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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.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE
FEDERAL ENERGY REGULATORY COMMISSION**

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QUESTION PRESENTED

Whether the principles set out in this Court's decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), apply to the Federal Energy Regulatory Commission's review of wholesale electricity rates set by contract when those rates are challenged by a non-contracting party.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 520 F.3d 464. The orders of the Federal Energy Regulatory Commission (Pet. App. 28a-101a, 102a-223a) are reported at 115 F.E.R.C. ¶ 61,340 and 117 F.E.R.C. ¶ 61,133.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2008. A petition for rehearing was denied on October 6, 2008 (Pet. App. 241a-248a). The petition for a writ of certiorari was filed on November 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Power Act (FPA or Act), 16 U.S.C. 791a *et seq.*, grants the Federal Energy Regulatory Commission (Commission or FERC) exclusive jurisdiction over the “transmission of electric energy in interstate commerce” and the “sale of electric energy at wholesale in interstate commerce” by public utilities. 16 U.S.C. 824(b)(1). Proposed rates for the sale or transmission of power within FERC’s jurisdiction are subject to FERC review to ensure that they are “just and reasonable” and not unduly discriminatory or preferential. 16 U.S.C. 824d(a) and (b). To that end, the FPA provides:

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, * * * schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

16 U.S.C. 824d(c).

b. In *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*), this Court interpreted provisions of the Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, that parallel the FPA. The Court held that, “by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts.” *Mobile*, 350 U.S. at 338. The Court further concluded that the NGA does not empower a natural gas

company unilaterally to modify its contracts with its customers. *Id.* at 343. “By preserving the integrity of contracts,” the Court observed, the statute promotes “the stability of supply arrangements which all agree is essential to the health of the natural gas industry.” *Id.* at 344. “On the other hand, denying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest.” *Ibid.*

On the same day that it issued its decision in *Mobile*, the Court held in *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*), that the FPA, like the NGA, did not authorize unilateral contract changes by the contracting parties. *Id.* at 353. The Court in *Sierra* also addressed the scope of the Commission’s authority under 16 U.S.C. 824e(a) to change rates if it finds them to be “unjust, unreasonable, unduly discriminatory or preferential.” In the underlying orders, the Commission had found a rate set by a contract to be unreasonable because it failed to yield the seller a reasonable rate of return. *Sierra*, 350 U.S. at 354. The Court held that the Commission had applied the wrong standard in reviewing the contract: “[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,” a utility nevertheless may agree by contract to accept such a rate, and, if it does so, it is not “entitled to be relieved of its improvident bargain.” *Id.* at 355.

Instead, the Court explained, “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 customers an excessive burden, or be unduly discriminatory.” *Sierra*, 350 U.S. at 355. The Court found this focus on the “public interest,” as distinguished from the private interests of the utilities, to be evidenced by the recital in 16 U.S.C. 824(a) that the scheme of regulation imposed by the Act “is necessary in the public interest.” *Sierra*, 350 U.S. at 355 (quoting 16 U.S.C. 824(a)). The Court therefore instructed that the matter be remanded to the Commission for further proceedings, noting that “[w]hether under the facts of this case the contract rate is so low as to have an adverse effect on the public interest is of course a question to be determined in the first instance by the Commission.” *Ibid.*

2. This case involves the “capacity” market for electricity in New England. In a capacity market, unlike a wholesale energy market, an electricity provider purchases from a generator the option to buy a specific quantity of energy, regardless of whether the energy itself is ultimately purchased. Pet. App. 2a. Providers make such purchases in order to maintain the reliability of the electric grid—by purchasing more capacity than their customers’ expected demand, providers can ensure that they are able to respond adequately to unexpected demand fluctuations. *Ibid.*

For many years, there were significant problems in the New England capacity market: generators were earning insufficient revenue, and therefore insufficient infrastructure was being developed, resulting in a barely sufficient supply of capacity. Pet. App. 2a. FERC, the generators, the electricity providers, and the power customers made several unsuccessful attempts to address those issues. *Ibid.* Ultimately, a settlement was

reached, with only eight of 115 parties opposing the settlement. *Id.* at 5a.

The key feature of the settlement was the creation of a Forward Capacity Market, under which there would be annual auctions for capacity, held three years in advance of when the capacity was needed. Pet. App. 5a. In the three-year gap between the first auction and the time when capacity purchased in that auction would be provided, the settlement provided for a series of fixed transition payments to be paid to generators. *Id.* at 6a. Under Section 4.C of the settlement agreement, future challenges to the transition payments or to the final prices from the auctions would be reviewed under the *Mobile-Sierra* “public interest” standard, “whether the change is proposed by a Settling Party, a non-Settling Party, or the FERC acting *sua sponte*.” *Id.* at 193a-194a.

The Commission approved the settlement, finding that, “as a package, it presents a just and reasonable outcome for this proceeding consistent with the public interest.” Pet. App. 103a. Most significantly, the settlement would resolve the problems in the New England capacity market by establishing “the appropriate market structure to ensure that generating resources are appropriately compensated based on their location and contribution to system reliability” and by “provid[ing] incentives to attract new infrastructure where needed.” *Id.* at 142a. The Commission also determined that the *Mobile-Sierra* provision in Section 4.C “appropriately balances the need for rate stability and the interests of the diverse entities who will be subject to” the Forward Capacity Market. *Id.* at 202a. The Commission explained that “[s]tability is particularly important in this case, which was initiated in part because of the unstable

nature of [installed capacity] revenues and the effect that has on generating units, particularly those who are critical to maintaining reliability.” *Ibid.* It concluded that the *Mobile-Sierra* provision would not operate to the detriment of parties not agreeing to the settlement, because the Commission would retain significant authority under *Mobile-Sierra* to protect non-parties to the contract. *Id.* at 201a; *id.* at 69a-70a.

3. The court of appeals rejected various challenges to the Commission’s approval of the settlement agreement, but it granted petitions for review to the extent that they challenged the approval of the *Mobile-Sierra* clause. Pet. App. 1a-27a.

The court of appeals held that, under *Mobile-Sierra*, “when the parties to a rate dispute reach a contractual settlement, FERC must enforce the terms of the bargain unless the public interest requires otherwise.” Pet. App. 20a. But the court held that the Commission may not approve a settlement agreement applying the *Mobile-Sierra* standard to rate challenges brought by non-contracting (or non-settling) third parties. *Ibid.* In the court’s view, the *Mobile-Sierra* doctrine carves out an “exception” to the generally applicable just-and-reasonable standard for claims brought by the contracting parties, and it is intended to “make it more difficult for either party to shirk its contractual obligations.” *Id.* at 20a, 24a. The court held that the application of *Mobile-Sierra* to non-settling parties would “deprive[] non-settling parties of their statutory right to have rate challenges adjudicated under the ‘just and reasonable’ standard.” *Id.* at 22a. Instead, the court concluded, “[w]hen a rate challenge is brought by a non-contracting third party, the *Mobile-Sierra* doctrine simply does not apply;

the proper standard of review remains the ‘just and reasonable’ standard.” *Ibid.*

4. After the court of appeals issued its decision, this Court decided *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1*, 128 S. Ct. 2733 (2008) (*Morgan Stanley*). In that case, the Court held that “[t]here is only one statutory standard for assessing wholesale electricity rates, whether set by contract or tariff—the just-and-reasonable standard.” *Id.* at 2745. Instead of representing a standard different from the just-and-reasonable standard, the *Mobile-Sierra* “‘public interest standard’ refers to the differing *application* of the just-and-reasonable standard to contract rates.” *Id.* at 2740. The Court explained that *Mobile-Sierra*’s “definition of what it means for a rate to satisfy the just-and-reasonable standard” is “a definition that applies regardless of when the contract is reviewed,” and therefore the application of *Mobile-Sierra* does not depend on when a contract rate is challenged. *Id.* at 2746. And the Court held that *Mobile-Sierra* applies equally to challenges by buyers and sellers; in either case, “[t]he contract rate must seriously harm the public interest” before it may be set aside. *Id.* at 2747.

5. After *Morgan Stanley* was decided, several parties to this case, including FERC, petitioned for rehearing en banc. The court of appeals denied the petitions. Pet. App. 245a-248a.

6. The court of appeals issued its mandate, and on remand, the Commission “approve[d] the settlement conditioned on the settling parties revising the standard of review applicable to non-settling third parties, consistent with the court’s decision.” 126 F.E.R.C. ¶ 61,027 at para. 5 (2009).

ARGUMENT

Petitioners contend (Pet. 14-15) that the decision of the court of appeals “destroys the certainty and stability that the electricity and natural gas markets require and that *Mobile-Sierra* attempts to provide.” The decision below does not conflict with any decision of any other court of appeals, and petitioners overstate its practical significance. Plenary review by this Court is not warranted. The decision of the court of appeals preceded this Court’s decision in *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1*, 128 S. Ct. 2733 (2008), however, and that decision may inform the proper resolution of this case. Accordingly, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated in relevant part, and the case remanded for further consideration in light of *Morgan Stanley*.

1. Petitioners assert (Pet. 25) that the decision of the court of appeals conflicts with “decades of settled practice” in the application of *Mobile-Sierra*, but none of the cases they cite considered the issue presented here, namely, whether contracting parties can impose the *Mobile-Sierra* presumption on future rate complaints brought by non-contracting parties. With the exception of *Town of Norwood v. FERC*, 587 F.2d 1306, 1309 (D.C. Cir. 1978), which involved a declaratory action brought by one of the contracting parties, each of the cases involved a Commission-initiated investigation under 16 U.S.C. 824e. While non-parties to the contracts at issue raised arguments in the proceedings, the rate investigations were initiated by the Commission in response to utility rate filings made under 16 U.S.C. 824d, and they were not the result of third-party complaints, as in this case. Thus, the cases stand for nothing more

than the proposition that the *Mobile-Sierra* public interest approach applies when a contract is challenged by a party to the contract or by the Commission acting on its own initiative under Section 824e.

The decision below does not conflict with that proposition. In fact, the court of appeals has previously held that parties may bind themselves and the Commission to review under the *Mobile-Sierra* presumption. See *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 953 (D.C. Cir. 1983) (Scalia, J.) (“[B]y broad waiver, the parties may eliminate both the utility’s right to make immediately effective rate changes under [Section 824d] and the Commission’s power to impose changes under [Section 824e], except the indefeasible right of the Commission under [Section 824e] to replace rates that are contrary to the public interest.”), cert. denied, 467 U.S. 1241 (1984); see also *Maine Pub. Utils. Comm’n v. FERC*, 454 F.3d 278, 283 (D.C. Cir. 2006). But that proposition does not resolve the analytically distinct question presented here: whether the *Mobile-Sierra* application of the just-and-reasonable standard governs rate challenges initiated by non-contracting parties.

2. While the Commission argued in its petition for rehearing en banc that the decision of the court of appeals raises significant policy concerns, those concerns do not rise to the level suggested by petitioners here (Pet. 19-23). There is no doubt that *Mobile-Sierra* protections promote contract stability: that fact informed the Commission’s unanimous decision to approve the *Mobile-Sierra* clause in the settlement at issue here. Pet. App. 202a (“Stability is particularly important in this case, which was initiated in part because of the unstable nature of [installed capacity] revenues and the effect that has on generating units, particularly those

who are critical to maintaining reliability.”). But petitioners overstate the extent to which the decision below undermines that stability, and, in the absence of a direct circuit conflict, the practical consequences of the decision have not been shown to be so significant as to warrant plenary review by this Court at this time.

Petitioners suggest (Pet. 19, 21) that the decision below could lead to widespread contract modification at the behest of a “boundless group” of interested parties. But the ordinary just-and-reasonable standard would itself furnish substantial protection for established rates such as those at issue here, and it gives the Commission discretion to take into account the facts and circumstances of the particular rate, term, or condition that is being challenged. See, e.g., *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (“Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high.”); *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) (“[T]his Court has often acknowledged that the Commission is not required by the Constitution or the Natural Gas Act to adopt as just and reasonable any particular rate level; rather, courts are without authority to set aside any rate selected by the Commission which is within a ‘zone of reasonableness.’”) (quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942)); cf. *Global Crossing Telecomms., Inc. v. Metrophones Telecomms, Inc.*, 550 U.S. 45, 57-58 (2007). Accordingly, even in the absence of the *Mobile-Sierra* clause in the settlement, the Commission may take into account, in addressing future challenges by non-settling third parties to either the transition payments or For-

ward Contract Market auction results, the importance of the settlement rates in assuring basic resource adequacy and maintaining reliability.

Petitioners also express concern (Pet. 19) that, under the ordinary just-and-reasonable standard, contracts may be abrogated based on changing market conditions that make them “temporarily[] unattractive” to third parties. But “[t]he FPA recognizes that contract stability ultimately benefits consumers, even if short-term rates for a subset of the public might be high by historical standards—which is why it permits rates to be set by contract and not just by tariff.” *Morgan Stanley*, 128 S. Ct. at 2749. A settlement may be just and reasonable when reviewed in its totality, even if, in the short run, the rate seems high. The Commission generally examines the reasonableness of a contract rate over the life of the contract, and not just in a single year. *Northern Va. Elec. Coop., Inc.*, 116 F.E.R.C. ¶ 61,173 at 61,741 (2006) (NOVEC). Commission precedent also typically requires rate challengers to show changed circumstances in order to obtain a rate change, even under the ordinary application of the just-and-reasonable standard. See, e.g., *Dynegy Moss Landing, LLC*, 123 F.E.R.C. ¶ 61,280 at 62,724 (2008); *NOVEC*, 116 F.E.R.C. ¶ 61,173 at 61,741.

Finally, petitioners argue (Pet. 22) that the decision of the court of appeals will permit contracting parties to evade the *Mobile-Sierra* presumption by recruiting a non-party to join them in challenging rates. While the decision does have the anomalous result of imposing a higher standard on contracting parties and the Commission acting on its own initiative than on non-parties challenging contract rates, the Commission should be able to mitigate that anomalous result by rejecting rate chal-

lenges that amount to inappropriate strategic behavior, such as a third-party complaint challenging a contract filed by a proxy for one of the contracting parties.*

3. Although this case does not warrant plenary review at this time, the Court should grant the petition for a writ of certiorari, vacate the decision below insofar as it rejected the Commission's ruling on the *Mobile-Sierra* issue and therefore granted the petitions for review to that extent, and remand for further consideration in light of *Morgan Stanley*. The court of appeals panel did not have the benefit of *Morgan Stanley* when it considered how to apply *Mobile-Sierra* principles in the context of the settlement agreement at issue here. In its petition for rehearing, the Commission argued that the decision below "directly conflicts with the subsequently-issued Supreme Court decision in *Morgan Stanley*." FERC Reh'g Pet. 2; but see Pet. App. 224a-240a (dissenting opinion of two members of the Commission). It is not necessary, however, for this Court to determine whether there is a conflict with *Morgan Stanley*. Whether or not a conflict exists, *Morgan Stanley* is undoubtedly relevant to this case, and it represents an "intervening development[]" that, at a minimum, creates "a 'reasonable probability' that the Court of Appeals [will] reject a legal premise on which it relied and which may affect the outcome of the litigation." *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996)).

* Petitioners express concern (Pet. 21-22) that the Ninth Circuit, on remand from this Court in *Morgan Stanley*, might apply the reasoning of the decision below. The Ninth Circuit has not done so but has instead remanded the case to the Commission to allow it to consider the issues remanded by this Court. *Public Utils. Comm'n v. FERC*, 550 F.3d 767 (2008).

There are at least two ways in which *Morgan Stanley* may inform the analysis of the court of appeals. First, the court of appeals stated that “[t]he *Mobile-Sierra* doctrine carves out an exception” to the statutory “just and reasonable” standard. Pet. App. 20a. It is possible that the court simply meant that *Mobile-Sierra* principles subject contract rates to a different *application* of the just-and-reasonable standard—in that sense, it would be correct to say *Mobile-Sierra* provides for an “exception” to the ordinary application of “just and reasonable” review. Cf. *Morgan Stanley*, 128 S. Ct. at 2740. But the court of appeals’ language leaves open the possibility that the court failed to appreciate that “[t]here is only one statutory standard for assessing wholesale electricity rates, whether set by contract or tariff—the just-and-reasonable standard.” *Id.* at 2745; see Pet. App. 22a (suggesting that application of *Mobile-Sierra* would “deprive[] non-settling parties of their statutory right to have rate challenges adjudicated under the ‘just and reasonable’ standard”). *Morgan Stanley* made clear that *Mobile-Sierra* is not an exception to the application of the just and reasonable standard; it simply “provide[s] a definition of what it means for a rate to satisfy the just-and-reasonable standard in the contract context.” 128 S. Ct. at 2746.

Second, the court of appeals stated that “the *Mobile-Sierra* doctrine is designed to ensure contract stability *as between the contracting parties*—*i.e.*, to make it more difficult for either party to shirk its contractual obligations.” Pet. App. 24a. That line of reasoning is similar to the Ninth Circuit’s interpretation of *Mobile-Sierra* “as the equivalent of an estoppel doctrine,” an interpretation that this Court rejected in *Morgan Stanley*. 128 S. Ct. at 2746. *Morgan Stanley* held that *Mobile-Sierra*

rests not on principles of estoppel but rather on a “presum[ption] that the rate set out in a freely negotiated wholesale-energy contract meets the ‘just and reasonable’ requirement imposed by law.” *Id.* at 2737. That presumption would not necessarily cease to apply simply because the challenge to the rate came from a non-contracting party.

The court of appeals should be given an opportunity to reconsider its analysis in light of *Morgan Stanley* and to determine how, if at all, the judgment should be altered, taking into account that decision and the action that the Commission has already taken to implement the judgment. A grant, vacatur, and remand is therefore appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated insofar as it granted the petitions for review, and the case remanded for further consideration in light of *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1*, 128 S. Ct. 2733 (2008).

Respectfully submitted.

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