

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**

BRIEF OF AMICI CURIAE AMERICAN PUBLIC POWER
ASSOCIATION AND NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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BRIEF OF *AMICI CURIAE*
AMERICAN PUBLIC POWER ASSOCIATION
AND
NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION OPPOSING
PETITION FOR A WRIT OF CERTIORARI

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 about 10 percent of the nation's electric generating capacity, and provide over 15 percent of all kilowatt-hours of electricity sold to ultimate customers. Sixty-six New England public power systems are APPA members.

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief, and the parties consented to the filing of this brief. 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.

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

Both associations' members participate in wholesale power markets as buyers *and* sellers. The associations assert that Court review of the decision below² is not warranted.

SUMMARY OF ARGUMENT

The *Mobile-Sierra* doctrine³ 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 (Snohomish)*, 554 U.S. ___, 128 S. Ct. 2733,

² *Me. Pub. Utils. Comm'n v. FERC (Maine Public)*, 520 F.3d 464 (D.C. Cir. 2008) (Pet. App. A), *reh'g denied*, No. 06-1403 (D.C. Cir. Oct. 6, 2008).

³ 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).

2746 (2008) (internal quotation omitted). That presumption arises once the contracting parties reach agreement; it does not depend on FERC's review and approval. *Id.* at 2745.

This case is about whether the *Mobile-Sierra* presumption—the linchpin of which is a freely negotiated agreement—can be imposed by contracting parties upon *non*-contracting parties. The D.C. Circuit concluded correctly that neither the parties to a contested settlement agreement nor the Federal Energy Regulatory Commission (FERC) may elevate the showing that non-settling parties must make to demonstrate that a rate has become unreasonable as to them.

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 reached a settlement purporting to set rates for all market participants, whether or not they agreed to the settlement. Some litigants objected.

Petitioners acknowledge that the contested settlement created no initial presumption of reasonableness as to non-parties. 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, 312 (1974); *Laclede Gas Co. v. FERC (Laclede)*, 997 F.2d 936, 944 (D.C. Cir. 1993).

While conceding that no presumption applied during FERC’s initial review of the contested settlement, Petitioners nonetheless contend that FERC could approve a settlement provision creating a forward-looking *Mobile-Sierra* presumption applicable to later challenges, whether brought by settling or non-settling parties. *Snohomish* teaches, however, that the *Mobile-Sierra* presumption arises from parties’ consent, not FERC’s approval, and that, where *Mobile-Sierra* applies, the timing of a challenge is irrelevant. 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.

Mobile-Sierra’s inapplicability in this case makes sense considering the doctrine’s role as a “reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other.” *Mobile*, 350 U.S. at 344. As applied to non-settling parties, the rates at issue here are not contract rates. They are tariff rates imposed pursuant to a settlement that the non-settling parties did not sign. *Mobile-Sierra* has never extended to unilaterally imposed rates, and the effort to employ *Mobile-Sierra* offensively here—first imposing rates on non-settling parties and then erecting a presumption of reasonableness making those rates harder to challenge later—is unsupportable.

Petitioners and supporting *amici*⁴ advance exaggerated claims that the decision below “undoes” *Snohomish* by allowing third-party surrogates to challenge unsatisfactory agreements, and will “destabilize the Nation’s power markets,” EPSA Br. 1. In fact, the decision below has not even “destabilize[d]” the settlement in *this case* or the resulting capacity market, which ISO-NE has touted as a success. Moreover, FERC and appellate courts will be able to distinguish legitimate third-party claims from pretextual or unsupported ones. Indeed, the panel below included two judges who had already encountered—and dismissed—such claims.

Petitioners and supporting *amici* ignore that, even under an ordinary just-and-reasonable standard, FERC does not take contract modification lightly. In considering whether changed circumstances have caused a rate to become unjust and unreasonable, FERC must balance consumer and investor interests, and may not simply disregard investments reasonably made in reliance on expected rate continuity. Consequently, billions have been invested in transmission or generation facilities priced under tariffs or contracts that are subject to an ordinary just-and-reasonable standard.

⁴ See Br. of the Elec. Power Supply Ass’n as *Amici Curiae* in Support of Pet. Cert., Dec. 22, 2008 (EPSA Br.).

Exaggerated claims about the need for “certainty” do not justify expanding *Mobile-Sierra* to insulate rates imposed on *non*-consenting parties.

ARGUMENT

I. **MAINE PUBLIC ACCORDS WITH PRECEDENT.**

Petitioners wrongly claim that the decision below rests on a legal theory rejected by *Snohomish* and will upset decades of settled precedent. Pet. for Writ of Cert. of NRG Power Mktg., LLC, at 23, Nov. 21, 2008 (Pet.).

A. ***Maine Public* does not conflict with *Snohomish’s* holding that there is one statutory standard.**

Petitioners argue that *Maine Public* wrongly treated the public-interest standard as an “atextual exception to the statutory just and reasonable standard,” when *Snohomish* clarified that it is merely a “differing *application* of that ... standard to contract rates,” Pet. 12 (internal quotations omitted). In doing so, they elevate semantics over substance. While *Maine Public* used pre-*Snohomish* nomenclature, see 128 S. Ct. at 2740, its holding does not depend on treating the public-interest standard as a statutory exception. Restating its holding using *Snohomish’s* terminology, *Maine*

Public held that contracting parties may not erect a presumption of reasonableness as against non-contracting parties, thereby making it harder for them to challenge the parties' contract, either initially or in light of changed circumstances.

B. Contested settlements are not presumed reasonable, because the factual basis for that presumption is missing.

Petitioners contend that contracting parties may compel FERC to presume the reasonableness of rates set forth in a contested settlement as against parties who opposed the settlement and refused to accept the risk allocation embodied in it.⁵ APPA and NRECA are aware of no judicial precedent for that position.

In 1974, this Court established the “correct legal principles” governing the Commission’s assessment of “settlement proposal[s] that lack[] unanimous agreement” *Mobil*, 417 U.S. at 312.

⁵ Compare Pet. 17 n.6, discussing Judge Posner’s characterization of fixed-price contracts as “explicit” (and, we might add, voluntary) assignments of market risk as between buyers and sellers, who “[have] only [themselves] to blame” if the contracts become unprofitable. That characterization does not apply to non-contracting parties.

That some parties agreed to the deal “did not, of course, establish without more the justness and reasonableness of its terms.” *Id.* at 312-13. Instead, the Court explained:

“If a proposal enjoys unanimous support from all of the immediate parties, it could certainly be adopted as a settlement agreement if approved in the general interest of the public. But even if there is a lack of unanimity, it may be adopted as a resolution *on the merits*, if FPC makes an independent finding supported by ‘substantial evidence on the record as a whole’ that the proposal will establish ‘just and reasonable’ rates”

Id. at 314 (quoting *Placid Oil Co. v. FPC*, 483 F.2d 880, 893 (5th Cir. 1973), *aff’d sub nom. Mobil*, 417 U.S. 283, underlined emphasis added). Thus, the Court affirmed the Fifth Circuit’s inquiry into “whether, viewing the terms of the proposal not as a traditional settlement but as a result of an administrative decision, it falls within that ‘zone of reasonableness’ which is supported by ‘substantial evidence on the record as a whole.’” *Placid Oil*, 483 F.2d at 894.

Numerous D.C. Circuit cases are in accord. *E.g.*, *Kelley ex rel. Mich. Dep’t of Natural Res. v. FERC*, 96 F.3d 1482, 1489 (D.C. Cir. 1996) (“[A]

settlement that is forced onto a party is effectively converted into a decision ‘on the merits.’”); *Laclede*, 997 F.2d at 946 (“reject[ing] the notion that any settlement, solely because of its status as such, is reasonable”); *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003-04 (D.C. Cir. 1990); *Consol. Gas Supply Corp. v. FERC*, 606 F.2d 323, 330 (D.C. Cir. 1979) (“The standard for judicial review of [a FERC order on] a contested settlement proposal is ... whether the Commission has made an independent rate determination supported by substantial evidence ...”).⁶

Contested settlements create no presumption of reasonableness because the element essential to that presumption—consent—is missing. FERC must therefore make an “independent finding ... that the proposal will establish ‘just and reasonable’ rates,” *Mobil*, 417 U.S. at 314 (internal quotation omitted).

⁶ In making that independent determination, FERC may accord “some weight” to the number of customers supporting or not opposing the agreement, but a headcount is not dispositive. 997 F.2d at 946.

C. FERC approval does not create a *Mobile-Sierra* presumption.

While Petitioners concede that FERC correctly reviewed the contested settlement under the “ordinary just-and-reasonable standard,” Pet. 13 n.4 and 7-8, they contend that settling parties may create forward-looking presumptions, applicable to later third-party challenges, by obtaining FERC approval of a *Mobile-Sierra* provision. *Id.*⁷

Snohomish itself foreclosed such claims by rejecting arguments that the standard for evaluating contract-modification requests depends on whether FERC previously reviewed the contract. 128 S. Ct. at 2745. To paraphrase Petitioners, if a *Mobile-Sierra* presumption applies, it arises “once the contract is signed ‘regardless of when [it] is reviewed.’” Pet. 5 (quoting 128 S. Ct. at 2737). The converse is also true. If no presumption applies when FERC initially considers a contested settlement, none can be established by FERC’s approval

⁷ Petitioners label section 4C of the settlement a “*Memphis* clause.” Pet. 7. That description is apt only insofar as section 4C preserved the *settling parties*’ ability to seek modifications under the ordinary just-and-reasonable standard. As to *non-settling* parties (who nonetheless pay the market-wide rates established by the settlement), section 4C attempted to create a presumption where none existed, and the “*Memphis* clause” label is inapt.

of it. To hold otherwise would be to treat *Mobile-Sierra*, contrary to *Snohomish*'s teaching, 128 S. Ct. at 2746, as an estoppel doctrine precluding FERC from modifying an agreement it once approved.⁸

**D. *Maine Public* respects the
Mobile-Sierra doctrine's
contractual foundations.**

Maine Public is consistent with *Mobile-Sierra*'s contractual foundations, while Petitioners' view conflicts with those premises. As explained in *Snohomish*, the Federal Power Act (FPA), 16 U.S.C. §§ 791a-825r, "departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting." 128 S. Ct. at 2738 (quoting *Verizon Commc'ns, Inc. v. FCC (Verizon)*, 535 U.S. 467, 479 (2002)). It did so because, "[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 negoti-

⁸ Contrary to Petitioners' suggestion (Pet. 25), *Snohomish*'s rejection of the estoppel analogy severed neither *Mobile-Sierra*'s contractual underpinnings nor the fundamental requirement of consent. The rejected analogy focused on whether FERC's initial rate approval estops later evaluation of whether the rate remains just and reasonable despite changed circumstances, 128 S. Ct. at 2746, exactly the sort of estoppel urged by Petitioners here.

ate a “just and reasonable” rate *as between the two of them.*” *Id.* at 2746 (emphasis added, quoting *Verizon*, 535 U.S. at 479). The FPA thus permits utilities to set rates “with individual electricity purchasers through bilateral contracts,” *id.* at 2738, and *Mobile-Sierra* requires FERC to presume that “the rate[s] set out in [such] freely negotiated wholesale-energy contract[s] meet[] the ‘just and reasonable’ requirement ...” *Id.* at 2737.

But while sophisticated buyers and sellers can look out for their own interests and trade other benefits in exchange for rights to mount later challenges—giving rise to a presumption that the resulting agreement is reasonable “as between the two of them,” 128 S. Ct. at 2746—their agreement establishes no presumption as to *other* entities. *See Verizon*, 535 U.S. at 479 (“[T]he principal regulatory responsibility [is] not to relieve *a contracting party* of an unreasonable rate....”) (emphasis added).

Here, remarkably, Petitioners seek to hold sophisticated entities to bargains they chose *not* to make—and then to enshrine the “deal” with *Mobile-Sierra* presumptions. As Commissioners Kelly and Wellinghoff noted, Pet. App. D. 228a, the proceedings here began with a unilateral tariff filing to establish a region-wide capacity market. After some litigants settled, the resulting market rules were incorporated into ISO-NE’s tariff, which binds

all wholesale market participants, including non-settling parties. From a non-party's perspective, the imposition of capacity market rules and rates to which they did not agree is a form of tariff-based regulation, which has never been subject to contract-based *Mobile-Sierra* presumptions. The court below correctly rejected the attempt to prevent non-settling parties from seeking review, under an ordinary just-and-reasonable standard, of rates that they are required to pay but to which they did not agree.⁹

E. Maine Public is consistent with Petitioners' cited cases.

Contrary to Petitioners' assertions, Pet. 16, the D.C. Circuit's decision does not upset decades of settled precedent. First, none of Petitioners' cited cases involved a situation like this one, where par-

⁹ The error in Petitioners' attempt to establish presumptions against non-party contract-modification requests is further illustrated by *Snohomish's* discussion of the role of *Memphis* clauses. As the Court explained, 128 S. Ct. at 2739, parties may "contract out of the *Mobile-Sierra* presumption ..." by specifying in their agreements the circumstances under which each would be permitted to seek a rate change unilaterally. *Id.* Under Petitioners' view of the law, while parties may "contract out" of the *Mobile-Sierra* presumption, *id.*, those who have never contracted *into* it remain subject to it nonetheless.

ties to a contested settlement seek to set market-wide rates, applicable to both settling and non-settling parties, and to harden those rates against future non-party challenges.

Second, while FERC's decisions have been inconsistent, FERC often has rejected invocations of *Mobile-Sierra* as an impediment to non-party contract modification requests.¹⁰ In *PJM Interconnection, LLC (PJM)*, 96 F.E.R.C. ¶ 61,206, at 61,878 & n.13 (2001), FERC explained that:

Mobile-Sierra does not speak to situations ... where a non-party ... seeks changes under section 206 [16 U.S.C. § 824e].¹³ Under PPL's interpretation, parties to a contract who agree among themselves not to seek rate changes would be able to bind not only one another, but also other entities who are not parties to that contract (and did not receive the contractual benefits in exchange for which the parties traded away their

¹⁰ According to Petitioners, the court of appeals "did not dispute that FERC had long applied *Mobile-Sierra* to third-party challenges." Pet. 12. In fact, the court expressly noted that FERC has accepted *Mobile-Sierra* provisions applying the public interest standard to non-contracting parties, "only since 2002." Pet. App. A. 23a.

right to seek rate changes). This result is not what the Supreme Court intended in *Mobile-Sierra*.

¹³ See, e.g., Southern Company Services, Inc., 67 F.E.R.C. ¶61,080, at pp. 61,227-28 (1994); accord, *Cities of Anaheim and Riverside v. Deseret Generation & Transmission Cooperative*, 90 F.E.R.C. ¶61,236, at p. 61,755 (2000); *Carolina Power & Light Co.*, 67 F.E.R.C. ¶61,074, at p. 61,205 (1994); see also *Northeast Utilities Service Co.*, 66 F.E.R.C. ¶61,332, at pp. 62,081-88, reh'g denied, 68 F.E.R.C. ¶61,041 (1994), aff'd, 55 F.3d 686, 689-93 (1st Cir. 1995)

Indeed, for at least a decade prior to 2002-03, FERC refused to accept settlement provisions subjecting non-parties—or FERC acting *sua sponte* on their behalf—to a *Mobile-Sierra* presumption.¹¹

¹¹ In addition to the cases cited in footnote 13 of *PJM*, see *ITC Holdings Corp.*, 102 F.E.R.C. ¶ 61,182, P 77 (distinguishing market-based rate agreements, like those at issue in *Snohomish*, from contracts that “set not only the respective rights and obligations of the contractual parties, but also the rates that third parties will pay”), *reh'g denied*, 104 F.E.R.C.

FERC considered such provisions to be “contrary to Commission precedent and to the Commission’s statutory mandate.” *Carolina Power & Light Co.*, 67 F.E.R.C. at 61,205.

Even after 2002-03, FERC sometimes rejected settlement provisions purporting to require non-parties or FERC to satisfy the public-interest version of the just-and-reasonable standard when seeking contract modifications. For example, while Reliability Must-Run (RMR) agreements superficially resemble bilateral purchase-sale agreements, they are negotiated for system reliability reasons by not-for-profit ISOs, which lack cost-reduction incentives because they pass on all of their costs to consumers. *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 803 (D.C. Cir. 2007). FERC has determined that RMR agreements harm markets and should be accepted only as a “last resort.” See

¶ 61,033 (2003); *Westar Generating, Inc.*, 100 F.E.R.C. ¶ 61,255, P 6 (2002); *Niagara Mohawk Power Corp.*, 97 F.E.R.C. ¶ 61,018, at 61,060 (2001); *GPU Energy*, 94 F.E.R.C. ¶ 61,336, at 62,241 (2001); *Turlock Irrigation Dist.*, 88 F.E.R.C. ¶ 61,322, at 61,978 (1999); *Mont. Power Co.*, 88 F.E.R.C. ¶ 61,019, at 61,051 (1999); *New England Power Co.*, 81 F.E.R.C. ¶ 61,281, at 62,371 (1997), *reh’g denied*, 83 F.E.R.C. ¶ 61,265 (1998), *aff’d sub nom. Town of Norwood v. FERC*, 202 F.3d 392 (1st Cir. 2000); *Sierra Pac. Power Co.*, 77 F.E.R.C. ¶ 61,048, at 61,186-87 (1996); *Wis. Pub. Serv. Corp.*, 69 F.E.R.C. ¶ 61,209, at 61,829 (1994); *Ne. Utils. Serv. Co.*, 67 F.E.R.C. ¶ 61,335 (1994).

Bridgeport Energy, LLC, 118 F.E.R.C. ¶ 61,243, P 41 (2007). While FERC has accepted settlements allowing such agreements to go into effect, it has rejected settlement provisions subjecting future challenges to those agreements to the public-interest application of the just-and-reasonable standard. *Id.* (holding that it “would be inconsistent with our duty under the [FPA]” to accept such provisions); see also *PSEG Power Co.*, 119 F.E.R.C. ¶ 61,168 (2007); *Milford Power Co.*, 119 F.E.R.C. ¶ 61,167, *reh’g denied*, 121 F.E.R.C. ¶ 61,042 (2007).

FERC also has refused to accept *Mobile-Sierra* provisions seeking to insulate aspects of the relationship between ISOs and transmission-owning public utilities (TOs). For example, in 2003, a group of New England TOs and ISO-NE entered into an agreement to facilitate formation of a regional transmission organization (RTO). FERC rejected the TOs’ proposal that “the *Mobile-Sierra* ‘public interest’ standard govern FERC review of termination and withdrawal” from the RTO, *Maine Public Utilities Commission v. FERC*, 454 F.3d 278, 281 (D.C. Cir. 2006), finding (*inter alia*) that such withdrawal could “have a substantial [deleterious] impact on other market participants and the markets themselves,” *id.* at 286 (internal quotation omitted). The D.C. Circuit affirmed, noting that “there is no expectation of contract stability when,” among other things, “that contract is a complex

agreement establishing a new regional structure impacting all market participants.” *Id.* at 284.

These cases are consistent not only with *Snohomish*, for the reasons explained above, but also with the courts of appeals decisions cited by Petitioners. First, Petitioners cite *Northeast Utilities Service Co. v. FERC (Northeast Utils. I)*, 993 F.2d 937 (1st Cir. 1993), and *Boston Edison Co. v. FERC*, 233 F.3d 60 (1st Cir. 2000), for the proposition that FERC, which is not a contracting party, must overcome the *Mobile-Sierra* presumption in every instance before modifying a contract. Pet. 26. In fact, those cases illustrate the distinction drawn here and in the FERC cases cited above: FERC must presume that contracts are reasonable as to those who sign them—and may modify them to protect contracting parties only if the failure to do so would harm the public. They do not stand for Petitioners’ contention that FERC must presume reasonableness as to *non*-parties and may modify contracts for their protection only upon a heightened, public-interest showing.

In *Northeast Utils. I*, FERC conditioned its approval of a proposed merger on modification of certain rate schedules filed in connection with the merger, including removal of language subjecting FERC to a public-interest standard for future rate changes. 993 F.2d at 960. The First Circuit remanded. Agreeing that “[t]he 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,” the court considered that protection to be limited to the “protection of outside parties from ‘undu[e] discriminat[ion]’ or imposition of an ‘excessive burden.’” *Id.* at 961 (citation omitted). “If there is some reason for departing from this public interest standard as framed by the Supreme Court,” the First Circuit held, “the Commission has not supplied it.” *Id.*

On remand, FERC better explained its reasoning and required the same contract modifications. The First Circuit affirmed:

FERC has responded to our concerns by explaining how the disputed contractual terms may harm third parties to the contract. It no longer relies so heavily upon the possibility that the contract may favor one party over another. For example, the Commission found the automatic rate-of-return-on-equity adjustment provision unacceptable because *third parties* may ultimately bear the burden of a rate component that does not reflect actual capital market conditions. Likewise, the “blank check” given owners of the power plant to determine the decommissioning costs

for themselves under New Hampshire law is impermissible because it may be cashed at the expense of non-parties to the contract.

Ne. Utils. Serv. Co. v. FERC (Northeast Utils. II), 55 F.3d 686, 692 (1st Cir. 1995). The First Circuit required no showing that “unequivocal public necessity” demanded the contract modifications to avoid “serious harm to the public interest,” Pet. 26. Instead, it affirmed FERC’s modification of the contracts because the agency had explained “how the disputed contractual terms may harm third parties ...” 55 F.3d at 692.

Boston Edison involved FERC’s *sua sponte* reduction of the return on equity (ROE) set forth in two bilateral contracts between a public utility seller and individual purchasers. 233 F.3d at 61, 63. Unlike the contested settlement in this case, the *Boston Edison* contracts did not establish rates paid by all wholesale-market customers, including non-consenting parties. In modifying the ROE, FERC did exactly what *Sierra* said FERC could not do: assume that a contract rate is unjust and unreasonable simply because it produces a return that is unfair to one of the contracting parties. FERC made no attempt to illustrate how non-contracting parties might be harmed, and the First Circuit remanded to FERC for further proceedings. On remand, the parties settled. *Boston Edison Co.*, 96

F.E.R.C. ¶ 61,290 (2001). *Boston Edison* thus says nothing about whether contracting parties may establish a presumption making it more difficult for *non*-parties to demonstrate that an agreement is unjust and unreasonable.

Petitioners' other cases are even less relevant. *Boroughs of Chambersburg v. FERC*, 580 F.2d 573 (D.C. Cir. 1978), *Public Service Co. of Indiana, Inc. v. FERC*, 575 F.2d 1204 (7th Cir. 1978), and *Town of Norwood v. FERC*, 587 F.2d 1306 (D.C. Cir. 1978), all involved attempts to resist public utility rate increases, permitted by applicable *Memphis* clauses, on grounds that the increase was unduly discriminatory compared to unchanged rates under other customers' contracts. *Mobile-Sierra's* only relevance to those cases was to explain why the public utilities did not also increase the other customers' rates.

Finally, *Wisconsin Public Power Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007), resolved tensions between long-standing, bilateral transmission service agreements and proposed tariff provisions implementing new wholesale-market and transmission-congestion management mechanisms. Because the new procedures would disrupt the existing agreements, FERC required a carve-out for existing agreements that could not be modified unilaterally. *Id.* at 255. In other words, in *Wisconsin*, parties to long-standing bilateral contracts (to

which they had consented) invoked *Mobile-Sierra* defensively to protect their agreements from being overridden by tariff. Here, the settling parties would use *Mobile-Sierra* offensively to subject non-settling parties to rates they never agreed to pay and hold them to *Mobile-Sierra* restrictions on future rate challenges. *Maine Public*, decided by a panel that included one of the *Wisconsin* judges, correctly understood that *Mobile-Sierra* neither requires nor justifies such a result.

**II. MAINE PUBLIC WILL
NEITHER UNDERMINE NOR
ALLOW EVASION OF
SNOHOMISH.**

Petitioners claim that *Maine Public* “threatens to turn [*Mobile-Sierra*] into a legal relic that applies only when rate challenges are brought by the direct counterparties in a contract.” Pet. 16. That would be problematic, Petitioners argue, because “*Mobile-Sierra* cannot provide contractual certainty or stability” if its reasonableness presumption runs only to the contracting parties, while allowing “contract modification under a less rigorous standard in challenges brought by *anyone* else.” *Id.* at 15. Petitioners raise the prospect of millions of “potential surrogates” seeking contract-rate changes under more lenient standards than would apply to challenges by contracting parties themselves. *Id.* at 19.

Petitioners offer no bases for these overblown claims. First, the use of surrogates to evade restrictions agreed to by contracting parties is unlikely. Although third-party protection always has afforded the “most attractive case” for contract modification, *Northeast Utils. I*, 993 F.2d at 961, FERC itself has observed that “[m]ost decisions involving *Mobile-Sierra* ... involve a request by one of the signatories to the contract at issue seeking to change the terms of the contract.” *PJM*, 96 F.E.R.C. at 61,878 n.13.¹²

Second, Petitioners greatly overstate the prospects for contract modification under an ordinary just-and-reasonable standard. *E.g.*, Pet. 19 (“Subjecting fixed-price contracts to midstream abrogation if changing market conditions make one side of the contract (even temporarily) unattractive to any non-contracting entity destroys the purpose of those contracts.”). FERC does not take contract abrogation lightly under *any* standard. *E.g.*, *Nev. Power Co. v. Duke Energy Trading & Mktg., LLC*, 100 F.E.R.C. ¶ 61,273, P 17 (2002) (“By emphasizing that a complainant bears a heavy burden of proof, we stated the obvious that the sanctity of

¹² In any case, worries over challenges by contract-party surrogates would not justify derogation of FPA protections for genuinely independent non-parties—including, as in this case, protection of customers required to pay rates to which they did not agree.

contracts is presumed and that the Commission will not lightly undo the terms of existing contracts regardless of the applicable standard of review.”); Pet. App. D 238a (“[A] challenger or the Commission acting *sua sponte* must prove that circumstances have changed so dramatically that the tariff provision has become unjust and unreasonable. This does not happen often.”). Indeed, on remand from the decision below, FERC reiterated that “[n]on-parties to this settlement will have a high burden should they seek to modify the settlement in the future under a just and reasonable standard.” *Devon Power LLC*, 126 F.E.R.C. ¶ 61,027, P 6 (2009).

While *amici* for Petitioners claim that “non-contracting third parties can be expected to challenge virtually any contract,” EPSA Br. 15, they cite just four complaints, *id.* at 9-10, and fail to note that FERC dismissed or denied them all without evidentiary hearings. One was dismissed following settlement. *Ill. ex rel. Madigan v. Exelon Generation Co.*, 121 F.E.R.C. ¶ 61,015 (2007). Three, filed by a single party, were denied on grounds that the complainant “failed to present sufficient evidence to demonstrate that the contract[s] [are] unjust and unreasonable or should otherwise be abrogated”), *Californians for Renewable Energy, Inc. v. California Public Utilities Commission*, 120 F.E.R.C. ¶ 61,272, P 50 (2007) (Docket No. EL07-50) and 119 F.E.R.C. ¶ 61,058, P 45 (2007) (Docket

Nos. EL07-37 and EL07-40), *pet. for review filed sub nom. Californians for Renewable Energy v. FERC*, No. 08-70010 (9th Cir. filed Jan. 2, 2008), *dismissed in part* (9th Cir. Apr. 28, 2008).

Similarly, in *Potomac Electric Power Co. v. FERC (Potomac)*, 210 F.3d 403 (D.C. Cir. 2000), the D.C. Circuit affirmed FERC's rejection of a party's contract-modification claims, including those dressed up as requests for *sua sponte* action to protect third parties:

Emphasizing that it “does not take contract modification lightly,” FERC reasoned that the mere fact that PEPCO was subject to higher rates under its agreement with APS than it would be under APS's OATT was insufficient reason for abrogating an agreement that PEPCO had fully supported at the time of filing.... FERC also rejected PEPCO's request that it act *sua sponte* to reduce the rates for the benefit of PEPCO's ratepayers, reasoning that it would be inappropriate to convert PEPCO's unilateral request for reformation into a FERC-initiated contract modification where the parties' agreement contained a *Mobile-Sierra* provision,

and where PEPCO had failed to satisfy the public interest standard.

210 F.3d at 406. In other words, both FERC and an appellate panel including two of the *Maine Public* judges have made short work of unmeritorious complaints and attempted end-runs like those the Petitioners fear. The Court should not constrain FERC's ability to redress harm imposed on legitimately aggrieved non-parties in an effort to guard against unsupported or pretextual claims with which FERC already is well equipped to deal.

III. MAINE PUBLIC WILL NOT DETER INVESTMENT.

Petitioners and *amici* express concern that the decision below will deter needed investment in generation facilities. *E.g.*, EPSA Br. 5. Using this case as an example, Petitioners claim that “the auction pricing mechanism ... produces voluntary agreements to provide capacity three years in the future, ... [b]ut the promise to pay the auction amounts cannot provide the necessary incentive [to invest in new facilities] if the promise can be revisited continuously in light of changing circumstances.” Pet. 20. Petitioners and *amici* argue that allowing non-party rate challenges under an ordinary just-and-reasonable standard will shatter the “contract certainty” necessary for investment, adding that the Court must not undermine investor confidence just when an economic crisis has nearly

frozen capital markets and massive infrastructure investment will be needed to support development and delivery of the output of new renewable-fuel generation resources. *E.g.*, Pet. 22-23.

As national organizations representing thousands of load-serving utilities of various sizes, including many who sign long-term contracts to support construction of new generation resources, APPA and NRECA have as much interest as Petitioners and their supporting *amici* in contract stability and a healthy investment environment. But APPA and NRECA do not subscribe to the overblown claims advanced by Petitioners and supporting *amici*.

First, as noted above, FERC does not take contract modification lightly even under the ordinary just-and-reasonable standard. Petitioners overlook that, in applying that standard, FERC must demonstrate to a reviewing court's satisfaction that it has balanced consumer and investor interests. Regardless of the applicable standard, FERC may not lightly disregard investments made in reliance on previously determined prices. Nor does FERC have a record of doing so. *See New York v. FERC*, 535 U.S. 1, 19 n.15 (2002).

Second, Petitioners offer no empirical support for their assumption that the ordinary just-and-reasonable standard deters investment, and the evidence is to the contrary. Here, although the

D.C. Circuit required FERC to modify a settlement that was conditioned on acceptance *without* modification, not a single settling party has sought to invalidate the settlement following the court's decision.¹³ Instead, ISO-NE finalized and filed the applicable market rules (which FERC accepted), and has conducted two annual auctions in which both generation and demand-side resources actively participated and which ISO-NE has touted as a success.¹⁴

¹³ Section 2 conditioned the settlement agreement on FERC's approval of it without modification or condition. If FERC's approval was conditional, the agreement would terminate unless the parties ratified the change or negotiated acceptable amendments within 30 days. On October 6, 2008, the D.C. Circuit denied rehearing of its order requiring FERC to modify the settlement. On January 15, 2009, FERC issued an order directing the submission of a compliance filing revising the standard of review applicable to non-settling parties. The parties' February 17, 2009 compliance filing acknowledged that, "notwithstanding [the Settlement's] original provisions," and subject to the Court's action (if any) in this case, § 4C of the Settlement will not apply to non-parties. Report of Compliance of ISO NE and New England Power Pool, Attach. B, Compliance Statement, at 1, *Devon Power LLC*, Docket No. ER03-563-065 (Feb. 17, 2009), *available at* FERC eLibrary Accession No. 20090218-0153. Comments on the Compliance Statement were due March 10, 2009, but none were filed.

¹⁴ Press Release, ISO-NE, New England's Second Power Resource Auction Produces Positive Outcomes for the Region (Dec. 10, 2008), *available at* <http://www.iso-ne.com/nwsiss/>

More generally, Petitioners ignore the many billions of dollars invested under tariff rates subject to change using an ordinary just-and-reasonable standard. Notably, most transmission service is provided under tariffs at cost-of-service rates that are subject to modification using an ordinary just-and-reasonable standard, and many billions have been invested (and continue to be invested) in transmission facilities whose costs are recovered through such rates. For example, in California, from 1998 through 2006, \$8.2 billion was invested in more than 400 transmission projects.¹⁵ In New England, between 2002 and 2006, transmission projects totaling \$833 million were placed in service, *id.*, while more than \$1 billion was invested in transmission in 2008 alone.¹⁶

Finally, Petitioners' claims that *Maine Public* has produced "disarray in the industry" (Pet. 22) are refuted by the very settlements that Petitioners cite in support of them. As Petitioners note, in the

pr/2008/final_fca2_results_121008.pdf.

¹⁵ ISO/RTO Council, *Progress of Organized Wholesale Electricity Markets in North America: A Summary of 2006 Market Data from 10 ISOs & RTOs*, at 5 (Oct. 16, 2007), available at <http://tiny.cc/c16AR> or through <http://www.isorto.org>, (under "Documents and Issues").

¹⁶ Kelly Harrington, *Renewables, Reliability Drive New England Transmission Investment*, SNL Energy Power Daily Northeast, Jan. 5, 2009, at 1, 1.

wake of *Maine Public*, FERC has required settling parties who wish to bind non-parties to include language stating that the standard to be applied to non-party challenges will be the most stringent standard permitted by law. That dozens of settlements using that language have been filed since *Maine Public* is not evidence of “disarray.” It is evidence that many settling parties either fail to perceive or are able to tolerate the “uncertainty” to which Petitioners object.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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March 18, 2009