

No. 08-674

IN THE
Supreme Court of the United States

NRG POWER MARKETING, LLC, *ET AL.*,
Petitioners,

v.

MAINE PUBLIC UTILITIES COMMISSION, *ET AL.*,
Respondents.

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

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

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

INTEREST OF AMICI¹

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

participant, whether or not it signed the settlement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

⁵ FERC Br. 30.

