobile-Sierra does not apply.*

The contested settlement establishing New England’s capacity market set forth specific, dollars-per-kilowatt-month capacity rates to be charged during the so-called “transition period,” which began in December 2006 and runs until mid-2010. Pet’rs’ App. 116a. Under *Mobil*, there can be no credible argument that a *Mobile-Sierra* presumption attaches to tariff rates adopted under a contested settlement. As FERC aptly observes:

The transition payments apply to all suppliers and purchasers of capacity—including the contesting parties and all future entrants into the market—not just to the settling parties.

As to these other participants, the transition payments do not resemble contractually negotiated rates at all.

FERC Br. 31 (emphasis added).¹⁴

Petitioners advance no serious argument to the contrary. Petitioners assert that “the transition-payment obligations of the settling parties are clearly ‘contract rates’ entitled to *Mobile-Sierra* protection,” Pet’rs’ Br. 53, but that is not the issue. On the real question, “[w]hether transition-payment obligations imposed on non-signatories would be contract or unilateral tariff rates, and whether FERC could impose *Mobile-Sierra* protection even in the latter event,” *id.* at 53-54 n.15, Petitioners claim that the matter is “complex” and repeat their entreaty that the Court refrain from passing on it.

Other than a passing reference to its “interest in the stability of the settlement,” FERC Br. 39, the agency never explains how or why FERC reasonably could apply a *Mobile-Sierra* presumption to what are unquestionably tariff rates. FERC and Petitioners’ focus on the short time during which

¹⁴ See also *id.* 16 (“The rates at issue here are set not by private contract, but pursuant to a tariff that was contained in a contested settlement ... ,” and “[t]he Commission therefore was not required to prescribe the public-interest standard for future challenges to [those] rates”).

the transition rates would be in effect (*id.*; Pet'rs' Br. 52) does not justify application of an otherwise-inapplicable *Mobile-Sierra* presumption; on the contrary, the limited time remaining demonstrates that it is unlikely that a challenge could be filed, let alone succeed, under an *ordinary* just-and-reasonable standard based on changed circumstances. In any event, for the reasons explained below, FERC lacks discretion to create or adopt a *Mobile-Sierra* presumption where the contracting parties' agreement is insufficient to do so by itself.

D. ISO-NE's post-transition capacity rates are tariff rates to which Mobile-Sierra cannot apply.

FERC and Petitioners take somewhat different tacks with respect to ISO-NE's post-transition, tariff-based capacity rates. Petitioners claim (Br. 47) that each payment of a tariff rate that uses an auction mechanism to establish the price is a separate contract to which *Mobile-Sierra* will apply regardless of whether the contested settlement (or FERC's approval of it) could effectuate that result. FERC disagrees, finding that the so-called auctions "will not result in contracts between buyers and sellers," but arguing nonetheless that "they share with freely negotiated contracts certain market-based features that render use of the public-interest standard appropriate." FERC Br. 36. Both arguments are incorrect. ISO-NE's post-transition

capacity rates are not contracts and lack the qualities necessary for FERC to presume their reasonableness—either initially or in light of changed circumstances.

1. ISO-NE's post-transition capacity rates are not contract rates.

Petitioners argue that because ISO-NE's method for determining post-transition capacity rates includes certain elements of an auction, the resulting rates are contract rates. Petitioners are incorrect. Tellingly, despite their insistence that auctions produce contracts, Petitioners do not seem certain with whom they will be contracting. *Compare* Pet'rs' Br. 49 ("Those that choose to acquire capacity through the auction ... are responsible for paying for capacity at the auction price ... [and], therefore, the auction rates reflect voluntary agreements between buyers and sellers.") *with id.* at 48 ("Before each auction, ISO-NE determines the amount of capacity *it* will purchase—the 'installed capacity requirement'—according to processes it develops in consultation with utilities and other stakeholders.") (emphasis added).

In fact, ISO-NE's method for determining post-transition period capacity rates includes few, if any, of the hallmarks of freely negotiated contracts among sophisticated parties from which the *Mobile-Sierra* presumption derives. Indeed, there is no

negotiation *at all* and no privity of contract between the sellers supplying the capacity and the wholesale customers paying the resulting rates. Neither buyers nor sellers have a breach of contract remedy against the other in cases of default.¹⁵ Most important, the exercise of parties' independent business judgment is largely supplanted or constrained by the operation of ISO-NE's tariff rules.

On the demand side, ISO-NE dictates administratively both the overall amount of capacity that must be procured in order to maintain reliability and the portion of that total amount for which individual customers must pay. *See* Pet's App. 85a. ISO-NE's calculation of the total "Installed Capacity Requirement" (ICR) depends on both its administrative determination of the level of reliability to be achieved and its assumptions about the types of capacity available, their dependability, and the amount of capacity that will be necessary to achieve its selected reliability standard. *See ISO New England Inc.*, 127 F.E.R.C. ¶ 61,142, PP 3-9 & n.5 (2009). The magnitude of the administratively-determined ICR—*i.e.*, the amount of capacity that must be procured—directly affects the capacity rates that ISO-NE charges LSEs under its tariff.

¹⁵ *Compare* Pet's Br. 48 ("[W]here winning bidder fails to pay, 'the seller is justified in treating the contract as breached or rescinded'" (quoting 7A C.J.S. *Auctions and Auctioneers* § 53, at 642 (2004))).

Conn. Dep't of Pub. Util. Control v. FERC, 569 F.3d 477, 478-79 (D.C. Cir. 2009) (ICR is “a key input into the market-based mechanism that determines transmission tariffs and end-user costs in the New England bulk power system”), *petition for cert. filed*, No. 09-277 (U.S. Sept. 3, 2009); Pet’rs’ App. 26a.

While customers may “self-supply” capacity in lieu of paying ISO-NE’s capacity rates, they may not choose to purchase or self-supply less than the ISO requires. Their ability to “self-supply” also is constrained, in that the ISO determines administratively whether and to what extent self-supplied resources “qualify” to supplant the obligation to pay ISO-NE’s rates. Pet’rs’ App. 112a-113a. ISO-NE’s “auction” offers no mechanism to negotiate bilaterally either reduced requirements, less stringent qualification criteria, or changes in non-price terms. In short, contracting freedom on the demand side of ISO-NE’s capacity “auctions” is dramatically constrained.

Similarly, on the supply side, ISO-NE rules dictate the characteristics that resources must exhibit in order to qualify as “capacity resources” under its tariff.¹⁶ They also limit both the bids that

¹⁶ In other words, ISO-NE’s resource-qualification requirements constrain customers’ flexibility to choose to pay lower capacity rates in exchange for less reliable capacity resources.

sellers may submit, specifying the prices below which they no longer are willing to sell into the market, and their ability actually to leave the market if prices drop below that level but their resources are needed for reliability.

The resulting “market” prices are further constrained by a “price collar,” *i.e.*, by floor and ceiling prices equal to 0.6 times and 1.4 times the “Cost of New Entry” calculated in accordance with the settlement. Joint App. 132. The contested settlement provides for that price collar to remain in place “[f]or the lesser of five FCAs or three Successful FCAs.” *Id.*

In these circumstances, there is no basis for a *Mobile-Sierra* presumption. Any confidence in the reasonableness of New England’s capacity prices derives from faith in the tariff rules that produce those rates, not from the “consent” of the buyers and sellers paying or being paid those rates. If taking and paying for tariff-required service was sufficient to support a *Mobile-Sierra* presumption, then *all* rates—whether established by contract or tariff—would be subject to such presumptions. *Morgan Stanley* reaches precisely the opposite result.

2. Because *Mobile-Sierra* is contract-based and ISO-NE's capacity rates are tariff-based, FERC lacked "discretion" to apply *Mobile-Sierra*.

FERC correctly concludes that ISO-NE's post-transition capacity rates are not contract rates to which the Act required it to apply a *Mobile-Sierra* presumption. It errs, however, in assuming that FERC had the "discretion" to apply a contract-based, *Mobile-Sierra* presumption to non-contract rates. FERC had no discretion to treat an apple as if it were an orange. For the same reason that FERC is not permitted to presume the reasonableness of tariff rates initially, it may not adopt a presumption that they will remain reasonable despite changed circumstances. FERC's contrary position fails to appreciate the reasons behind the *Mobile-Sierra* presumption and *Morgan Stanley's* emphasis on the differences between contract rates and tariff rates. It also distorts the statutory scheme and impermissibly impairs FERC's own regulatory authority.

Over the dissenting opinion of two Justices, *Morgan Stanley* drew a distinction between tariff rates and contract rates, *e.g.*, 128 S. Ct. 2749 n.6, and required FERC to presume the reasonableness of freely-negotiated, fixed-price contracts unless the public interest demanded otherwise. *Morgan*

Stanley further required FERC to apply that presumption regardless of whether it had any prior opportunity to review the contract rates. The Court explained that the *Mobile-Sierra* presumption arises from the parties' consent to contract rates, not from FERC's acceptance of them. *See id.* at 2746. Moreover, the reason why *Mobile-Sierra* presumptions last for the duration of contract rates, even in the face of changed circumstances, is that freely-negotiated, fixed-price contracts inherently allocate the risks of changed circumstances, and those allocations are presumptively reasonable as well. *See N. Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 278 (7th Cir. 1986) (“[A] fixed-price contract is an explicit assignment of the risk of market price [changes]”); Econ. Br. 17 (“[C]ontracting parties have allocated the risk of price fluctuations *between themselves*”) (emphasis added).

FERC's position that it had “discretion” to apply a *Mobile-Sierra* presumption to tariff rates ignores these premises and the fundamental differences between tariff and contract rates. Unlike fixed-price contracts, tariff rates include no presumptively-reasonable allocation of future risks. Nor can FERC's acceptance of a tariff rate create such an ongoing reasonableness presumption, for several reasons. First, *Morgan Stanley* holds that *Mobile-Sierra* presumptions arise from parties' consent, not from FERC's regulatory judgment that a

rate is just and reasonable. If an absence of consent precludes the presumption from attaching initially, FERC's acceptance of the rate cannot supply it. To hold otherwise would be to treat *Mobile-Sierra*, contrary to *Morgan Stanley's* teaching, 128 S. Ct. at 2746, as an estoppel doctrine preventing FERC from revisiting the reasonableness of rates it initially accepted.

The conclusion that FERC lacks "discretion" to apply a *Mobile-Sierra* presumption to tariff rates also flows from the nature of the doctrine as a limitation of FERC's authority. See Pet's Br. 27 ("*Mobile-Sierra* limits *FERC's* authority to abrogate contract rates."). While regulatory agencies may choose not to *exercise* their authority—assuming that such restraint is consistent with the obligations that Congress has placed upon them—agencies cannot *limit* their authority. Only Congress may do that. In accepting the tariff setting forth ISO-NE's capacity rates, FERC could legitimately emphasize the need for rate stability and could even announce its intention to look with disfavor upon requests for rate changes, but FERC's current policy views and its initial assessment of ISO-NE's tariff rates carry no greater weight than the views that FERC might subsequently bring to a later assessment of those rates in light of changed circumstances.¹⁷ FERC cannot apply a *Mobile-*

¹⁷ In performing such a later review, the FPA still would re-

Sierra presumption to ISO-NE's tariff-based capacity rates because of the absence of a freely-negotiated, fixed-price contract invoking that presumption and limiting FERC's authority.

FERC's attempts to justify its purported discretion to adopt a *Mobile-Sierra* presumption are unpersuasive. FERC first poses a faulty analogy between capacity rates calculated in accordance with ISO-NE's tariff and rates contained in power-sales agreements freely negotiated by buyers and sellers under market-based rate tariffs. FERC Br. 36-37. But for the reasons set forth above, *see supra* pp. 24-27, ISO-NE's tariff-based mechanism for calculating capacity rates has little in common with freely-negotiated, bilateral power sales agreements. That FERC may rely on freely negotiated contracts among buyers and sellers without market power to establish just and reasonable rates does not mean that capacity priced under the tariff-based mechanisms of a central market administrator also can be presumed just and reasonable.

quire FERC to balance consumer and investor interests and therefore to give due weight to investments that may be made in reasonable reliance upon an expectation of rate continuity. But the precise balance to be struck is a matter for that later Commission to decide.

Second, FERC argues (Br. 38) that “application of the public-interest standard to auction results would promote an important interest in rate stability.” But FERC itself seems to acknowledge that its “interest in rate stability,” however important, cannot enable the agency to create a *Mobile-Sierra* presumption absent parties’ consent to contract rates. FERC therefore “couple[s]” its finding regarding the need for rate stability with “the presumptively just and reasonable nature of the auction prices.” *Id.* But that is circular reasoning. The very thing that FERC sought to prove was *whether* it was permitted to presume the reasonableness of ISO-NE’s post-transition capacity rates.

**II. THE PUBLIC-INTEREST
TEST DOES NOT
ADEQUATELY PROTECT
NON-CONSENTING
WHOLESALE CUSTOMERS**

Petitioners attempt to downplay the impact of imposing the “much more restrictive” (Pet’rs’ App. 19a (internal citations omitted)) public-interest standard on rate challenges by non-consenting wholesale customers, suggesting that such customers are “members of the public” whom FERC may protect under that standard. *E.g.*, Pet’rs’ Br. 19, 28 (“[T]he relevant harm [under *Mobile-Sierra’s* public-interest test] has always been harm *to the public*, *i.e.*, to third parties.”). Petitioners’ argument is premised on semantics, not

substance. Petitioners know full well that applying *Mobile-Sierra's* public-interest standard would make it significantly harder for dissenting wholesale customers to challenge the rates imposed on them. If *Mobile-Sierra's* applicability or inapplicability made no difference, they would not have brought this case before the Court.

The mere fact that dissenting wholesale customers are members of the public does not mean they will receive the same protection under *Mobile-Sierra's* public-interest test as they would under ordinary just-and-reasonable review. Contracting parties are "members of the public" too, but no one argues that the public-interest test protects them to the same extent or in the same way as would have been the case if they had preserved their rate-change rights through a *Memphis* clause. While FERC and the courts have applied *Mobile-Sierra's* public-interest test with varying degrees of stringency,¹⁸ the most common formulations suggest

¹⁸ In some cases, courts have found the public-interest test satisfied simply by a FERC finding that non-parties (as opposed to the contracting parties themselves) may be harmed by the parties' contracts. *Ne. Utils. Serv. Co. v. FERC*, 55 F.3d 686, 692 (1st Cir. 1995). In other cases, courts have construed the public-interest test as "practically insurmountable," *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984), justifying rate changes only in "extraordinary circumstances," *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 582 (1981), of "unequivocal

that applying the public-interest standard changes not only the identity of the entities whose harm may be considered but, also, the magnitude of the harm that must be demonstrated to justify a rate challenge.

Mobile-Sierra's distinction between private interests and the public interest arose in cases where the only wholesale customers paying the contract rates were the parties to the contract. In such cases, limiting rate changes to situations where the public interest requires it is just another way of saying that the FPA does not relieve contracting parties of their improvident bargains. And where contracting parties advance public-interest claims that happen to align with their private interests, it makes sense to treat those claims skeptically and to require convincing proof that the public interest would be harmed substantially by continuation of the agreed-upon rates.¹⁹

Wholesale customers attempting to challenge rates imposed on them without their consent stand

public necessity," *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968) (citing *Mobile*).

¹⁹ See *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 406 (D.C. Cir. 2000), in which a panel that included two judges later to hear the case below affirmed FERC's rejection of contract-modification claims by a party, including those dressed up as requests for *sua sponte* action to protect third parties.

on different footing, however. They are not merely “members of the public” whom FERC must protect as part of the general public interest. They are the immediate customers paying rates subject to the Commission’s jurisdiction. Their interests in the reasonableness of jurisdictional wholesale rates are neither attenuated nor indirect. The FPA requires FERC to ensure that jurisdictional rates in all wholesale transactions are just and reasonable. Private agreements between public utilities and *some* customers cannot affect the mode of analysis that FERC applies in determining whether that commandment has been satisfied with respect to other customers.

If there had been no contested settlement in this case and FERC had simply accepted a unilateral ISO-NE tariff filing, no one could dispute that any wholesale customer subject to the tariff rates could seek rate changes later based on changed circumstances. Nor could anyone dispute that FERC would review such requests under an ordinary just-and-reasonable standard. Here, ISO-NE’s capacity rates are the result of a tariff filing made to implement a contested settlement, which FERC found to be just and reasonable despite Respondents’ objections. From the perspective of a wholesale customer who did not sign the settlement, these facts are no different from the hypothetical above. Yet Petitioners in this case would prevent FERC from modifying the rates that such customers pay unless

they can show that failure to do so would “severely harm[]” the public interest, *Morgan Stanley*, 128 S. Ct. at 2749. There is no basis for that judicially-unprecedented result.²⁰

III. WHETHER AND HOW *MOBILE-SIERRA* SHOULD APPLY TO “INDIRECTLY-AFFECTED” THIRD PARTIES DEPENDS ON THE FACTS.

We have contended that where, as here, some wholesale customers agree to a tariff rate and others oppose it, FERC may accept those rates if it independently finds them to be just and reasonable but that no *Mobile-Sierra* presumption attaches to

²⁰ We say “judicially unprecedented” because since 2003, FERC, breaking with past practice, has sometimes (though not always) accepted *Mobile-Sierra* provisions in settlements and other contracts that set rates to be paid by contracting and non-contracting wholesale customers alike. Before 2003 (and occasionally since then), FERC rejected such provisions and held *Mobile-Sierra* inapplicable to non-consenting third parties. *E.g.*, *PJM Interconnection, LLC*, 96 F.E.R.C. ¶ 61,206, at 61,878 & n.13 (2001) (holding that “*Mobile-Sierra* does not speak to situations ... where a non-party ... seeks changes under Section 206” and citing cases); *Carolina Power & Light Co.*, 67 F.E.R.C. ¶ 61,074, at 61,205 (1994) (rejecting settlement provisions purporting to hold non-parties to a *Mobile-Sierra* presumption on grounds that they are “contrary to Commission precedent and to the Commission’s statutory mandate”).

the rates as a result of that acceptance. The issuance of a ruling on this point would resolve the only matter at issue in this proceeding. However, Petitioners have asked the Court to resolve the separate question of whether, in cases where a *Mobile-Sierra* presumption legitimately attaches, that standard applies to a subsequent rate challenge mounted by an indirectly-affected third party, such as a retail customer to whom costs are passed through.

APPA and NRECA submit that there is no single, hard-and-fast rule to be applied. The right answer depends on (*inter alia*): the degree of alignment between the interests of the contracting buyer or seller and that of the complainant and whether the circumstances under which the agreement was negotiated supports a presumption that the rates were reasonable. In many cases, the premise articulated by the amici economists—that “wholesale buyers will seek out the lowest rates” because state regulators may prohibit them from passing-through to retail ratepayers imprudently-incurred costs, Econ. Br. 12—is demonstrably false. *Some* public utilities, including independent system operators such as ISO-NE, are virtually guaranteed to recover from ratepayers *all* of their costs (whether prudently incurred or not) because they are non-profit entities without shareholders and with no other means to cover their costs. As the D.C. Circuit has found, ISO-NE’s untrammelled

ability to pass through its costs undercuts confidence that it will seek assiduously to minimize those costs. *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 803 (D.C. Cir. 2007). APPA and NRECA submit that, in such circumstances, FERC may not reasonably presume the justness of the rates that an ISO agrees to pay on behalf of load-side interests but is virtually guaranteed to pass through to its load-serving customers.

Stated differently, situations will arise in which customers who are nominally “indirectly affected,” *e.g.*, Petr’s’ Br. 3, are in fact the real parties in interest, even though they were not represented at the bargaining table. At times, FERC itself has recognized that independent system operators’ ostensibly bilateral contracts function as tariffs setting market-wide rates or establishing market-wide rules, and it has rejected or modified *Mobile-Sierra* provisions in such contracts,²¹ a step that Petitioners’ position would

²¹ *E.g.*, *ISO New England Inc.*, 106 F.E.R.C. ¶ 61,280, PP 128-30, corrected by 107 F.E.R.C. ¶ 61,051 (2004), petition for review denied sub nom. *Me. Pub. Utils. Comm’n v. FERC*, 454 F.3d 278 (2006); *Bridgeport Energy, LLC*, 118 F.E.R.C. ¶ 61,243, P 41 (2007) (finding that “it would be inconsistent with our duty under the [FPA]” to accept provisions in such contracts purporting to affect the standard of review to be applied to rate-change requests by non-parties or by the Commission *sua sponte*); *PSEG Power Co., LLC*, 119 F.E.R.C. ¶ 61,168, P 25 (2007); *Milford Power Co., LLC*, 119 F.E.R.C.

foreclose. The Court should not adopt any rule regarding ostensible “third parties” that bars FERC from recognizing such distinctions or from conducting an ordinary just-and-reasonable review of contract rates virtually guaranteed to be imposed on customers of independent system operators.

**IV. MAINE PUBLIC DOES NOT
CONFLICT WITH MORGAN
STANLEY’S HOLDING THAT
THERE IS ONLY ONE
STATUTORY STANDARD**

Petitioners argue that the decision below must be vacated because it conflicts with *Morgan Stanley*’s holding that the FPA contains only one standard by which to judge public utility rates: the just-and-reasonable standard. *E.g.*, Pet’rs’ Br. 24-25. That argument should be rejected. While *Maine Public* was decided before *Morgan Stanley* and used pre-*Morgan Stanley* nomenclature, the D.C. Circuit denied FERC’s request for rehearing, including rehearing *en banc*, after this Court’s decision was issued. None of the nine judges who considered FERC’s *en banc* petition voted to rehear the case. Pet’rs’ App. 247a. Petitioners’ argument that *Maine Public* conflicts with *Morgan Stanley* amounts to an assertion that all nine of those

judges subscribed, even after *Morgan Stanley*, to the “obviously indefensible” proposition (128 S. Ct. 2740) that *Morgan Stanley* rejected.

The reality is that the D.C. Circuit’s decision did not depend on treating the public-interest test as a statutory exception. Restating its holding using *Morgan Stanley*’s terminology, *Maine Public* held that contracting parties may not impose rates on unwilling wholesale customers through a contested settlement and then erect a presumption of reasonableness making it harder for them to challenge those rates in light of changed circumstances. That determination was correct and should be affirmed.

CONCLUSION

The decision below should be affirmed because FERC erred in accepting Section 4.C of the contested settlement agreement.

Respectfully submitted,

SCOTT H. STRAUSS

Counsel of Record

JEFFREY A. SCHWARZ

SPIEGEL & MCDIARMID LLP

1333 New Hampshire Avenue, NW

Washington, DC 20036-1512

SUSAN N. KELLY
*Vice President of Policy Analysis and General
Counsel*
AMERICAN PUBLIC POWER ASSOCIATION
1875 Connecticut Avenue, NW, Suite 1200
Washington, DC 20009-5715

WALLACE F. TILLMAN
General Counsel
RICHARD MEYER
Senior Regulatory Counsel
NATIONAL RURAL ELECTRIC COOPERATIVE
ASSOCIATION
4301 Wilson Boulevard
Arlington, VA 22203-1860

*Counsel for Amici Curiae
American Public Power Association and
National Rural Electric Cooperative Association*

September 11, 2009