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 PUBLIC CITIZEN, INC., AND AARP IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Public Citizen, Inc., is a consumer advocacy organization founded in 1971.[1] On behalf of its members nationwide, Public Citizen appears before Congress, administrative agencies, and the courts on a wide range of issues and works toward enactment and effective enforcement of laws and regulations protecting consumers, workers, and the general public. As relevant to this case, Public Citizen is particularly concerned with protecting the interests of retail electricity customers, who ultimately bear the costs of wholesale electricity rates that are, at least nominally, regulated by the Federal Energy Regulatory Commission (FERC). Because unjust and unreasonable wholesale electricity rates are almost invariably passed on to retail customers, proper enforcement by FERC of the provisions of the Federal Power Act (FPA) that outlaw unjust and unreasonable rates is critical to the protection of the consumers whom the FPA was primarily intended to benefit. Public Citizen has therefore participated, and continues to participate, in litigation challenging FERC's so-called "market-based rate" system, which deviates from the requirements of the FPA in many critical respects.

AARP is a nonpartisan, nonprofit organization that helps people over the age of 50 to have independence, choice, and control in ways that are beneficial to them and society as a whole. AARP has

[1] Letters of consent to the filing of this brief from all parties are on file with the Clerk. The brief was not authored in whole or in part by counsel for a party, and no person or entity other than the amici curiae or their counsel made a monetary contribution to its preparation or submission.

nearly 40 million members. AARP is greatly concerned about the threats to health and safety of America's most vulnerable citizens caused by the recent sharp rise in energy costs. Because the cost of utilities has skyrocketed, many low and middle-income families and older people must now choose between paying their energy bills for heating and cooling and paying for other essentials such as food and medicine. AARP therefore works in both Congress and the states to protect consumers from excessive rates and charges. As consumers, AARP members depend upon the protection from excessive rates that the FPA affords when it is effectively administered by FERC—protection founded on the FPA's core command that rates be just and reasonable.

Both Public Citizen and AARP previously submittted or joined in the submission of briefs to this Court as amici curiae in *Morgan Stanley Capital Group v. Public Utility District No. 1*, 128 S. Ct. 2733 (2008), which like this case concerned the scope of the Court's 1956 decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.,* 350 U.S. 332 (*Mobile*) and *FPC v. Sierra Pacific Power Co.,* 350 U.S. 348 (*Sierra*). The amici curiae now submit this brief because the positions taken by FERC and the petitioners in this case are, if anything, even more damaging to the protection of the public than FERC's embrace of "market-based rates." The expansion of the *Mobile-Sierra* doctrine that FERC and petitioners advocate would effectively nullify the consumer protection goals of the FPA by imposing a virtually insurmountable obstacle to challenging wholesale electricity contracts that result in unjust and unreasonable rates paid by consumers.

SUMMARY OF ARGUMENT

The FPA regulates wholesale electricity rates with the objective of protecting the ultimate consumers of electricity by guaranteeing that rates are "just and reasonable." Far from substituting a regime of sanctity of contract for that statutory bond of protection, the "*Mobile-Sierra* doctrine" has, through most of its history, provided only that power sellers dissatisfied with rates they agreed to in contracts could escape their improvident bargains only if they demonstrated that the rates were unlawful under the FPA, and could meet that burden only by invoking the interests of the public, not their own private interests. Even as more recently extended in *Morgan Stanley* (and a handful of lower court decisions preceding it) to impose a similar burden on wholesale buyers, the doctrine has never been deemed to create a "presumption" that rates are just and reasonable when challenged by consumers, public authorities, or others who were not parties to the contracts establishing them. Petitioners and FERC are therefore wrong to suggest that there is a long history of protecting contractually established rates against challenges by third parties under the normal statutory "just and reasonable" standard.

Nor does the reasoning of this Court's decision in *Morgan Stanley* support the creation of a weighty "presumption" that consumers and other non-parties to wholesale power contracts must overcome in challenging contractually specified rates as unjust and unreasonable. According to *Morgan Stanley*, the *Mobile-Sierra* doctrine rests on the notion that parties to such contracts can be expected to protect their own private interests, and thus that the lawfulness of rates set in wholesale electricity contracts should be assessed on the basis of their justness and reasonableness to the *public*. There is no basis for the further leap that contracting parties can also be expected to protect the interests of the public. Indeed, there is every reason to believe that they will not, because wholesale purchasers who resell power to consumers are typically entitled to pass on their costs directly to consumers, and thus have reduced incentives to minimize costs. Thus, where members of the public or their representatives are asserting their own rights under the FPA to have FERC determine the lawfulness of rates that directly affect their interests, neither *Mobile-Sierra* nor *Morgan Stanley* supports the imposition of any heightened burden on them. The unmodified statutory standard—whether rates are just and reasonable—governs such challenges.

ARGUMENT

I. This Case Is Not an Appropriate Vehicle for Making Sweeping Rulings About the Scope of the *Mobile-Sierra* Doctrine.

FERC argues convincingly in its brief that the *Mobile-Sierra* doctrine does not, of its own force, apply to the capacity rate-setting mechanisms established by the settlement agreement at issue in this case. *See* FERC Br. 24-32. Nonetheless, FERC joins the petitioners in inviting this Court to reverse the decision of the court of appeals based on broad propositions about the application of the *Mobile-Sierra* doctrine to third-party challenges to rates established in wholesale electricity contracts—even though, as FERC acknowledges, that is not, properly speaking, what this case is even about.

FERC has it precisely backwards. If, as FERC maintains, the rate-setting arrangements in this case are not ones to which the FPA requires application of the *Mobile-Sierra* doctrine at all, this case cannot be the appropriate arena for determining whether the FPA somehow requires extending the application of the *Mobile-Sierra* doctrine to third-party challenges to wholesale rate contracts or, if it does, what the doctrine means in the context of such a challenge.

Instead, the issue should be whether the Commission may, in approving a settlement agreement, prospectively limit the rights of third-parties who may challenge future capacity rates established using the mechanism created by the settlement, by calling for the application of a "public interest" standard derived from the *Sierra* decision to complaints that those rates are unjust and unreasonable under section 206 of the FPA (16 U.S.C. § 824e).[2]

To that more limited question (if it falls within the scope of the question presented), the answer is no. Nothing in the FPA authorizes FERC to accept a settlement (and a contested settlement at that) that does not satisfy the just and reasonable standard. And "that [a] proposal is a settlement does not 'estab-

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[2] The two key provisions of the FPA involved here are section 205, codified at 16 U.S.C. § 824d, and section 206, codified at 16 U.S.C. § 824e. For ease of reference, we henceforth use the U.S. Code rather than FPA section numbers in this brief, as the Court did in *Morgan Stanley* and FERC does in its brief in this case.

lish without more the justness and reasonableness of its terms.'" *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C. Cir. 1990) (quoting *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 312-13 (1974)). Nor is there any reason for establishing a "presumption" that capacity rates established through the settlement mechanisms will in any way reflect some representation of the interests of consumers (or state agencies or other third parties) that could justify any expectation that the resulting rates will be "just and reasonable" as to them. *Cf. Morgan Stanley*, 128 S. Ct. at 2746 (quoting *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 479 (2002)). In its order approving the settlement, FERC identified no such reason for applying the statutory just and reasonable standard less stringently to complaints by third parties.

II. The *Mobile-Sierra* Doctrine Creates No "Presumption" That Rates Are Just and Reasonable from the Standpoint of Non-Parties to a Contract.

Assuming for the sake of argument that issues as to the scope of the *Mobile-Sierra* doctrine, where it applies of its own force to a contractually established rate, are properly before the Court, the argument of FERC and the petitioners that the doctrine limits the ability of non-parties to a contract to complain that rates are unjust and unreasonable *as to them* or that it creates a heightened "presumption" of legality of contract rates that binds non-parties, is wholly unwarranted. It finds support neither in the FPA itself nor in the *Mobile-Sierra* doctrine's construction of the FPA—even the expansive version of that doctrine adopted by the Court in *Morgan Stanley*.

A. Petitioners' Assertion That the *Mobile-Sierra* Doctrine Has Long Limited Claims That Contractually Established Rates Are Unjust and Unreasonable to Consumers Is Historically Inaccurate.

Central to petitioners' and FERC's argument is the notion that the FPA has long been interpreted to erect a heightened barrier to consumers and other non-parties who seek to have contractually based wholesale electric rates modified on the ground that they are unjust and unreasonable. Based on this supposedly settled understanding of the FPA, petitioners assert that the power industry will face massive disruption unless non-parties challenging rates are held to as stringent a standard as sellers seeking to free themselves from an "improvident bargain." Pet. Br. 6 (quoting *Sierra*, 350 U.S. at 355).

Petitioners' and FERC's position is historically inaccurate. Until this Court's decision only last year in *Morgan Stanley*, the application of *Mobile-Sierra* to purchasers under wholesale electricity contracts was itself supported only by a scant handful of recent judicial decisions. There is even less basis for extending the doctrine still further to erect a "presumption" applicable to non-parties challenging rates they neither bargained for nor agreed to. Indeed, even the recent decisions predating *Morgan Stanley* that had applied *Mobile-Sierra* to claims made by buyers under wholesale electricity contracts acknowledged that FERC must remain solicitous of the interests of consumers who are the ultimate intended beneficiaries of the FPA. There is no warrant for abandoning that solicitude and imposing on consumers a heightened burden when they seek to protect their rights under the FPA to insist that rates ultimately passed on to them be just and reasonable.

1. The Federal Power Act and the Origins of *Mobile-Sierra*

The legal framework against which *Mobile* and *Sierra* were decided is the FPA. The Act regulates "the sale of electric energy at wholesale" (i.e., "sale of electric energy to any person for resale"). 16 U.S.C. §§ 824(b)(1), (d). The bedrock command of the FPA is set forth in 16 U.S.C. § 824d(a):

> All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"Public utility," as used in § 824d(a), is a term of art under the FPA, referring to entities that own or operate facilities for wholesale *sale* (or transmission) of electricity in interstate commerce. 16 U.S.C. §§ 824(b)(1), (e).[3] Thus, in the FPA, "public utility" does not simply refer generically to electric power companies, nor does it describe what many people may normally think of as "utilities"—that is, compa-

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[3] Such facilities, in the case of wholesale power marketers, who own neither generation units nor power lines but buy and sell power at wholesale, may simply be the contracts that they use to acquire and resell power. *See Automated Power Exch., Inc. v. FERC*, 204 F.3d 1144, 1151-52 (D.C. Cir. 2000).

nies that sell electricity at retail to the consumers who actually use it and that are typically regulated (or, today, deregulated) by the states.

Although the FPA directly regulates wholesale rates and transactions and the sellers who engage in them, its reason for doing so is that such sales are "for ultimate distribution to the public" and thus are "affected with a public interest." *Id.* § 824(a). As this Court has repeatedly recognized, "[a] major purpose of the whole Act is to protect consumers against excessive prices." *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952). The FPA's provisions, like the parallel provisions of the Natural Gas Act, are aimed at "afford[ing] consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atl. Refining Co. v. Public Serv. Comm'n*, 360 U.S. 378, 388 (1959). Thus, consumers are supposed to be FERC's "prime constituency" in its administration of the FPA, *Md. People's Counsel v. FERC*, 761 F.2d 780, 781 (D.C. Cir. 1985), and each provision of the Act "must be read in light of the Federal Power Act's primary purpose of protecting the utility's customers." *Elec. Dist. No. 1 v. FERC*, 774 F.2d 490, 492-93 (D.C. Cir. 1985) (Scalia, J.).

The Act accomplishes its ends by requiring that public utilities (i.e., wholesale sellers of power) must file schedules setting forth their rates and charges, as well as all contracts establishing or affecting such rates and charges, with FERC. 16 U.S.C. § 824d(c). When a public utility changes a rate, charge or contract, it must provide advance notice, and FERC may investigate and set for hearing the question whether the change is lawful (that is, "just and reasonable" as required by § 824d(a) and not preferential in violation of § 824d(b)). *See* 16 U.S.C. §§ 824d(d), (e). FERC may also suspend the effect of the change for a limited time pending hearing and/or, if the new rate goes into effect and is then held unlawful, order refunds. *Id.* § 824d(e). Even after a rate or contract goes into effect, § 824e provides that FERC at all times retains authority, upon its own initiative or upon a complaint filed by anyone, to find that the rate or contract is "unjust, unreasonable, unduly discriminatory or preferential." If FERC so finds it must "determine the just and reasonable rate … or contract to be thereafter observed and in force, and shall fix the same by order." 16 U.S.C. § 824e(a).

In *Mobile*, this Court considered whether, under the parallel provisions of the Natural Gas Act, a seller that had entered into a contract obligating it to provide gas at a particular rate could unilaterally supersede that contract just by filing with the Commission a schedule setting forth a new, higher rate subject to Commission review. The Court, not surprisingly, said no. The Act, the Court held, permitted rates for particular customers "to be established initially by contract," 350 U.S. at 339, subject, like "any other rate," to being "set aside" if "found unlawful by the Commission." *Id.* at 342. Nothing, however, in the Act's provisions authorizing (and, indeed, requiring) the filing of rates and contracts, empowered sellers "to change their contracts unilaterally" just by purporting to make a new rate filing in violation of the contract already on file. *Id.* at 340.

Sierra, decided the same day, took *Mobile* a step further. In *Sierra*, a wholesale electricity supplier sought to escape a contract in which it had committed to sell power to a buyer at a rate it now thought unreasonably low. To that end it, like the seller in *Mobile*, attempted to avoid its contract by unilaterally filing a new rate schedule. *Sierra* began by holding that the FPA, like the Natural Gas Act, did not permit a public utility (i.e., a wholesale power seller) to change its contracts unilaterally by filing new rate schedules. 350 U.S. at 353. The *Sierra* Court, however, had to address an additional question: whether the Commission had effectively found the old contract rate unlawful and exercised its power under § 824e to replace it with a new, lawful rate (namely, the one filed by the seller). *See id.* The seller argued that the Commission had made such a finding by determining that the seller's rate of return on the contract was unreasonably low, while the rate of return under the rate schedule the seller was attempting to substitute for the contract was reasonable.

The Court rejected the seller's argument, holding instead that:

> [W]hile it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. … In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory. That the purpose of the power given the Commission by § [824e(a)]

> is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in § [824] of the Act that the scheme of regulation imposed "is necessary in the public interest." When § [824e(a)] is read in the light of this purpose, it is clear that a contract may not be said to be either "unjust" or "unreasonable" simply because it is unprofitable to the public utility.

350 U.S. at 355.

The holding of *Mobile* was by its nature limited to sellers, because purchasers of power obviously cannot unilaterally file rate schedules regardless of whether they are parties to a contract. *Sierra*, too, stated its holding in terms applicable to sellers of power: It said that a "public utility"—that is, a seller for resale, a wholesaler—could not seek to have the Commission overturn a rate it had agreed to by contract unless the rate was "so low as to adversely affect the public interest." *Id.* at 355. Moreover, given the FPA's objective of protecting consumers, it was not surprising that the Court concluded that the circumstances in which the Act's goals would be impaired by *low* rates would be quite unusual, and that lack of profitability for the seller was not sufficient to render a rate it had "improvidently" agreed to unlawful. *Id.*

2. *Mobile-Sierra* in the Courts

In the decades immediately following the announcement of what has come to be known as the *Mobile-Sierra* doctrine, there is no sign that courts or the Commission viewed it as erecting any heightened standard for challenges to rates by purchasers of power, let alone by consumers adversely affected by high rates. In one of the first appellate decisions issued after *Mobile* and *Sierra*, the Fourth Circuit held that those decisions did not apply to a claim that a contract rate was unlawful under the FPA because it was too high, and this Court denied certiorari. *S.C. Generating Co. v. FPC*, 249 F.2d 755 (4th Cir. 1957), *cert. denied*, 356 U.S. 912 (1957).

This Court's subsequent decisions applying and elaborating the doctrine, like *Mobile* and *Sierra* themselves, concerned the circumstances in which sellers could be relieved of contract rates they claimed were too low. Those decisions established that sellers could, by contract, preserve their right to file rate changes (subject to Commission review under the ordinary just and reasonable standard), *see United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1959), and that absent such provisions in the contract, a seller could obtain a Commission order invalidating its contract rates as too low only in what the Court described as cases of "unequivocal public necessity." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968).[4]

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[4] *Permian Basin*, like *Memphis*, *Sierra*, and *Mobile*, was a case where sellers sought to be relieved of rates they considered too low, and the Court there emphasized that it was important to the scheme of regulation to hold "regulated companies"—i.e., sellers—to their contracts. 390 U.S. at 822. We recognize that in *Morgan Stanley*, the Court held that the same principle extended to buyers. Our point is not that *Morgan Stanley* was incorrect in so holding (though obviously we advocated a different result in that case), but that for most of the history of the *Mobile-Sierra* doctrine, it was not so applied.

The lower courts, too, regularly described the doctrine as it was set forth in *Mobile* and *Sierra* themselves, as a limit on the ability of a public utility to file a rate schedule that raised rates in derogation of a contract binding the seller to a stated lower rate. For example, the D.C. Circuit summed up its understanding of the doctrine in a widely quoted passage in *Richmond Power & Light v. FPC*, 481 F.2d 490, 493 (D.C. Cir. 1973):

> The rule of *Sierra*, *Mobile* and *Memphis* is refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid.

The same court similarly stated that *Mobile* and *Sierra*, "read conjunctively, make it crystal clear that the Commission possess only limited power to *raise prices* … above those contractually fixed by the parties." *Pub. Serv. Comm'n v. FPC*, 543 F.2d 757, 790 (D.C. Cir. 1975) (emphasis added).[5] Or, as Judge Leventhal put it, the *Mobile-Sierra* doctrine provided that the FPA's provisions "do not authorize the Commission to approve unilateral rate increases that are inconsistent with a seller's contractual obligations." *Gulf States Utils. Co. v. FPC*, 518 F.2d 450, 452 (D.C. Cir. 1975).[6] *Accord, e.g., Papago Tribal*

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[5] The court cited this Court's decision in the *Permian Basin Area Rate Cases* as an example of the application of *Mobile-Sierra* to prevent sellers from raising rates above those set forth in contracts. *Id.* at 792.

[6] As *Gulf States* illustrates, the bulk of litigation in the lower courts, particularly after this Court's decision in *Memphis*,

(*Footnote continued*)

Util. Auth. v. FERC, 610 F.2d 914, 929-30 (D.C. Cir. 1979). Although the D.C. Circuit was the primary expositor of the *Mobile-Sierra* doctrine, other circuits also shared this understanding of its application.[7] The Commission, too, recognized that the *Mobile-Sierra* doctrine applied when a seller sought to escape rates it considered too low, and the standard imposed by *Sierra* was "whether the challenged rates 'are so low as to adversely affect the public interest.'" *Phil. Elec. Co.*, 58 F.P.C. 88, 90 1977 WL 17458 (1977) (quoting *Sierra*, 350 U.S. at 355). As the Commission put it, "Most of the judicial precedent dealing with the *Sierra* doctrine has addressed the question of the lawfulness of unilateral attempts to increase fixed rates in contravention of an effective contract." *Id.*

Moreover, decisions in the lower courts that, like *Permian Basin*, emphasized the heavy burden that a public utility must bear to satisfy the *Sierra* standard also arose in the context of efforts by sellers to raise rates. For example, *Papago Tribal Utility Au-*

involved construction of contracts to determine whether they set forth fixed rates or whether they permitted sellers to file new rates unilaterally (but always "subject to [the Commission's] review powers under §§ [824d(e)] and [824e(a)]," 518 F.2d at 452). Thus, *Mobile-Sierra* really represents two different doctrines, the first concerning whether a seller has waived by contract its ability to make unilateral rate filings, and the second concerning the standard for review of contractually established rates under § 824e when challenged by a party to the contract who has waived the right to file unilaterally.

[7] *See, e.g., City of Fulton v. United States*, 680 F.2d 115, 120 (Ct. Cl. 1982); *Pennzoil Co. v. FERC*, 645 F.2d 360, 373-74 (5th Cir. 1981); *Pub. Serv. Co. v. FPC*, 557 F.2d 227, 229 (10th Cir. 1977).

thority v. FERC, 723 F.2d 950 (D.C. Cir. 1983) (*Papago II*), where the court described the *Sierra* standard as "practically insurmountable" (*id.* at 954), was a case in which a wholesale electricity seller had sought FERC authorization to raise rates, and the issue was whether its contract permitted rate increases only under the "public interest" standard, or whether it allowed them when the Commission found that the existing rate was not "just and reasonable" to the seller under the unmodified statutory standard. The same was true in *Kansas Cities v. FERC*, 723 F.2d 82 (D.C. Cir. 1983), where the court called the standard "almost insurmountable." *Id.* at 87-88.[8]

As the D.C. Circuit elsewhere said, *Mobile* and *Sierra* "merely specify that heavy burdens must be met before contractually fixed low rates may be increased without the consent of the customer." *Town of Norwood v FERC*, 587 F.2d 1306, 1312 (D.C. Cir. 1978). It is, of course, hardly surprising that under a statute dedicated to the protection of consumers, claims that rates to which a seller has agreed are too low would rarely if ever prevail. The major authorities construing *Mobile-Sierra* do not suggest that a similar burden should be imposed where the claim is that rates are unjustly or unreasonably high from the standpoint of the consumers the FPA protects.

[8] *See also E. Ky. Power Co-op v. FERC*, 489 F.3d 1299, 1309 (D.C. Cir. 2007) (describing *Mobile-Sierra* as a doctrine under which "utility providers" may "contractually relinquish" some of their "rate-filing freedom" and may increase rates above those specified by contract only when they satisfy the "practically insurmountable" public interest standard).

Indeed, the Commission rejected the existence of any such burden in its 1976 decision in *Electric & Water Plant Board v. Kentucky Utilities Co.*, 55 F.P.C. 2035, 0076 WL 159953. There, the Commission addressed an effort of a wholesale purchaser to have provisions changed in a fixed-rate contract it had agreed to (based on the argument that a fuel-adjustment clause in the contract was in conflict with an intervening Commission regulation). The Commission held that *Mobile* and *Sierra* were applicable to the purchaser only to the extent that it, like the seller, could not "unilaterally" abrogate a contract rate (a proposition obvious even without *Mobile* and *Sierra* because buyers cannot unilaterally file rates), and could be relieved of the contractual rate only if it were held unlawful under § 824e. *Id.* at 2042-43. But the Commission did *not* require the buyer in such circumstances to make any heightened showing in order to demonstrate the unlawfulness of rates under § 824e. Rather, the Commission stated that the standard applicable to challenges to contractually fixed rates was whether "'the rate [provided by the contract] is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory' *or is so high that it exceeds a just and reasonable rate*." *Id.* at 2042 (emphasis added; footnote omitted) (quoting *Sierra*, 350 U.S. at 355). That is, the unmodified statutory standard applied to a claim that the contract rate was unlawful because it was excessive.

Moreover, even the few and relatively recent lower court decisions, dating from the mid-90s, that first applied *Mobile-Sierra* to claims by purchasers in wholesale energy transactions do not suggest that third parties—that is, consumers and the government agencies assigned the task of protecting them—who assert that a rate is unjust and unreasonable to them are held to a more stringent standard in demonstrating the unlawfulness of the rate than they would be in the absence of the contract.

For example, in *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937 (1st Cir. 1993), which appears to be the first judicial decision squarely applying *Mobile-Sierra* to a purchaser's request that contractual rates be lowered,[9] the court held that FERC had wrongly applied the normal version of the just and reasonable standard rather than *Sierra*'s "public interest" variant in lowering the selling utility's rate of return, and it remanded to FERC for further explanation of its action. *Id.* at 961. In so doing, however, the court expressly noted that "the most attractive case for affording additional protection, despite the presence of a contract, is where the protection is intended to safeguard the interests of third parties, notably the buyer's customers." *Id.*

On remand, FERC adhered to its decision to reduce the contract rates. The agency repeated state-

[9] In *Morgan Stanley*, the Court cited *Boston Edison Co. v. FERC*, 856 F.2d 361, 372 (1st Cir. 1988), as an instance of application of *Mobile-Sierra* to a purchaser's claim, but although the court in *Boston Edison* discussed *Mobile* and *Sierra*, the decision addressed a different, and narrower, question, namely the enforceability of a contractual clause providing that a purchaser had a limited amount of time to claim refunds of overcharges.

ments made in its earlier decision that it was "not aware of any court definitively holding that parties to a contract can waive the section [824e] rights of nonparties, and we believe that in cases where a nonparty challenges a rate contract in a section [824e] proceeding, it need only show that the contract is unjust, unreasonable, unduly discriminatory or preferential." *Ne. Utils. Serv. Co.*, 66 FERC ¶ 61332, at 62078, 1994 WL 92839 (1994). FERC further explained at length that prior cases (including most notably *Papago II*) that described the *Mobile-Sierra* standard as nearly "insurmountable," arose in the different context of claims that contract rates were unreasonably low, and that the Commission's paramount mission of protecting consumers required it to apply a more flexible standard when the claim was that rates were unreasonably high to the detriment of consumers. *See id*. at 62081-88.

Upon further review, the First Circuit sustained the Commission's order. *Ne. Utils. Serv. Co. v. FERC*, 55 F.3d 686 (1st Cir. 1995). In upholding FERC's application of a flexible, consumer-protective standard where an unreasonably high rate affected the interests of third parties (that is, consumer ratepayers), the court stated:

> The holding of *Sierra* is clear; what justifies protective action in the public interest by the Commission *when it is considering whether a contract rate is too low* is where the rate might impair the financial ability of the utility to continue to supply electricity, force electricity consumers to bear an excessive burden, or be unduly discriminatory. This definition of what is necessary in the public interest was formulated

> in the context of a *low-rate* case. It was not and could not be an across-the-board definition of what constitutes the public interest in other types of cases.

Id. at 690 (emphasis in original). Moreover, the court specifically rejected the argument that *Papago II*'s "practically insurmountable" dictum applied in cases where the public was adversely affected by too-high rates. *Id.* at 692.[10]

The D.C. Circuit, like the First Circuit, had held *Mobile-Sierra* applicable to claims by purchasers in a few recent cases preceding *Morgan Stanley*, but that court, too, had stopped far short of imposing a heightened burden on consumers or other non-parties in challenging a contract rate as unjustly or unreasonably high. For example, in *Texaco Inc. v. FERC*, 148 F.3d 1091 (D.C. Cir. 1998), the first case in which the D.C. Circuit held *Mobile-Sierra* applicable to a buyer's claim that a contract provision was unreasonable, the court held that FERC could not consider the contracting parties' own interests in determining the lawfulness of the contract, but it nonetheless *upheld* FERC's determination that the contract was unlawful under § 824e because it would "distort" pricing in the gas market and have anti-competitive effects on a third-party competitor of the buyer. *Id.* at 1097. The court nowhere suggested that had consumers, or the buyer's third-party competitor, com-

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[10] After the First Circuit's holding in *Northeast Utilities II*, FERC reaffirmed its view that contracts did not limit its authority to protect the interests of non-parties. *See S. Co. Servs., Inc.*, 67 FERC ¶ 61,080 (1994); *Fla. Power & Light Co.*, 67 FERC ¶ 61,141 (1994).

plained directly, they would have borne some elevated burden to demonstrate that the contract was unjust and unreasonable from the standpoint of their interests.

Similarly, in *Potomac Electric Power Co. v. FERC,* 210 F.3d 403 (D.C. Cir. 2000) (*Pepco*), which this Court cited in *Morgan Stanley* as an instance of the application of *Mobile-Sierra* to § 824e complaints brought by purchasers, see 128 S. Ct. at 2739, the D.C. Circuit quite pointedly refrained from suggesting that consumers who were not themselves parties to the contract containing the challenged rate would have had to show anything more than that it resulted in unjust and unreasonable rates if they had challenged it themselves. In *Pepco*, a retail power company brought a complaint under § 824e seeking to have rates under a contract for the purchase of transmission lowered to conform to rates that subsequently were offered by the seller under new "open access tariffs" instituted as a result of FERC's Order 888. The D.C. Circuit held that Pepco, the purchaser, was itself subject to the *Mobile-Sierra* standard and thus could not invoke its own interests to establish the unreasonableness of the contract. Acknowledging that courts and the Commission had taken a more protective approach where interests of consumers and other non-parties were at issue, the court rejected application of that approach to Pepco because "Pepco is not itself a non-party." *Id.* at 408-09. Moreover, the court noted, beyond simply asserting that it passed rates along to its retail customers, Pepco had neither shown, nor even attempted to show, that its ratepayers were adversely affected at all, or that they suffered undue discrimination or excessive burden as a result of the challenged contract provisions. *Id.* at 409-10. Nowhere did the court suggest that, had rates paid by third parties actually been shown to be unjust and unreasonable under the conventional statutory standard, the contract would nonetheless have been upheld.

In sum, it is not the case, as petitioners and FERC contend, that the *Mobile-Sierra* doctrine reflects a consistent 50-year history of contract "sanctity" in the face of claims that rates resulting from wholesale power contracts are unjustly and unreasonable high. Rather, as originally articulated and applied by the courts for most of its history, the doctrine protected purchasers against attempts by sellers to raise rates unilaterally. And even as more recently extended to apply to claims by purchasers that rates are unlawfully high, the doctrine has foreclosed only claims that contracts were unreasonable from the standpoint of the interests of the purchasers themselves—that is, the actual contracting parties—not claims that contracts resulted in rates that were unjust and unreasonable to the consuming public whom the FPA was intended to protect.

B. *Morgan Stanley* Does Not Create a Presumption that Contract Rates Challenged by Non-Parties Are Lawful.

Morgan Stanley, of course, held that purchasers are subject to the *Mobile-Sierra* doctrine, but neither its holding nor its reasoning supports imposition of some new "presumption" that contract rates are just and reasonable to the members of the public who ultimately pay them but whose interests were not represented in the formation of the contracts themselves.

Rather, in holding that *Mobile-Sierra* applies to claims by purchasers that a contract rate is unjust and unreasonable, the Court in *Morgan Stanley* decided that what *Sierra* referred to as the "private interests" of the contracting companies themselves could not be considered in determining the lawfulness of their contracts. *Sierra*, 350 U.S. at 355. Nothing in that holding implies that where the public's interest in being free from unduly high rates is invoked, some heightened standard must apply.

Nor do the justifications for the *Mobile-Sierra* rule imply that consumers and other non-parties to contractual arrangements should face an increased "presumption" that rates they challenge are just and reasonable. *Mobile-Sierra* has been described as being based on a "broad waiver" of the contracting parties' right to have the Commission consider their interests in evaluating the fairness and reasonableness of the contract. *Papago II*, 723 F.2d at 953. But contracting parties cannot, by agreement, waive other people's rights, and thus cannot affect FERC's "indefeasible right," *id.*—indeed, its indefeasible statutory duty—to protect the public against unjust and unreasonable rates.

Morgan Stanley similarly reasoned that *Sierra* was "grounded in the commonsense notion that '[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a "just and reasonable rate" *as between the two of them*.'" 128 S. Ct. at 2746 (quoting *Verizon*, 535 U.S. at 479) (emphasis added). Even assuming its debatable factual premise to be true, that justification only goes as far as the interests of the parties themselves. Common sense may suggest that wholesale buyers and sellers "often" negotiate rates that are fair from the standpoint of their own particular interests (though the reverse may also "often" be true), but it hardly suggests that such rates will be fair from the standpoint of third parties.

Indeed, both common sense and long experience demonstrate that in transactions for the purchase and sale of wholesale electricity, companies that purchase power for resale to consumers can *not* be expected to negotiate rates that are just and reasonable to consumers, precisely because retail sellers of power have an almost unlimited ability to pass on rates to consumers. In particular, this Court's decisions in *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co. v. Thornburg,* 476 U.S. 953, 970 (1986), nearly always guarantee that a wholesale rate that is filed with FERC (or satisfies the requirements that are said to pass for filing under FERC's new market-based rate regime) can be passed on to retail consumers notwithstanding any protections state law may attempt to provide consumers against unreasonable rates. Thus, wholesale purchasers have little incentive to minimize their costs. For this reason, "neither the Commission nor [the courts] may merely assume, without analysis, that the [wholesale purchasers'] protection of their own interests (if indeed they were able to protect them) will inure to the benefit of consumers; as regulated utilities, … [they] might not have a sufficient incentive, in dealing with the [wholesale sellers], to minimize their costs." *Tejas*, 908 F.2d at 1003. In other words, the interests of wholesale purchasers are not "sufficiently likely to be congruent with those of ultimate consumers" to justify treating their "agreement as dispositive of the consumers' interests." *Id*. at 1004.

Morgan Stanley's reasoning thus does not support imposing a "presumption" that contract rates challenged by consumers or other third parties are lawful. Even as extended in *Morgan Stanley*, the *Mobile-Sierra* doctrine is a "presumption" only in the limited sense that it imposes on parties to a contract a burden of showing something more than that the contract's rates are unjust and unreasonable as to them, based (according *to Morgan Stanley*) on an expectation that they would not agree to terms that are unfair *to themselves*. The "presumption," in other words, refers simply to the burden of demonstrating that the rates are unjust and unreasonable from the standpoint of the public as opposed to the private interests of the contracting parties.[11] Any such "presumption," however, is by its terms inapplicable when members of the public challenge contract rates as unjust and unreasonable to them. Put another way, *Mobile-Sierra*, as construed in *Morgan Stanley*, may require that the justness and reasonableness of

[11] We note that other than one passing, off-hand reference to a "*Mobile-Sierra* presumption" in one D.C. Circuit opinion, *Union Electric Co. v. FERC*, 890 F.2d 1193, 1196 (D.C. Cir. 1989), the first time the doctrine was described by a court as establishing a "presumption" appears to have been in the pair of Ninth Circuit decisions that led to this Court's decision in *Morgan Stanley*, *Public Utilities District No. 1 v. FERC*, 471 F.3d 1053 (9th Cir. 2006), *vacated*, 128 S. Ct. 2993 (2008), and *Public Utilities Commission v. FERC*, 474 F.3d 587 (9th Cir. 2006), *aff'd*, 128 S. Ct. 2733 (2008).

contract terms be determined from the standpoint of the public, but it erects no "presumption" that such rates are consistent with the interests of the public.

Finally, in light of petitioners' and FERC's suggestion that extension of the *Mobile-Sierra* doctrine to encompass claims of non-parties is somehow necessary to support FERC's recent acceptance of so-called "market-based rates" under the FPA, a few observations on that subject are called for. To begin with, in this case, as in *Morgan Stanley* itself, the lawfulness of FERC's market-based rate regime is not before the Court. *See Morgan Stanley*, 128 S. Ct. at 2741, 2747. Indeed, the rates at issue are not market-based rates as FERC uses that term. As *Morgan Stanley* acknowledged, the lawfulness of FERC's market-based rate program is an open question, *see id.*, and in this case, as in *Morgan Stanley* itself, the Court should not purport to answer it when it is not properly presented by the case at bar.[12]

Moreover, far from being essential to carry out FERC's market-based rate program,[13] the interpre-

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[12] The principal legal infirmities in the market-based rate program were catalogued in the brief joined by amicus Public Citizen in *Morgan Stanley*, and we will not reiterate those points here. See Brief of Amici Curiae Colorado Office of Consumer Counsel, et al., No. 06-1457, at 15-20.

[13] Indeed, a doctrine that in its inception principally concerned the circumstances under which contracting parties were deemed to have waived the right to make unilateral rate filings seems singularly out of sync with a regulatory regime in which FERC has (albeit without statutory authority) largely dispensed with rate filings. *See Morgan Stanley*, 128 S. Ct. at 2741.

tation of *Mobile-Sierra* that petitioners offer here would render FERC's market-based rate regime superfluous, as it would allow even sellers ineligible to participate in that program (because they possess market power, for example) to immunize any rate they wish to charge from serious scrutiny whenever they have been able to find a buyer who will contract with them for power at that rate.[14] In short, the position of petitioners is, in effect, that the FPA is and always has been a program where the lawfulness of a rate was a question principally of what the market would bear. That has never been the law. Indeed, the FPA was enacted principally as a response to market failures that left consumers (and state regulators) "helpless against [utility] combinations," *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944), not simply to ratify market outcomes. Holding that the interest in contract sanctity requires a "presumption" that rates in wholesale electricity contracts are just and reasonable from the standpoint of the public would turn the FPA's goal of "protect[ing] consumers against exploitation," *id.*, on its head.

[14] Because the *Mobile-Sierra* doctrine applies to transmission as well as wholesale power contracts (*see, e.g., Pepco*), petitioners' position would effectively make unregulated freedom of contract predominant in transmission as well. Even FERC, however, concedes that transmission providers typically have market power that makes any semblance of a market-based rate regime for transmission unworkable. *See New York v. FERC*, 535 U.S. 1 (2002) (upholding FERC's Order 888, which imposes a variety of regulatory requirements on transmission as remedial measures under § 824e based in part on findings that transmission rates were unjust and unreasonable).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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