American Bar Association
www.supremecourtpreview.org

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

REPLY BRIEF FOR PETITIONERS

MICHAEL R. BRAMNICK
General Counsel
CHRISTOPHER C. O'HARA
Assistant General Counsel
NRG ENERGY, INC.
211 Carnegie Center Drive
Princeton, NJ 08540
(609) 524-4601

JOHN N. ESTES III
Counsel of Record
JOHN LEE SHEPHERD, JR.
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7338

JEFFREY A. LAMKEN
ROBERT K. KRY
MOLOLAMKEN LLP
The Watergate
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners NRG Power Marketing, LLC, Devon Power LLC, Connecticut Jet Power LLC, Norwalk Power LLC, Middletown Power LLC, Montville Power LLC, and Somerset Power LLC state that the corporate disclosure statement included in petitioners' opening brief remains accurate.

TABLE OF CONTENTS

Page

I. *Mobile-Sierra* Applies to Challenges by Non-Contracting Parties 4

A. Respondents' Defense of the Court of Appeals' Rationale Is Unpersuasive 4

B. Respondents Are Not Distinguishable from Other Non-Parties 12

II. The Auction and Transition Rates Are Contract Rates 16

A. The Auction Rates Are Contract Rates 17

B. The Transition Rates Are Contract Rates 24

Conclusion 28

TABLE OF AUTHORITIES

Page

CASES

Ark. La. Gas Co. v. *Hall*, 453 U.S. 571 (1981) 23

Cajun Elec. Power Coop., Inc. v. *FERC*, 924 F.2d 1132 (D.C. Cir. 1991) 25

Cities of Bethany v. *FERC*, 727 F.2d 1131 (D.C. Cir. 1984) 25

Cities of Newark v. *FERC*, 763 F.2d 533 (3d Cir. 1984) 25

Conn. Dep't of Pub. Util. Control v. *FERC*, 569 F.3d 477 (D.C. Cir. 2009), pet. for cert. filed, No. 09-277 (Sept. 3, 2009) 18

FPC v. *Texaco Inc.*, 417 U.S. 380 (1974) 7

Kokkonen v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994) 24

Ky. W. Va. Gas Co. v. *Pa. Pub. Util. Comm'n*, 837 F.2d 600 (3d Cir. 1988) 11

Local No. 93, Int'l Ass'n of Firefighters v. *City of Cleveland*, 478 U.S. 501 (1986) 14, 24

Morgan Stanley Capital Group Inc. v. *Pub. Util. Dist. No. 1*, 128 S. Ct. 2733 (2008) .... *passim*

Ne. Utils. Serv. Co. v. *FERC*:

993 F.2d 937 (1st Cir. 1993) 8, 10

55 F.3d 686 (1st Cir. 1995) 12

Richmond Power & Light v. *FPC*, 481 F.2d 490 (D.C. Cir. 1973) 21

TABLE OF AUTHORITIES—Continued

Page

Town of Norwood v. *FERC*, 587 F.2d 1306 (D.C. Cir. 1978) 9

Trans World Airlines, Inc. v. *Thurston*, 469 U.S. 111 (1985) 17

United Gas Pipe Line Co. v. *Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) 1

United Parcel Serv., Inc. v. *Mitchell*, 451 U.S. 56 (1981) 16

Wis. Pub. Power, Inc. v. *FERC*, 493 F.3d 239 (D.C. Cir. 2007) 9

STATUTES

Federal Power Act, ch. 687, 49 Stat. 803 (1935):

16 U.S.C. § 824d(c) 20

16 U.S.C. § 824e(a) 7

16 U.S.C. § 825g(a) 15

16 U.S.C. § 825*l* 15

Cal. Pub. Util. Code:

§ 454.5(b)(5) 12

§ 454.5(c)(3) 12

ADMINISTRATIVE MATERIALS

18 C.F.R. § 385.602(f)(3) 27

Bridgeport Energy, LLC, 118 F.E.R.C. ¶ 61,243 (2007) 9

Devon Power LLC:

115 F.E.R.C. ¶ 63,013 (2006) 27

126 F.E.R.C. ¶ 61,027 (2009) 3

ISO New England, Inc., 118 F.E.R.C. ¶ 61,157 (2007) 23

TABLE OF AUTHORITIES—Continued

Page

Ne. Utils. Serv. Co.:
50 F.E.R.C. ¶ 61,266 (1990) 10
66 F.E.R.C. ¶ 61,332 (1994) 10

Norwalk Power, LLC, 125 F.E.R.C. ¶ 61,390 (2008) 8

Policy Statement on Electric Creditworthiness, 109 F.E.R.C. ¶ 61,186 (2004) 21

MISCELLANEOUS

7 Am. Jur. 2d *Auctions and Auctioneers* (1997):
§ 17 22
§§ 37-45 21
§ 49 18
§ 52 18

7A C.J.S. *Auctions and Auctioneers* § 53 (2004) 18

ISO New England Inc., FERC Electric Tariff No. 3, § I, Ex. ID, Billing Policy, http://www.iso-ne.com/regulatory/tariff/sect_1/index.html:
§ 1.3 21
§ 2.4(e) 21
§ 2.4(*l*) 21
§ 3.4 23

ISO New England Inc., FERC Electric Tariff No. 3, Market Rule 1, http://www.iso-ne.com/regulatory/tariff/sect_3/index.html:
§ III.8.1 26
§ III.8.9 26

TABLE OF AUTHORITIES—Continued

Page

§ III.13.1 23
§ III.13.1.6 23
§ III.13.7.2 21
§ III.13.7.2.1.1 20
§ III.13.7.3 .... 20, 21
§ III.13.7.3.1 21

ISO New England Inc., FERC Electric Tariff No. 3, attach. A, Market Participant Service Agreement, http://www.iso-ne.com/regulatory/tariff/attach_a/index.html:
art. 4.1 20
art. 5.1 20

ISO New England Inc., *Forward Capacity Auction Results Filing* (Mar. 3, 2008), http://www.iso-ne.com/regulatory/ferc/filings/2008/mar/index.html 20

ISO New England Inc., *Internal Market Monitoring Unit Review of the Forward Capacity Market Auction Results and Design Elements* (June 5, 2009), http://www.iso-ne.com/regulatory/ferc/filings/index.html.. 10

ISO New England Inc., *Manual for Installed Capacity (M-20)* (23d rev. July 1, 2009), http://www.iso-ne.com/rules_proceds/isone_mnls/index.html 26

R. Lord, *Williston on Contracts* (4th ed. 2007)... 17, 21, 22

J. Perillo, *Corbin on Contracts* (rev. ed. 1993).. 17

TABLE OF AUTHORITIES—Continued

Page

Restatement (Second) of Contracts (1981):
§ 28 17
§ 28 cmt. e 22
§ 52 cmt. c 21
§ 356(1) 23
§ 356 cmt. c 23
§ 356 cmt. d 23

Restatement (Third) of Agency (2006):
§ 6.01 21
§ 6.01(1) 23, 26

U.C.C. § 2-328 17

IN THE

Supreme Court of the United States

NO. 08-674

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

REPLY BRIEF FOR PETITIONERS

For more than 50 years, the *Mobile-Sierra* doctrine has preserved "the stability of supply arrangements which all agree is essential to the health of the * * * industry," *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956), by requiring FERC to "presume" that contract rates meet "the 'just and reasonable' requirement imposed by law," and permitting FERC to abrogate such rates only in "extraordinary circumstances where the public will be severely harmed," *Morgan Stanley Capital Group Inc.* v. *Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2737, 2749 (2008). Respondents do not dispute that the decision below creates a broad exception to that rule, allowing *everyone* from the virtually

unlimited ranks of indirectly affected non-contracting parties—whether retail consumers, interest groups, state regulators, or elected officials—to challenge contract rates free from *Mobile-Sierra*'s requirements. That decision would render half a century of *Mobile-Sierra* jurisprudence a pointless exercise. *Mobile-Sierra* would preserve the Federal Power Act's principle of contract stability in challenges by contracting counterparties but abandon it whenever the challenge came from anyone else. That decision cannot be reconciled with the rationales underlying *Mobile-Sierra*. It cannot be reconciled with *Morgan Stanley*. And it cannot be reconciled with common sense.

Despite having successfully urged the court of appeals to adopt precisely the broad exception it adopted, see Resp. C.A. Br. 51-53, respondents now defend that holding at best half-heartedly and then quickly shift to alternative theories. Respondents first propose a narrower challenger-based exception, claiming that—even if *Mobile-Sierra* applies to non-parties generally—it should not apply here because respondents are not typical non-parties. Alternatively, they claim that *Mobile-Sierra* does not apply because the rates at issue are not contract rates. But this Court granted review to address the issue the court of appeals decided: "Whether *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 (emphasis added). It did not grant review to consider whether some other putatively special category of challengers should be exempt, or whether the particular rates here should be exempt.

Neither alternative theory supports the judgment below in any event. Respondents, for example, urge that they should be allowed to challenge the rates at issue

without regard to *Mobile-Sierra* because, unlike typical "indirectly affected" non-parties, they are purportedly "b[ou]nd" by the settlement to "pay certain rates." Resp. Br. 20. That theory would require the Court to *modify* the judgment, not affirm it. The court of appeals held that the settlement agreement's *Mobile-Sierra* clause could not be applied to *any* non-contracting party, not just respondents: "[W]hen a rate challenge is brought by a non-contracting third party," the court held, "the *Mobile-Sierra* doctrine simply does not apply." Pet. App. 22a; see also *id.* at 20a. Accordingly, FERC on remand ordered the parties to revise the agreement to exempt *all* "rate challenges brought by non-contracting third parties." *Devon Power LLC*, 126 F.E.R.C. ¶ 61,027, at 61,114 (2009). Respondents seek to revise that result, not defend it.

Respondents' theory is also fundamentally mistaken. *Mobile-Sierra* protects particular rates—those set by contract—regardless of the challenger's identity. And respondents' contention that they are "bound" to "pay certain rates" is incoherent. Five of the six respondents (two attorneys general, two end-user interest groups, and a utility regulator) do not participate in wholesale markets and are not "bound" to pay wholesale rates in any conceivable sense. None of the six (including NSTAR) is bound to pay the auction rates, because market participants can choose to contract outside the auction. And no respondent is bound to the transition rates either (which have nearly expired in any event).

Respondents alternatively argue that the auction and transition rates at issue are not "contract rates" covered by *Mobile-Sierra*. But that theory would require the Court to *expand* the relief granted below: If the rates are not contract rates, *Mobile-Sierra* would not apply of

its own force even to signatories. FERC rejected that argument below, finding that the rates at issue *are* contract rates, and the court of appeals did not address the issue. There is no reason for this Court to depart from its usual practice of declining to address matters not passed on by the court below.

In no event should the Court accept respondents' invitation to dismiss the writ as improvidently granted. Resp. Br. 16 n.1. The court of appeals decided this case on the ground that *Mobile-Sierra* is categorically inapplicable to challenges by non-parties. This Court should reverse that ruling. It can then remand, or it can address respondents' alternative arguments. But respondents cannot convert their virtual abandonment of the rationale they successfully urged on the court below into a basis for leaving the court of appeals' erroneous ruling—and its devastating consequences—in place.

I. *MOBILE-SIERRA* APPLIES TO CHALLENGES BY NON-CONTRACTING PARTIES

A. Respondents' Defense of the Court of Appeals' Rationale Is Unpersuasive

While some of respondents' *amici* defend the court of appeals' holding that *Mobile-Sierra* applies only to cases of "buyer's or seller's remorse," see, *e.g.*, CPUC Br. 7-11, respondents themselves barely offer a defense—and with reason. That holding cannot be reconciled with *Mobile-Sierra*'s foundations or with this Court's decision in *Morgan Stanley*. FERC agrees: "The court of appeals erred in holding that the *Mobile-Sierra* 'public interest' standard applies only to the contracting parties and not to third parties challenging a transaction." FERC Br. 17.

1. As respondents acknowledge (Resp. Br. 3-4), *Mobile-Sierra* rests on the sensible conclusion that rates agreed upon by sophisticated wholesale-market partici-

pants can be expected to be reasonable. That reasonableness logically cannot vary based on the identity of the person challenging the rate. See Pet. Br. 34-37. As FERC explains, the "negotiation between the[ ] parties creates the basis for presuming the contract rate to be just and reasonable," and "[w]hether a contracting party or a third party or no one at all files a complaint, the question for FERC * * * is always the same." FERC Br. 18-19. Respondents also do not deny *Mobile-Sierra*'s foundations in the necessity of contract stability. That stability would be a mirage if everyone but the contracting parties themselves could challenge contract rates unconstrained by *Mobile-Sierra*. See Pet. Br. 37-41. "If contract rates could readily be set aside at the behest of any non-contracting party, suppliers and customers would not have the assurance of stability that the *Mobile-Sierra* rule is intended to provide." FERC Br. 22.

Mobile-Sierra's public-interest standard, moreover, exists for the precise purpose of protecting the interests of non-contracting parties. See Pet. Br. 27-29. "The oddity of exempting third-party challenges from the *Mobile-Sierra* 'public interest' standard would be particularly great, given that the very point of that standard is to protect third parties." FERC Br. 19. It makes no sense to say that *the public's* right to just and reasonable rates is preserved by FERC's authority to abrogate contract rates in "extraordinary circumstances where *the public* will be severely harmed," *Morgan Stanley*, 128 S. Ct. at 2749 (emphasis added), but to exempt members of *the public* from that standard when they assert the claims themselves. The public-interest standard, moreover, is a constraint on *FERC's* authority: "Under the *Mobile-Sierra* doctrine, *the Federal Energy Regulatory Commission* * * * must presume" that contract rates are rea-

sonable. *Id.* at 2737 (emphasis added). There is no reason FERC's authority should vary depending on who initiated the proceeding before it. See Pet. Br. 29-33. On those points, respondents offer no answer.

2. Respondents likewise do not seriously dispute that the court of appeals' rationale contravenes *Morgan Stanley*. The court below held that applying *Mobile-Sierra*'s public-interest standard would "deprive [non-parties] of their statutory right to challenge rates under the 'just and reasonable' standard." Pet. App. 19a. The court thus viewed *Mobile-Sierra* as an "exception" to the statutory requirement. *Id.* at 20a. But *Morgan Stanley* flatly rejected as "obviously indefensible" the notion that "a standard different from the statutory just-and-reasonable standard applies to contract rates." 128 S. Ct. at 2740. "Rather," it explained, "the term 'public interest standard' refers to the differing *application* of that just-and-reasonable standard to contract rates." *Ibid.*

Respondents dismiss the court of appeals' error as one of "nomenclature." Resp. Br. 28-29. But that error was central to the court's decision. Because the court viewed *Mobile-Sierra*'s public-interest standard as a departure from the statutory standard, the court held that the public-interest standard could not be applied to anyone but those who had agreed, by contract, to give up their statutory rights. See Pet. Br. 24-26; Pet. App. 19a-24a. *Morgan Stanley* eviscerates the premise of that argument by making clear that the public-interest standard simply defines "what it means for a rate to satisfy the just-and-reasonable standard in the contract context." 128 S. Ct. at 2746.

Respondents nonetheless continue to insist that *Mobile-Sierra* would "deprive [them] of their statutory rights." Resp. Br. i.; see also *id.* at 22. The Federal

Power Act requires rates to be just and reasonable, but it does not grant anyone a "right" to one particular application of that just-and-reasonable standard when this Court's precedents require a different one. Under *Mobile-Sierra*, FERC must presume that rates are reasonable when set by "contract" rather than "unilaterally by tariff." *Morgan Stanley*, 128 S. Ct. at 2738-2740, 2746 n.3, 2749 n.6. That presumption rests on the nature of the rate, not the identity of the challenger. A contract rate does not cease to be a contract rate merely because it is challenged by a non-contracting party.

3. Respondents contend (at 33-36) that applying *Mobile-Sierra* to non-parties would deregulate the market in violation of *FPC* v. *Texaco Inc.*, 417 U.S. 380 (1974). But *Morgan Stanley* squarely rejected that argument:

> *Texaco* had nothing to do with [the *Mobile-Sierra*] doctrine. It held that the Commission had improperly implemented a scheme of *total deregulation* by applying no standard of review at all * * * . It did not cast doubt on the proposition that in a proper regulatory scheme, the ordinary mode for evaluating contractually set rates is to look to whether the rates seriously harm the public interest * * * .

128 S. Ct. at 2746 (citation omitted).

The fact that contracts can include *Memphis* clauses allowing parties to seek modification under the ordinary just-and-reasonable standard (Resp. Br. 24-25) does not prove that non-parties must be allowed to challenge *all* contract rates under that standard. It is far from clear that contracting parties may adopt a *Memphis* clause that applies the ordinary just-and-reasonable standard to their own challenges but not challenges by non-parties. FERC can set aside contract terms that are "unduly discriminatory," 16 U.S.C. § 824e(a), and it has repeatedly

rejected discriminatory *Memphis* clauses, see, *e.g.*, *Norwalk Power, LLC*, 125 F.E.R.C. ¶61,390, at 62,839 & n.3 (2008). A blanket exception from *Mobile-Sierra* for all non-party challenges thus is hardly necessary to prevent the result that respondents disparage.

4. Respondents deny that the court of appeals' decision threatens contract stability. See Resp. Br. 40-45. But the expert federal regulator disagrees: The court of appeals' rule, it urges, would undermine "the assurance of stability that the *Mobile-Sierra* rule is intended to provide." FERC Br. 22. Respondents make light of the suggestion that "'hordes of motivated non-parties'" stand ready to challenge contract rates. See Resp. Br. 2, 32. But FERC's reports are littered with non-party challenges, including some underlying *Morgan Stanley* itself. See Pet. Br. 38-39 & nn.9-10. And the broad range of parties and *amici* before the Court today—from elected officials, to industry associations, to AARP, to the aptly named Public Citizen—makes clear that the "hordes of motivated non-parties" have arrived already.

Respondents assert that the "electric industry managed to maintain its stability and integrity for * * * five decades" despite alleged uncertainty over *Mobile-Sierra*'s scope. Resp. Br. 42-43. As millions of residents in California and elsewhere can attest, however, electricity supply has hardly been robust enough to maintain "stability and integrity." And the legal landscape was not so uncertain then as it is now. Respondents admit that, until the decision below, *no court* had rejected *Mobile-Sierra*'s applicability to non-contracting parties. See *id.* at 29. At least three court of appeals decisions, by contrast, had applied *Mobile-Sierra* to non-contracting parties. See Pet. Br. 31-32 & n.6. Respondents claim that *Northeast Utilities Service Co.* v. *FERC*, 993 F.2d 937

(1st Cir. 1993), did not address "whether a non-settling party to a settlement agreement may bring a challenge to a rate derived from that settlement agreement." Resp. Br. 30-31. While that case did not involve a challenge by a "non-*settling* party" to a "*settlement* agreement," it did involve a challenge by a non-*contracting* party to a *contract*, and the court required FERC to apply *Mobile-Sierra*. See Pet. Br. 31. Respondents' efforts to distinguish the other cases are equally unavailing.[1]

Respondents admit that *FERC* has "applied the *Mobile-Sierra* presumption to third parties" since 2002. Resp. Br. 32. While they claim FERC's practice is "far from uniform," the only contrary decisions they cite involve so-called "Reliability Must Run" agreements. See *id.* at 32-33. FERC refuses to apply *Mobile-Sierra* to that particular type of agreement only because those agreements raise special concerns. See, *e.g.*, *Bridgeport Energy, LLC*, 118 F.E.R.C. ¶61,243, at 62,193 (2007) (opining that such agreements "suppress market-clearing prices" and "deter investment in new generation"). Whether or not those concerns justify refusing to apply *Mobile-Sierra*, they are specific to that type of agreement and are not present here. Respondents, moreover, do not cite a single FERC decision holding non-party challenges exempt from *Mobile-Sierra* before 1994. And even between 1994 and 2002, FERC did apply *Mobile-Sierra* to non-parties when a court required it to do so.

---

[1] Respondents urge that *Wisconsin Public Power, Inc.* v. *FERC*, 493 F.3d 239 (D.C. Cir. 2007), involved an "undue discrimination" claim. Resp. Br. 31. But the court applied *Mobile-Sierra* to reject *non-contracting parties'* claims that contracts would shift congestion costs to them. 493 F.3d at 273-275. Similarly, *Town of Norwood* v. *FERC*, 587 F.2d 1306 (D.C. Cir. 1978), stated that FERC could modify contracts as a remedy for undue discrimination *against a non-party* only if *Mobile-Sierra*'s public-interest standard was met. *Id.* at 1312.

See *Ne. Utils. Serv. Co.*, 50 F.E.R.C. ¶61,266, at 61,831-32, 61,837-39 (1990), remanded, 993 F.2d 937, on remand, 66 F.E.R.C. ¶61,332, at 62,088-92 (1994). The most that can be said for respondents' position is that FERC refused to apply *Mobile-Sierra* to non-parties for a brief period and was reversed the one time its decision was subject to judicial review.[2]

Respondents suggest that suppliers can avoid instability by settling with all those who might challenge their rates. Resp. Br. 41. The court of appeals' decision, however, exempts *all* non-contracting parties from *Mobile-Sierra*. See Pet. App. 20a, 22a. Consequently, to achieve stability, a supplier would have to settle with not only those who expressly protested the contract, but also every member of the public (currently existing or yet to be incorporated or born) that might someday be affected. Respondents never explain how that is feasible.

Finally, respondents assert that the "ordinary" just-and-reasonable standard is sufficiently protective. Resp. Br. 43-45. FERC made that same argument opposing certiorari in *Morgan Stanley* and opposing plenary review here, to no avail. See FERC Br. in Opp. in Nos. 06-1454 *et al.*, at 11-12, 17-18; FERC Pet. Br. 10-11. The argument has never been persuasive and does not improve through repetition. While cut from the same statutory

[2] Respondents also point to the excess supply and decreasing prices in recent capacity auctions (Resp. Br. 42) but make no attempt to separate the effects of contract instability from other factors—such as the recession—that plainly affected demand. ISO-NE itself attributes the auction results to a "decline in the need for capacity and a large amount of demand resources [*i.e.*, commitments *not* to require capacity] clearing in the auction." ISO New England Inc., *Internal Market Monitoring Unit Review of the Forward Capacity Market Auction Results and Design Elements* 6 (June 5, 2009), http://www.iso-ne.com/regulatory/ferc/filings/index.html.

cloth, the ordinary just-and-reasonable standard and *Mobile-Sierra*'s public-interest standard are quite different. Respondents and the court below both describe the public-interest standard as "'much more restrictive.'" Resp. Br. 4; Pet. App. 19a. And respondents' own *amici* criticize the public-interest standard for making rates "significantly harder" to challenge. APPA Br. 31-35. Respondents cannot have it both ways: They cannot complain about the difficulty of meeting the *Mobile-Sierra* standard while pretending it is not so different from ordinary just-and-reasonable review after all.

5. Respondents' *amici* defend the court of appeals' decision in briefs that read as if *Morgan Stanley* had never been decided. CPUC, for example, devotes an entire section to arguing that "none of this Court's cases preclude[s] the Commission from modifying contract rates except in extraordinary circumstances," CPUC Br. 11-14, seemingly oblivious to *Morgan Stanley*'s square holding that "the FPA intended to reserve the Commission's contract-abrogation power for those extraordinary circumstances where the public will be severely harmed," 128 S. Ct. at 2749. CPUC's list of reasons why contract rates should *not* be presumed reasonable despite 50 years of contrary precedent largely boils down to the claim that utilities lack adequate incentives to negotiate aggressively. See CPUC Br. 21-23. Those arguments are even more unfounded today than they were 50 years ago when *Mobile* and *Sierra* were decided.[3] Respon-

---

[3] States can and do take measures to ensure that utilities negotiate aggressively. Notwithstanding the filed-rate doctrine, for example, state regulators generally can "inquire into whether [a] retailer prudently chose to pay the FERC-approved wholesale rate of one source, as opposed to the lower rate of another source." *Ky. W. Va. Gas Co.* v. *Pa. Pub. Util. Comm'n*, 837 F.2d 600, 609 (3d Cir. 1988); see Economists Br. 12-13 n.7. States can also use *ex ante* mecha-

dents' *amici* disagree with *Morgan Stanley* and the half-century of jurisprudence that preceded it, but they provide no basis for overruling those precedents.

B. Respondents Are Not Distinguishable from Other Non-Parties

Respondents urge that this Court need not decide whether *Mobile-Sierra* applies to "members of the general public who are indirectly affected by wholesale energy contracts" because respondents, unlike other non-parties, are purportedly "b[ou]nd * * * to pay certain rates." Resp. Br. 20. But the court of appeals required the settlement agreement to exempt *all* non-party challenges from *Mobile-Sierra*, not just *respondents'* challenges, and FERC implemented that ruling on remand (and in scores of other cases as well). See p. 3, *supra*; Pet. Reply App. 1a-10a. Respondents' argument thus does not support the judgment they obtained. And their argument lacks merit in any event.

1. *Mobile-Sierra*'s protections attach to particular *rates*. They do not attach to particular *challengers*. *Mobile-Sierra* requires FERC to presume that rates are reasonable when set by "contract" rather than "unilater-

---

nisms such as competitive bidding requirements or regulatory review of proposed contracts. See, *e.g.*, Cal. Pub. Util. Code § 454.5(b)(5), (c)(3). CPUC's suggestion that wholesale markets cannot be competitive because purchasers have an obligation to provide service (CPUC Br. 22-23) is like arguing that food markets cannot be competitive because people need to eat. And CPUC's complaints about related-party transactions (*id.* at 23) ignore FERC's authority to consider the absence of arm's-length bargaining in applying the public-interest standard. See *Ne. Utils. Serv. Co.* v. *FERC*, 55 F.3d 686, 691-692 (1st Cir. 1995). Electricity markets are far more competitive today than 50 years ago. See *Morgan Stanley*, 128 S. Ct. 2740-2742. If market imperfections were not sufficient to undermine the presumption of reasonableness then, they certainly are not now.

ally by tariff." See *Morgan Stanley*, 128 S. Ct. at 2738-2740, 2746 n.3, 2749 n.6. Each of the rationales underlying *Mobile-Sierra*'s presumption—that rates agreed upon by sophisticated buyers and sellers can be expected to be reasonable, and that contract stability is necessary for infrastructure development—rests on the nature of the rate, not the identity of the challenger. For those reasons, claims that a particular challenger is "bound" or "directly affected" are irrelevant. So long as the rate is a contract rate, *Mobile-Sierra* applies—whether the rate is challenged by an indirectly affected member of the public, a non-settling party who objected before FERC, FERC itself, or the contracting parties (the truly "bound" parties).

Of course, a claim that some entity paying a rate is "bound" to do so without its consent may bear strongly on whether it is paying a *contract* rate. A wholesale purchaser may be "bound" to pay a seller's unilaterally filed tariff rate, and *Mobile-Sierra* would not apply if the purchaser challenged that rate. But the reason *Mobile-Sierra* would not apply is that unilateral tariff rates are not contract rates, not that the purchaser's "bound" status exempts him from a *Mobile-Sierra* presumption applicable to everyone else. By contrast, where a rate is the product of an agreement—where it is a contract rate—*Mobile-Sierra* applies across the board.

2. In any event, while respondents repeatedly assert that "Respondents"—plural—are "bound" by the settlement to "pay certain rates," see Resp. Br. 8, 20, 27, five of the six respondents are not "bound" in any conceivable sense. Aside from NSTAR, respondents are the attorneys general of Connecticut and Massachusetts, the Maine Public Utilities Commission, and two end-user interest groups. See Resp. Br. ii-iii. Unless, for example,

Attorney General Blumenthal has been operating an electric utility for the benefit of his electorate in his spare time, we can safely say that none of those five entities is "bound" to pay wholesale electricity rates. An entity is not "bound" by a settlement merely because it is indirectly affected by the settlement. See *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 507-512, 528-530 (1986); Pet. Br. 41-43.

That respondents were parties to the proceedings before FERC and objected to the settlement agreement does not change their status. That proves at most that they met the broad zone-of-interests test for administrative-law standing—a test that myriad indirectly affected non-parties can satisfy. See Pet. Br. 37. If anything, respondents' participation before FERC strengthens the case for *Mobile-Sierra* protection, because respondents had a full opportunity to voice their concerns.

NSTAR likewise is not "bound" to pay the rates at issue. With respect to the auction rates, the settlement agreement's "self-supply" provision allows utilities like NSTAR to contract for capacity outside the auction or provide it themselves, thus "meet[ing] [their] capacity obligations *without paying the auction clearing price*." Pet. App. 112a (emphasis added); see Pet. Br. 10, 49. Despite the obvious relevance of that provision, respondents do not mention it even once. NSTAR is not "bound" to pay the transition rates either. See p. 26, *infra*. But even if it were, that would not justify allowing respondents to evade *Mobile-Sierra* when challenging the obligations of *other* parties that *did* agree to the rates they pay or receive under the agreement.

In any event, the claim that an entity is "bound" to pay a rate is relevant only to whether that rate is a contract rate, see pp. 16-27, *infra*, not to whether *Mobile-Sierra*

applies to non-party challenges. If NSTAR were truly "bound" to pay suppliers a particular rate, for example, that might matter if it meant NSTAR was paying a rate set unilaterally by the seller rather than a contract rate. That might make the rate NSTAR pays more susceptible to attack (by NSTAR or any other challenger). But it would not give NSTAR additional rights that other non-parties lack (much less a special right to challenge obligations that *others* voluntarily undertook). There is no reason to invent a new dichotomy between "bound" and "not bound" non-parties, or an even more vague dichotomy between "directly affected" and "indirectly affected" non-parties, when *Mobile-Sierra*'s distinction between contract rates and unilateral tariff rates already captures the relevant distinction.

3. The dangers of respondents' invitation to create a challenger-based exemption from *Mobile-Sierra* are underscored by *amici*'s proposals to exempt a variety of other categories of challengers. CPUC suggests an exception for state public utility commissions. CPUC Br. 29-33. But *Mobile-Sierra* clearly applies to proceedings that FERC initiates *sua sponte*, as *Mobile* itself makes clear. See Pet. Br. 33; FERC Br. 20-21. It makes no sense to apply *Mobile-Sierra* to the federal agency charged with superintending wholesale energy markets, but to exempt state regulators that lack FERC's expertise and congressional mandate—to say nothing of the parochial focus that makes state commissions unsuited to regulate interstate wholesale markets. CPUC claims that federal law grants state commissions "special status," CPUC Br. 30-31, but the provisions it cites concern only *procedural* rights such as intervention, see 16 U.S.C. §§825g(a), 825*l*. That Congress granted *only* those limited procedural rights refutes the notion that it also in-

tended state commissions to have substantively broader rights to challenge contract rates.

APPA proposes an exception from *Mobile-Sierra* for ISOs and other utilities that can pass on their costs and thus allegedly lack incentives to negotiate. APPA Br. 35-38. But that is merely a variation of CPUC's unpersuasive argument that utilities in general lack incentives to negotiate. See pp. 11-12 & n.3, *supra*. Because the same unpersuasive claims could be made about most utilities, APPA's exception would swallow the *Mobile-Sierra* rule.

This Court normally does not consider arguments raised only by *amici*. See *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981). Nonetheless, *amici*'s attempts to create various subcategories of exempted non-parties underscore the breadth of the ruling the court of appeals actually issued. That court held that *any* non-contracting party can challenge contract rates without regard to *Mobile-Sierra*. That result is irreconcilable with this Court's precedents, ignores *Mobile-Sierra*'s rationales, and threatens to destroy the certainty this Court sought to ensure in *Morgan Stanley* only two Terms ago.

II. THE AUCTION AND TRANSITION RATES ARE CONTRACT RATES

There is no reason for this Court to reach out to address respondents' claim that the auction and transition rates are not contract rates. See Pet. Br. 45-46. In its order on rehearing below, FERC considered and rejected the argument that the "rates identified in the Settlement Agreement * * * are not contracts eligible for *Mobile-Sierra* protection." Pet. App. 70a-71a, 75a-76a. That issue was raised in the court of appeals only by an intervenor, see Pet. Br. 46, and that court did not address it, instead holding *Mobile-Sierra* inapplicable to particu-

lar *challengers*—*i.e.*, non-contracting parties. Indeed, *no* court has previously addressed the potentially case-specific issue of whether these auction and transition rates are contract rates. Whether *Mobile-Sierra* applies to particular challengers, and whether it applies to particular rates, are two distinct questions; this Court need not address one to address the other. And a ruling in respondents' favor on this issue would require the Court to expand the relief granted below. See pp. 3-4, *supra*; cf. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 119 n.14 (1985). If the Court addresses the issue nonetheless, it should reject respondents' position.

A. The Auction Rates Are Contract Rates

1. The auction rates are plainly contract rates. Neither FERC nor respondents deny that the capacity auctions produce binding obligations to provide and pay for capacity, just like other contracts. See Pet. Br. 47-49. As with other contracts, those obligations are imposed only on *willing* sellers and *willing* buyers with a variety of options. See *id.* at 48-49. And conspicuously *unlike* unilateral tariff rates that ordinarily do not receive *Mobile-Sierra* protection, auction prices are not dictated by sellers; they result from an iterative bidding process in which multiple parties participate. See *id.* at 48-50.

Nor does anyone dispute that, from time immemorial, auction results have been understood to be contracts. The Uniform Commercial Code specifically addresses "sale[s] by auction" as a type of sales contract. See U.C.C. § 2-328. And the leading *contracts* treatises all have sections devoted to "auctions"—sections that would not belong unless auctions produced contracts. See *Restatement (Second) of Contracts* § 28 (1981); 1 R. Lord, *Williston on Contracts* § 4:12, at 515-540 (4th ed. 2007); 1 J. Perillo, *Corbin on Contracts* § 4.14, at 637-645 (rev. ed.

1993); see also 7 Am. Jur. 2d *Auctions and Auctioneers* §§ 49, 52, at 398, 402 (1997); 7A C.J.S. *Auctions and Auctioneers* § 53, at 642 (2004).

An auction is simply a formal, structured method of negotiating a sale price. If a buyer and seller embroiled in hard-nosed negotiation were to retain a mediator, who required them to make successive bids and offers under seal, the result would not cease to be a "contract" merely because of that element of structure. The same is true here. Far from undermining the rationales for *Mobile-Sierra* protection, moreover, the capacity auctions' structure—approved by FERC under the ordinary just-and-reasonable standard, see Pet. App. 135a-144a—reinforces those rationales because it makes prices even *more* likely to be reasonable. "[T]he real world decision makers who use the Forward [Capacity] Market do so precisely for its ability to evaluate prices." *Conn. Dep't of Pub. Util. Control* v. *FERC*, 569 F.3d 477, 484-485 (D.C. Cir. 2009) (Tatel, J.), pet. for cert. filed, No. 09-277 (Sept. 3, 2009); see also Pet. Br. 51 & n.14. And the need for contract stability is no less paramount. The auctions cannot ensure that suppliers will invest hundreds of millions of dollars in necessary infrastructure if auction prices are subject to revision years into the contract. See Pet. Br. 51-52.

While respondents repeatedly assert that auctions "bind" purchasers to pay rates against their will, that simply is not true. Because the settlement agreement's "self-supply" provision allows utilities to contract for capacity outside the auction or provide it themselves, utilities can "meet [their] capacity obligations *without paying the auction clearing price*." Pet. App. 112a (emphasis added); see Pet. Br. 10, 49. NSTAR may have objected to the *settlement*. But the auction results are separate

consensual contracts entitled to *Mobile-Sierra* protection. If ISO-NE had decided to solve New England's capacity problems by requiring its load-serving entities to negotiate contracts informally, *Mobile-Sierra* would clearly apply to the resulting contracts. There is no reason *Mobile-Sierra* would not likewise apply where, as here, ISO-NE gives load-serving entities the *choice* of either negotiating contracts outside the auction or contracting for capacity through the auction.

2. FERC's claim in its brief that the auctions do not yield contract rates is inexplicable. FERC admits that "[t]he results of the capacity auctions * * * possess[ ] certain characteristics of contracts." FERC Br. 30. It agrees that "[t]he auctions result in binding obligations by sellers to offer capacity" and "a commitment * * * to buy the amount of capacity required." *Ibid.* It concedes that auction participants can be expected to "arrive at just and reasonable rates" because auctions "share with freely negotiated contracts certain market-based features that render use of the public-interest standard appropriate." *Id.* at 36-37. And FERC's own decision below—which it now ignores—specifically rejected the argument that the "rates identified in the Settlement Agreement * * * are not contracts eligible for *Mobile-Sierra* protection." Pet. App. 70a-71a, 75a-76a.

Nonetheless, attempting once again to maximize the regulatory discretion that *Mobile-Sierra* was designed to constrain, see Pet. Br. 32-33 n.7, FERC claims that auction results are not contracts and thus should receive *Mobile-Sierra* protection only if FERC, in its beneficence, chooses to grant such protection. FERC Br. 30-31, 36-38. Respondents go further, urging that auction results are not contracts and cannot receive *Mobile-Sierra* protection even if FERC finds it necessary. Resp.

Br. 16-19, 37-40. Neither FERC's nor respondents' arguments withstand scrutiny.

Respondents urge that "the tariffs that set * * * the rules for conducting auctions are by definition not contract rates" and that "settlement provisions for * * * payments" following the auctions "were to be implemented through then yet-to-be-developed tariff revisions." Resp. Br. 16-17; cf. FERC Br. 30. That argument confuses the auction *rules* with the agreements on *rates* that result. The *rules* governing auctions, including the *rules* governing payment obligations in general terms, are set forth in the ISO's tariff. See J.A. 117-118; ISO New England Inc., FERC Electric Tariff No. 3, Market Rule 1 §§ III.13.7.2.1.1(a), III.13.7.3, http://www.iso-ne.com/regulatory/tariff/sect_3/index.html ("ISO-NE Market Rule 1"). Those *rules* can be modified under the ordinary just-and-reasonable standard. See Pet. App. 200a; J.A. 95. But the *rates* that parties agree to pay based on the auctions are *not* set forth in the tariff. They are reported to FERC in a Section 205 filing, like other contract rates. See J.A. 118; 16 U.S.C. § 824d(c); ISO New England Inc., *Forward Capacity Auction Results Filing* (Mar. 3, 2008), http://www.iso-ne.com/regulatory/ferc/filings/2008/mar/index.html. Besides, the relevant distinction is between rates set by contract and rates set "*unilaterally* by tariff." *Morgan Stanley*, 128 S. Ct. at 2738-2740, 2746 n.3, 2749 n.6 (emphasis added). Auction rates are bilateral or multilateral, not unilateral.

FERC invokes the ISO's role as the "facilitating entity at the middle of the market." FERC Br. 30. While the ISO participates as an agent,[4] that does not mean the

---

[4] The ISO acts as an agent on behalf of market participants. See ISO New England Inc., FERC Electric Tariff No. 3, attach. A, Market Participant Service Agreement arts. 4.1, 5.1, http://www.iso-ne.com/

auction results are not contracts; parties routinely contract through agents acting as intermediaries. See *Restatement (Second) of Contracts* § 52 cmt. c; *Restatement (Third) of Agency* § 6.01 (2006). And to the extent FERC is suggesting that the ISO is the immediate purchaser of capacity in the auctions, the auction results would still be contracts—in that case, voluntary bilateral contracts between each supplier and the ISO. See J.A. 90; *Richmond Power & Light* v. *FPC*, 481 F.2d 490, 496-497 (D.C. Cir. 1973) (*Mobile-Sierra* applies where parties "agree to a rate changeable in a specific manner"). Load-serving entities would merely be downstream purchasers who pay the ISO for the capacity they require. See p. 21 n.4, *supra*.

FERC urges that auction results are not "recorded in separate agreements between a particular generator and a particular purchasing entity." FERC Br. 30. But an auction result does not have to be "recorded" to be a contract; the contract arises from the parties' conduct—the winning participant's bid and the auctioneer's acceptance. See Pet. Br. 47-48. The very fact that treatises discuss auctions where the property is covered by the Statute of Frauds suggests there is no general requirement that auction results be "recorded." See, *e.g.*, 1 *Williston on Contracts* § 4:12, at 537-540; 7 Am. Jur. 2d *Auctions and Auctioneers* §§ 37-45, at 388-396. And each auction con-

---

regulatory/tariff/attach_a/index.html; *Policy Statement on Electric Creditworthiness*, 109 F.E.R.C. ¶ 61,186, at 61,904-05 (2004). Load-serving entities remit payment to the ISO for their shares of capacity purchased in the auction, and the ISO in turn distributes payments to suppliers. See Pet. App. 112a; J.A. 70; ISO-NE Market Rule 1 §§ III.13.7.2, III.13.7.3, III.13.7.3.1; ISO New England Inc., FERC Electric Tariff No. 3, § I, Ex. ID, Billing Policy §§ 1.3, 2.4(e), (*l*), http://www.iso-ne.com/regulatory/tariff/sect_1/index.html ("ISO-NE Billing Policy").

tract *is* between a "particular generator" and either the ISO or the group of participating load-serving entities. The contract may be multilateral rather than bilateral, but it is still a contract.

FERC claims that "the consequences of default are specified not in an agreement between participants in the auction but in a tariff"—specifically, the tariff setting forth the auction rules. See FERC Br. 30-31; p. 20, *supra*. Under well-established principles, however, such auction rules are deemed incorporated into the bids made at the auction and hence into the contracts that result: "Ordinarily bidders are or should be aware of [auction] terms [that are] published or announced. A bid need not repeat such terms; it is understood as embodying them. Hence the bidder is held to the published or announced terms * * * ." *Restatement (Second) of Contracts* § 28 cmt. e; see also 1 *Williston on Contracts* § 4:12, at 523-525; 7 Am. Jur. 2d *Auctions and Auctioneers* § 17, at 372. Besides, a contract is no less a contract merely because the consequences of default are specified elsewhere—whether in a separate agreement, another document, or background legal principles.

3. APPA argues that the auctions involve "no negotiation *at all*." APPA Br. 23-24. Not so. Suppliers compete in the auctions by offering different amounts of capacity at different prices. That process—a series of increasingly attractive offers followed by acceptance—is simply a formalized and structured form of negotiation. See p. 18, *supra*. Nor is APPA correct that there is "no privity of contract." APPA Br. 24. If the ISO is the contracting party, there is privity between each supplier and the ISO. And if the ISO is an agent, there is privity between each supplier and the group of load-serving entities that chose to acquire capacity through the auction using the ISO as

their agent. See *Restatement (Third) of Agency* § 6.01(1); pp. 20-21, *supra*.[5]

That the ISO determines the installed capacity requirement administratively (APPA Br. 24-25) is also irrelevant. That is simply the total *amount* of capacity to be purchased. See Pet. App. 118a. The *price* for that capacity, and the amount (if any) each supplier will provide, are determined through the auction. The installed capacity requirement, moreover, can be challenged under the ordinary just-and-reasonable standard. See J.A. 95; *ISO New England, Inc.*, 118 F.E.R.C. ¶ 61,157, at 61,758 (2007).

APPA complains that the ISO can disqualify self-supply resources. APPA Br. 25. But the ISO operates an integrated transmission network in which one supplier's failure can have repercussions throughout; consequently, *all* suppliers must meet reliability qualifications. See J.A. 98-119; ISO-NE Market Rule 1 § III.13.1. The only ground for "disqualifying" a self-supply resource is failure to meet those criteria, see J.A. 65, 84, 111; cf. ISO-NE Market Rule 1 § III.13.1.6, a determination that is subject to ordinary just-and-reasonable review, see Pet. App. 119a-120a, 202a. State law might bar hospitals from hiring unlicensed physicians, for example, but that would not mean that a hospital's employment agreements with its *licensed* physicians were anything other than contracts. Likewise here, the ISO's authority to prevent

---

[5] APPA also claims there is no breach-of-contract remedy. APPA Br. 24. But a supplier that did not get paid could pursue contract remedies. See *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 582 n.12 (1981); ISO-NE Billing Policy § 3.4. Although the capacity auction rules sometimes specify consequences of default, see p. 22, *supra*, contracts often include such provisions, see, *e.g.*, *Restatement (Second) of Contracts* § 356(1) & cmts. c-d.

load-serving entities from contracting with unreliable suppliers does not transform auction results into something other than contracts.

Finally, APPA complains about the price collar and other auction rules that limit the permissible bids and clearing prices. APPA Br. 25-26. But structured negotiations like auctions necessarily have rules. An auctioneer in a run-of-the-mill auction may specify a minimum opening bid or bid increment. It would be absurd for the winning bidder to escape his payment obligation by pointing to those limitations and claiming that his obligation is not a contract after all.

The sheer quantity of arguments that respondents, FERC, and APPA offer up should not obscure their failure to cite *any* legal authority to support them. Every leading contracts treatise—the *Restatement*, Williston, Corbin—recognizes that auction results are contracts. None suggests that particular features of these capacity auctions affect that status. This Court should not disregard longstanding, black-letter law in favor of contrived distinctions with no relevance.

B. The Transition Rates Are Contract Rates

The transition rates are also contract rates protected by *Mobile-Sierra*. While FERC admits that "the settlement represented an agreement among the signators," FERC suggests that this "agreement" is not a contract because it reflected "the resolution of a disputed proceeding before the Commission" and was "submitted to the Commission for its approval." FERC Br. 31. That argument lacks merit. That a settlement is approved by a court or agency may make it a judicial or administrative decree as well, but that character exists *in addition to* its status as a contract. See *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994); *Firefighters*,

478 U.S. at 519; *Cajun Elec. Power Coop., Inc.* v. *FERC*, 924 F.2d 1132, 1135 (D.C. Cir. 1991). For that reason, "[t]he policies underlying the *Mobile-Sierra* doctrine apply with equal force to settlement agreements." *Cities of Newark* v. *FERC*, 763 F.2d 533, 546 (3d Cir. 1985) (citing *Cities of Bethany* v. *FERC*, 727 F.2d 1131, 1139 (D.C. Cir. 1984)). That FERC reviewed and approved the settlement agreement may not have been *necessary* for *Mobile-Sierra* to apply. See *Morgan Stanley*, 128 S. Ct. at 2745-2746. But it certainly did not render the agreed-upon rates any *less* likely to be just and reasonable.

FERC also urges that the transition rates apply not only to parties that signed the agreement but also to non-settling parties such as NSTAR. See FERC Br. 31. But that cannot possibly justify treating the *settling parties'* obligations as anything other than contracts. The settling parties signed the agreement specifying what each of them would pay or receive. See J.A. 163-164. Yet, under the court of appeals' holding, any non-contracting party can challenge even *those* voluntarily agreed-upon rates (not merely NSTAR's) free from *Mobile-Sierra*'s restrictions. See Pet. App. 20a, 22a. A state public official, for example, could challenge the amount a state utility had agreed to pay on the theory that the transition payments were indirectly harming consumers—even if the utility had agreed to those rates by signing the settlement. That result is impossible to square with *Mobile-Sierra*. If the transition rate *that NSTAR pays* were not a contract rate, that might mean that NSTAR (or anyone else) could challenge *what NSTAR pays* under the ordinary just-and-reasonable standard. But it could not justify stripping *Mobile-Sierra* protection from the transition rates that parties who *signed* the settlement agreed to pay or receive.

Besides, even the transition rate that NSTAR pays is a voluntary contract rate. Utilities like NSTAR can "meet their assigned [capacity] obligations through use of bilateral contracts" and thus avoid paying the transition rates. See ISO-NE Market Rule 1 §§ III.8.1, III.8.9; ISO New England Inc., *Manual for Installed Capacity (M-20)* § 2.5 (23d rev. July 1, 2009), http://www.iso-ne.com/rules_proceds/isone_mnls/index.html. And whether or not *NSTAR* agreed to the transition rates, *ISO-NE*—the entity that actually makes transition payments on behalf of load-serving entities—agreed to those rates by signing the settlement agreement. See Pet. Br. 54 n.15; J.A. 90; ISO-NE Market Rule 1 §§ III.8.1, III.8.9; *Restatement (Third) of Agency* § 6.01(1).

In any event, FERC could choose to apply *Mobile-Sierra* to a transition rate even if it were not a contract rate. Whether a rate is "just" and "reasonable" depends upon the circumstances. FERC thus has discretion to apply the statutory just-and-reasonable standard in a manner that tracks *Mobile-Sierra*'s public-interest standard when circumstances justify a similar presumption of reasonableness. See FERC Br. 22-39. Here, FERC approved the transition rates under the ordinary just-and-reasonable standard, and "[t]he short duration of the [transition] payment regime makes it unlikely that the transition payments will become unjust or unreasonable." *Id.* at 39. The widespread support for the transition rates confirms their reasonableness. If the agreement of two parties (a single buyer-seller pair) creates a presumption of reasonableness, the agreement of dozens of market participants creates a stronger presumption still. See

Pet. Br. 54 n.15.[6] The need for stability, moreover, remains acute. See *ibid.*; FERC Br. 39.

Ultimately, these complexities underscore precisely why this Court should not address the status of the transition rates. The Court ought not wade into the intricacies of whether the ISO or the load-serving entities is the contracting party, which rates are contract rates, or whether FERC has discretion to apply *Mobile-Sierra* to a rate that is not a contract rate, where no court has ever addressed those issues before. Moreover, the question is almost entirely moot. The last transition payment is due in May 2010. J.A. 164. NSTAR had a full opportunity to challenge the transition payments under the ordinary just-and-reasonable standard. See Pet. App. 120a-121a & n.32, 144a-147a. It lost on that issue before FERC, *id.* at 151a-161a, and lost again in the court of appeals, *id.* at 8a-15a. Neither NSTAR nor anyone else has filed a complaint alleging changed circumstances that might justify a different result under *any* standard. And respondents' own *amici* admit that it is unlikely such a circumstance will emerge. See APPA Br. 21-22. The Court should not expend its resources deciding a complex issue of no practical significance to the parties before it. Instead, the Court should address only the issue the court of appeals decided.

---

[6] APPA downplays the support for the settlement, urging that some of the 115 parties neither signed nor opposed it. APPA Br. 15. But, as the settlement judge noted, those parties were "deemed under the regulations to have waived any objections," so that "107 parties now support the Settlement." *Devon Power LLC*, 115 F.E.R.C. ¶ 63,013, at 65,075 (2006) (citing 18 C.F.R. § 385.602(f)(3)).

CONCLUSION

For the foregoing reasons and those set forth in petitioners' opening brief, the court of appeals' decision should be reversed.

Respectfully submitted.

JOHN N. ESTES III
Counsel of Record
JOHN LEE SHEPHERD, JR.
SKADDEN, ARPS, SLATE,
MEAGER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7338

MICHAEL R. BRAMNICK
General Counsel
CHRISTOPHER C. O'HARA
Assistant General Counsel
NRG ENERGY, INC.
211 Carnegie Center Drive
Princeton, NJ 08540
(609) 524-4601

JEFFREY A. LAMKEN
ROBERT K. KRY
MOLOLAMKEN LLP
The Watergate
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000

Counsel for Petitioners

OCTOBER 2009