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

REPLY FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court 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 the petition remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

REPLY FOR PETITIONERS

For more than 50 years, *Mobile-Sierra* has protected the "stability of supply arrangements" that is "essential to the health of the [energy] industry." *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956). Under *Mobile-Sierra*, FERC must "presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement," and FERC cannot abrogate such a rate except "'in circumstances of unequivocal public necessity.'" *Morgan Stanley Capital Group Inc.* v. *Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2737, 2739 (2008) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968)).

The decision below guts that protection. Under it, the *Mobile-Sierra* presumption applies *only* to challenges brought by the contracting parties themselves. Literally anyone else—any consumer, advocacy group, utility commission, or state attorney general—can challenge contract rates free from *Mobile-Sierra*. Recognizing the decision's impact, FERC urged below that this case "presents a question of *exceptional importance*" because it "undermines the contract certainty needed for infrastructure investment." FERC Pet. for Reh'g and Reh'g En Banc, Nos. 06-1403, *et al.*, at 10, 12 (D.C. Cir. Aug. 8, 2008) (emphasis added). The decision, FERC added, is "manifestly anomalous" and "misapprehen[ds]" the law. *Id.* at 5, 11.

Before this Court, FERC characterizes the decision below as "anomalous" and urges the Court to grant the petition, vacate, and remand in light of this Court's intervening decision in *Morgan Stanley*. FERC Br. 11, 12-14. Seeking to forestall plenary review, however, FERC downplays the decision's importance, urging that "ordinary" just-and-reasonable review is adequately protective. But that argument is impossible to reconcile with

Mobile-Sierra and *Morgan Stanley*. And FERC's own actions following the D.C. Circuit's decision underscore the need for review.

I. THE DECISION BELOW PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE

A. Despite having urged below that the court of appeals' decision has "exceptional importance"—sufficient importance to warrant FERC's first petition for rehearing *en banc* in almost five years, see FERC Reh'g Pet. 2 & n.2, 10—FERC now asserts that the decision is perhaps not so important after all. *Mobile-Sierra*'s protection can be jettisoned, FERC urges, because "the ordinary just-and-reasonable standard would itself furnish substantial protection." FERC Br. 10-11. But that is precisely the argument FERC made in opposing review in *Morgan Stanley*, see FERC Br. in Opp. in Nos. 06-1454, *et al.*, at 11-12, 17-18—and which this Court rejected on the merits.

Under the ordinary just-and-reasonable standard, FERC can modify rates whenever they deviate from an ill-defined "'zone of reasonableness.'" FERC Br. 10 (quoting *Permian Basin*, 390 U.S. at 767). *Mobile-Sierra*'s "public-interest" standard, by contrast, permits abrogation of contract rates "'only in circumstances of unequivocal public necessity'"—*i.e.*, "extraordinary circumstances where the public will be severely harmed." *Morgan Stanley*, 128 S. Ct. at 2739, 2749 (quoting *Permian Basin*, 390 U.S. at 822). As the court below recognized, "the public interest standard is 'much more restrictive' than the just and reasonable standard." Pet. App. 19a.

For precisely that reason, *Morgan Stanley* rejected the Ninth Circuit's substitution of a "zone of reasonableness" test for *Mobile-Sierra*'s public-interest standard. That ordinary just-and-reasonable formula, this Court

held, "fails to accord an adequate level of protection to contracts" and "give[s] short shrift" to their important role. 128 S. Ct. at 2747, 2749. Such a permissive standard "threaten[s] to inject more volatility into the electricity market by undermining a key source of stability." *Id.* at 2749. Yet FERC champions that same "'zone of reasonableness'" standard here. FERC Br. 10.

FERC stresses that ordinary just-and-reasonable review "gives the Commission *discretion* to take into account the facts and circumstances" and that "the Commission *may* take into account * * * the importance" of contract stability. FERC Br. 10-11 (emphasis added). But that is exactly the problem. *Mobile-Sierra* does not promote contract stability by granting FERC *discretion* to respect contracts when FERC deems it expedient. *Mobile-Sierra* promotes that goal by *denying* FERC discretion to modify contracts absent "unequivocal public necessity." *Morgan Stanley*, 128 S. Ct. at 2739, 2745. Energy companies cannot rationally invest hundreds of millions of dollars developing new infrastructure based on a regulator's assurance that it *might* consider contractual expectations when consumers, elected officials, or other non-parties later challenge contract rates. FERC's assurances that it "generally" examines reasonableness over a contract's life and "typically" requires a showing of changed circumstances (Br. 11) only underscore the malleability of its proposed standard. Mere "changed circumstances" are insufficient to meet *Mobile-Sierra*: The respondents in *Morgan Stanley* claimed changed circumstances, but this Court held that FERC "was *required* * * * to apply the *Mobile-Sierra* presumption" nonetheless. See 128 S. Ct. at 2743, 2745.

The non-federal respondents' assertion that the ordinary just-and-reasonable standard is a "substantial obstacle" to abrogation (Br. in Opp. 26-27) fails for the same reason. The vigor with which they challenge *Mobile-*

Sierra's applicability here belies their claim. The difference between the two standards was important enough to justify review—and reversal—in *Morgan Stanley*. It is no less important here.

B. FERC does not dispute that, because contract rates indirectly affect a vast array of consumers, regulators, and interest groups, the decision below creates a virtually unbounded class of potential complainants who can challenge contract rates free from *Mobile-Sierra*'s requirements. Under broad principles of administrative-law standing, *any person* claiming to be adversely affected can file a complaint challenging a rate. See 16 U.S.C. § 824e(a); 18 C.F.R. § 385.206(a); *United States* v. *SCRAP*, 412 U.S. 669, 689 n.14 (1973). Indeed, respondents nowhere dispute that, under the D.C. Circuit's theory, *Morgan Stanley* itself should have been resolved differently because one respondent there—the Nevada Attorney General, Bureau of Consumer Protection—was not a contracting party. See Pet. 21.

FERC suggests that it can mitigate the problem by weeding out challenges filed by a "proxy for one of the contracting parties." FERC Br. 11-12. But FERC does not explain what it means by a "proxy." It nowhere explains how a "proxy" exception would provide adequate protection unless that term encompasses every consumer, advocacy group, or state agency or official who might file an after-the-fact challenge. The decision below drew no distinction between proxies and other third parties. FERC never identifies the source of its authority to create a proxy exception for unrelated entities. Nor does FERC explain how such an exception can be administered without side-show trials exploring the relationships among various entities.

Declining to endorse FERC's proxy theory, the nonfederal respondents urge that suppliers should "reach a settlement with all parties." Br. in Opp. 27. But the

court of appeals held that *any* non-contracting party can challenge an agreed-upon rate, not just settlement objectors. See Pet. App. 22a. And *Mobile-Sierra*'s promise of contract stability will be empty if it exists only where an energy supplier manages to contract with every *existing* and *future* person or entity that might someday be adversely affected by a contract rate.[1]

C. The decision below has mired the energy industry in uncertainty. Following the D.C. Circuit's decision, FERC has regularly required agreements submitted for filing—whether they be ordinary contracts or settlements, bilateral or multilateral, contested or uncontested—to replace any clause providing *Mobile-Sierra* protection with a clause that allows non-parties to challenge rates under the "most stringent standard permissible under applicable law." See App., *infra*, 1a-10a (listing scores of proceedings); Pet. 22 & n.8; *e.g.*, *Duke Energy Carolinas, LLC*, 123 FERC ¶61,201 at P10 & n.10 (2008). But no one knows what that standard means. And two of FERC's four active Commissioners have maintained—in more than 30 different opinions—that the D.C. Circuit's decision exempting non-party challenges from *Mobile-Sierra* "applies with at least equal force" to challenges by FERC itself. *E.g.*, *Devon Power LLC*, 126 FERC ¶61,027 (2009) (Kelly & Wellinghoff, Comm'rs, writing separately). *Mobile-Sierra* offers no promise of contract stability where so many can so readily deny that it applies to their challenges.

II. THIS CASE SQUARELY PRESENTS THE ISSUE

Unable to obscure the importance of the question presented, the non-federal respondents—but not FERC—claim this case is an unsuitable vehicle because it involves

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[1] APPA claims (Br. 23-26) that non-party challenges were infrequent in the past. But now that the D.C. Circuit has provided a roadmap for evading *Mobile-Sierra*, past experience is no guide.

a multiparty settlement agreement rather than an "ordinary wholesale power contract bilaterally agreed to by a seller and buyer." Br. in Opp. 10-12. That contention is triply mistaken.

First, the decision below drew no distinction between multiparty settlements and "ordinary wholesale power contract[s]." The court held categorically that, "when a rate challenge is brought by a non-contracting third party, the *Mobile-Sierra* doctrine *simply does not apply*." Pet. App. 22a (emphasis added). The correctness of that holding is the only question presented, and this case is an appropriate vehicle for addressing it.

Second, the distinction makes no sense. Settlement agreements *are* a species of contract. See *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994). That an agreement is reached during litigation does not diminish its importance or reasonableness. Nor is there any basis in law or logic for distinguishing multiparty from bilateral contracts.

Finally, the proposed distinction does not even apply here. Petitioners do not claim that the *settlement agreement itself* should have been reviewed under *Mobile-Sierra*'s public-interest standard. The settlement in fact was reviewed under the ordinary just-and-reasonable standard, see Pet. App. 140a-144a, 200a, as the parties contemplated, see *id.* at 193a-194a. The question presented is whether *future* challenges will be subject to *Mobile-Sierra* in the two circumstances specified by the agreement: challenges to prices set at upcoming forward-capacity *auctions* (once FERC initially approves those prices), and challenges to transition payments. See *id.* at 6a, 193a-194a, 200a-203a.

Rates agreed upon through forward-capacity auctions are not meaningfully different from the "ordinary wholesale power contract[s]" respondents envision. Through

the auction, a willing utility commits to buy, and a willing supplier commits to sell, capacity at a particular price. See Pet. App. 110a-111a. That is the classic context—a voluntary agreement between sophisticated parties—where *Mobile-Sierra* has long applied. Those agreements, moreover, will often require suppliers to build new infrastructure. See *id.* at 110a. Yet the decision below would deny them *Mobile-Sierra* protection—potentially years into the contract, after the supplier has invested millions of dollars—if the challenge is brought by *anyone* other than a contracting party.[2]

III. THE DECISION BELOW IS INCORRECT AND INCONSISTENT WITH PRECEDENT

A. FERC neither defends the decision below nor retreats from its position that it is "manifestly anomalous" and a "misapprehension of [the] law." FERC Reh'g Pet. 5, 11; see also FERC Br. 11. Attempting a merits defense, the non-federal respondents urge that *Mobile-Sierra* does not apply here because, under general contract-law principles, contracts do not bind non-parties. Br. in Opp. 20-21, 24-26 (citing *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002)). But respondents ignore the obvious flaw in that theory: Under general contract-law principles, *non-parties ordinarily cannot challenge a contract at all*, even if it indirectly affects them. See Pet. 31. Contract law gives shoppers no right to challenge the rate the local grocer agrees to pay a farmer for lettuce.

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[2] Because auction results are paradigmatic "ordinary wholesale power contract[s]," this case is an ideal vehicle (and it would not be necessary to resolve the status of transition payments, which could be addressed on remand and which terminate in May 2010 in any event, see Pet. App. 116a). The standard applicable to auction prices—and to all the wholesale contracts the decision below imperils—will continue to have great forward-looking importance until this Court resolves the issue.

The FPA departs from that contract-law norm by authorizing non-parties to challenge contract rates so long as they have standing under broad administrative-law principles. See p. 4, *supra*. But one cannot invoke general contract-law principles to *expand* a non-party's ability to challenge a rate where those contract-law principles would not permit him to challenge the rate *at all*.

In any event, *Mobile-Sierra* does not rest on the notion that contracting parties implicitly sign away their statutory rights. Rather, it reflects the sound principle that sophisticated buyers and sellers are likely to negotiate prices that are efficient and therefore presumptively "just and reasonable." That is why the doctrine is a constraint on *FERC's* authority to modify contracts rather than on the *contracting parties'* authority to challenge them. See Pet. 29-30. As this Court declared in the first sentence of its opinion in *Morgan Stanley*: "Under the *Mobile-Sierra* doctrine, the Federal Energy Regulatory Commission * * * must presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement imposed by law." 128 S. Ct. at 2737. "That presumption would not necessarily cease to apply simply because the challenge to the rate came from a non-contracting party." FERC Br. 14.[3]

Burdens on third parties are certainly relevant to whether a challenge *satisfies Mobile-Sierra*'s public-

[3] To support their claim that *Mobile-Sierra* does not apply to third-party challenges, respondents invoke *Morgan Stanley*'s observation that a sophisticated buyer and seller in a wholesale market can "be expected to negotiate a 'just and reasonable' rate *as between the two of them*." Br. in Opp. 15 (quoting 128 S. Ct. at 2740) (emphasis added by respondents). But that language merely explains *why* contract rates are presumed reasonable. The Court was not undermining its core holding that the rates are presumed reasonable, much less suggesting that the presumption may evaporate based on the challenger's identity.

interest standard. That standard permits FERC to consider, for example, whether a rate "cast[s] upon other consumers an excessive burden." *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348, 354-355 (1956). The very fact that *Mobile-Sierra* contemplates evaluation of third-party harms, however, confirms that it covers *all* challenges to contract rates, including third-party challenges. See Pet. 28-29.

B. Courts have repeatedly applied *Mobile-Sierra* to third-party challenges. See Pet. 25-28. FERC argues that all but one of those cases involved "Commission-initiated investigation[s]" in which non-parties "raised arguments," not proceedings initiated by "third-party complaints." FERC Br. 8. But that distinction makes no sense. If *Mobile-Sierra* applied only when contracting parties challenge their own agreements, there would be no reason to apply that doctrine where FERC (itself a non-party) challenges a contract to vindicate third-party interests—whether FERC does so in a proceeding it initiates or following a third-party complaint. Tellingly, in FERC's order on remand in this case, two Commissioners expressly rejected the distinction FERC now invokes, urging that the D.C. Circuit's decision exempting third-party challenges from *Mobile-Sierra* "applies with at least equal force" to Commission challenges brought *sua sponte*. See p. 5, *supra*.

Northeastern Utilities Service Co. v. *FERC*, 993 F.2d 937 (1st Cir. 1993) ("*NUSCO*"), demonstrates the futility of respondents' effort to reconcile the cases. There, FERC modified an uncontested three-party contract *sua sponte* to require just-and-reasonable review in future challenges, hypothesizing the agreement "might unduly discriminate against *entities not parties to the contract.*" *Id.* at 960, 961 (emphasis added). The First Circuit held that concern "inadequate" to justify departure from *Mobile-Sierra* because "[t]he *Mobile-Sierra* doctrine itself

allows for intervention by FERC where it is shown that the interests of third parties are threatened." *Id.* at 961. The court later upheld FERC's subsequent order only because FERC "applied the 'public interest' doctrine on remand." *Ne. Utils. Serv. Co.* v. *FERC*, 55 F.3d 686, 692 (1st Cir. 1995). That decision, and others like it (Pet. 25-28), are impossible to square with the notion that non-party challenges are exempt from *Mobile-Sierra*.[4]

IV. AT A MINIMUM, THE COURT SHOULD GRANT, VACATE, AND REMAND

Because the D.C. Circuit's decision eviscerates *Mobile-Sierra*, plenary review is warranted. At a minimum, the Court should grant, vacate, and remand in light of *Morgan Stanley*, as FERC suggests. FERC Br. 12-14.

As the petition explains (Pet. 23-25), the decision below conflicts with *Morgan Stanley* in at least two respects. First, the court of appeals erroneously treated *Mobile-Sierra* as "carv[ing] out an exception" to the statutory just-and-reasonable standard. Pet. App. 20a. That error was not a mere semantic misstep. Br. in Opp. 20-21. The court expressly based its holding on concerns about "depriv[ing] [non-]parties of their *statutory right*" to just-and-reasonable review. Pet. App. 22a-23a (emphasis added). *Morgan Stanley* makes clear that any such concern is unfounded because public-interest review under *Mobile-Sierra* is merely one *application* of the

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[4] Cases like *NUSCO* also answer the claim that FERC has applied *Mobile-Sierra* to third-party claims only since 2002. Br. in Opp. 18-19. To the extent FERC has episodically sought to narrow *Mobile-Sierra*—a doctrine it sometimes "very much dislikes," *Borough of Lansdale* v. *FPC*, 494 F.2d 1104, 1110 & n.28 (D.C. Cir. 1974) (citing cases)—cases like *NUSCO* have ensured that such flirtations are short-lived. Besides, any intermittent tergiversation at FERC underscores precisely why FERC must be *required* to follow *Mobile-Sierra* and the issue cannot be left to agency discretion.

statutory just-and-reasonable standard. 128 S. Ct. at 2740.

Second, the court of appeals' decision rests on the misperception that *Mobile-Sierra* seeks only "to make it more difficult for either *party* to shirk its contractual obligations." Pet. App. 24a (emphasis added). "That line of reasoning," FERC explains, "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*." FERC Br. 13-14. For that reason too, the decision below cannot be reconciled with *Morgan Stanley*, and this Court should grant, vacate, and remand in light of that intervening decision.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[5] This Court remands in light of intervening cases even where litigants have raised those cases in seeking rehearing below. See, *e.g.*, *Keisler* v. *Hong Yen Gao*, 128 S. Ct. 345 (2007); *Johnson* v. *Potter*, 127 S. Ct. 3003 (2007); *Klinger* v. *Director, Dep't of Revenue*, 545 U.S. 1111 (2005). That reflects the reality that lower courts sometimes rely on this Court's GVR practice, rather than losing litigants' rehearing requests, to identify decisions that warrant reconsideration in light of this Court's intervening decisions.

Respectfully submitted.

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