

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: NRG POWER MARKETING, LLC, ET AL., Petitioners, v.
MAINE PUBLIC UTILITIES COMMISSION, ET AL.
CASE NO: No. 08-674
PLACE: Washington, D.C.
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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first today in Case 08-674, NRG Power Marketing v. Maine
5 Public Utilities Commission.

6 Mr. Lamken.

7 ORAL ARGUMENT OF JEFFREY A. LAMKEN

8 ON BEHALF OF THE PETITIONERS

9 MR. LAMKEN: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 This case concerns a bedrock principle of
12 Federal -- Federal energy law, the Mobile-Sierra
13 doctrine. The question presented and the issue decided
14 below is whether Mobile-Sierra's public interest
15 standard ceases to apply whenever a contract rate is
16 challenged by a noncontracting party.

17 FERC and we agree that the answer is no.
18 Mobile-Sierra's presumption of --

19 JUSTICE SOTOMAYOR: Does it matter who is
20 the challenger? Are you in a different position than
21 the other parties to this action?

22 You're a third party who is being bound to a
23 particular rate. The others do have a different
24 interest, or they're in a different position with
25 respect to their challenges, correct?

1 MR. LAMKEN: Your Honor, I represent -- we
2 represent -- I represent NRG, which entered into the
3 settlement agreement and is -- would like to be bound by
4 the results of the auction contract. And so we are
5 happy with the agreements we enter into, and a concern
6 that we have is that nonparties can come in and
7 challenge the contracts under a lower standard.

8 JUSTICE SOTOMAYOR: So aren't you in a
9 different position than those other challengers?

10 MR. LAMKEN: We certainly are in a different
11 position, but they --

12 JUSTICE SOTOMAYOR: So why doesn't that
13 difference do what the D.C. Circuit said?

14 JUSTICE GINSBURG: Mr. Lamken, you're not a
15 challenger?

16 MR. LAMKEN: That's exactly right.

17 JUSTICE GINSBURG: Yes. I think --

18 MR. LAMKEN: We are not a challenger. We
19 are --

20 JUSTICE GINSBURG: -- the question relates
21 to the other side --

22 MR. LAMKEN: Right.

23 JUSTICE GINSBURG: -- not to his side --

24 JUSTICE SOTOMAYOR: No. I do understand
25 that, but that's what I'm trying to get to. The D.C.

1 Circuit Court's reasoning was very simple: You're a
2 contracting party; you're bound to it. Why should the
3 others who didn't agree to this term be bound by
4 Mobile-Sierra? That's the essence of their holding.

5 MR. LAMKEN: Right. Nobody is arguing that
6 a noncontracting party is bound to terms that it didn't
7 agree to in a contract.

8 The question is that, when a noncontracting
9 party comes in to challenge the terms that two
10 consenting, willing buyer and a seller have agreed
11 to, what is the standard that should apply for that
12 outsider to come in and challenge the rate the two
13 people have agreed to?

14 And Mobile-Sierra and Morgan Stanley all
15 provide the answer, and that is the public interest
16 standard. The standard is that, under the Mobile-Sierra
17 doctrine, the Federal Energy Regulatory Commission must
18 presume the contract rate meets the just and reasonable
19 requirement provided by law.

20 Unless --

21 JUSTICE SOTOMAYOR: So then does that bind
22 all types of third parties?

23 MR. LAMKEN: It certainly applies to the
24 Federal Energy Regulatory Commission, and it would be a
25 rather odd rule that the agency which is charged with

1 Congress with administering the statute, has the
2 greatest expertise, is bound by a more demanding
3 standard, but an entity, an outsider with no such
4 statutory mandate and no such expertise is subject to a
5 lower standard when it comes in and asks for a contract
6 rate to be overturned or abrogated.

7 In fact, the court of appeals' ruling can't
8 be reconciled with Mobile-Sierra's foundation and the
9 need for contractual certainty. The whole point is to
10 provide certainty of contract so that companies can
11 invest hundreds of millions of dollars in infrastructure
12 projects without worrying that their contracts will be
13 abrogated lightly after the fact. But few could risk
14 entering into such contracts and make those investments
15 if any noncontracting party -- if the Mobile-Sierra
16 doctrine applied only to contracting parties, the two
17 people who signed the contract. But --

18 CHIEF JUSTICE ROBERTS: It's a bit much to
19 say that the importance is to preserve the stability of
20 two parties' contract, and, therefore, a third party who
21 didn't sign the contract is bound to the two parties'
22 contract.

23 MR. LAMKEN: Well, the nonparty isn't
24 actually paying the rate. The two parties are paying
25 the rate. The nonparty is saying: I'm adversely

1 affected by that rate indirectly. And we're all
2 regularly adversely affected by contracts we didn't
3 enter into. The example we give in our brief is the
4 theatergoers affected by the amount the theater pays for
5 the movies and the popcorn and things like that. But
6 the question is what's the standard for that outsider to
7 abrogate a rate the two, a willing buyer and a willing
8 seller, have entered into?

9 CHIEF JUSTICE ROBERTS: Well, so why don't
10 you -- why isn't it restricted to some type of direct,
11 parties directly affected, as well as -- I mean, you
12 complain about the hordes of people who will be able to
13 challenge these. Well, it assumes that anybody can
14 challenge it.

15 MR. LAMKEN: Well, it certainly applies to
16 the parties most directly affected, which are the
17 parties that actually entered into the contract and are
18 paying the rates. So it applies to the Federal Energy
19 Regulatory Commission, which is the expert regulator,
20 and it doesn't make much sense to have another --
21 another exemption for some category of not directly
22 bound but sufficiently -- sufficiently affected parties.
23 It would --

24 JUSTICE ALITO: Is there any other area of
25 the law in which the parties to a contract can, in

1 effect, dictate the substantive standard of
2 administrative review for challenges raised by
3 nonparties?

4 MR. LAMKEN: I think the answer is I don't
5 know if there is other areas where there's a
6 possibility of a Memphis clause, if that's what you're
7 referring to, where the parties can actually -- when
8 they enter into a contract, they can actually lower the
9 standard. But the general rule is that when a party
10 comes in and tries to abrogate a contract, they have no
11 greater rights to challenge the contract than the
12 parties who entered it themselves. If they are a
13 third-party beneficiary, it's the same right. And if
14 they're a nonparty, at least so far as we can tell, they
15 have no right to challenge the validity of the contract,
16 at least as a matter of contract law.

17 JUSTICE KENNEDY: Am I correct -- and maybe
18 this is more proper for the government than for you, or
19 for all the parties. I take it no one questions the
20 propriety, the lawfulness, of the FERC determination to
21 convene the settlement process? There's no argument
22 that this was an improper, an unlawful process?

23 MR. LAMKEN: No. There is certainly no such
24 claim before this Court, and I'm not aware of any such
25 one. But what came out of the process were agreements

1 with respect to rates, and the settled rule is that such
2 agreements cannot be abrogated unless the public
3 interest would be severely harmed. And --

4 JUSTICE KENNEDY: Can I --

5 JUSTICE GINSBURG: Of course, there is.
6 What's -- what's really lurking behind this case is
7 whether this is a contract rate, and there FERC
8 disagrees with you, I take it. You were talking about
9 that the rate that emerges from a contract between two
10 people -- nobody else is party to it, but you say the
11 rate stands; FERC cannot abrogate the rate; nobody can
12 ask FERC to abrogate that bilateral contract rate. But
13 here we're not talking about a bilateral contract, where
14 how many people were involved in the settlement? Well
15 over a hundred.

16 MR. LAMKEN: Scores, yes. And --

17 JUSTICE GINSBURG: So that's quite a
18 different picture than the bilateral contracts that were
19 at issue in Sierra and Mobile.

20 MR. LAMKEN: Certainly FERC agrees with us
21 that at least some of the rates before this Court are
22 contract rates.

23 JUSTICE SCALIA: Did the lower court reach
24 that question?

25 MR. LAMKEN: No, the lower court didn't

1 address the question.

2 JUSTICE SCALIA: Did we grant cert on that
3 question?

4 MR. LAMKEN: You did not, and this Court
5 regularly declines to address matters that were merely
6 assumed or presumed by the court below and instead
7 answers the question that was actually answered by the
8 court below, which in this case is an important and
9 recurring question. Based on the decision below, FERC
10 has actually gone back and rewritten more than 50
11 contracts to create an exemption for noncontracting
12 parties, including contracts that are clearly bilateral
13 contracts, Your Honor.

14 CHIEF JUSTICE ROBERTS: I'm sorry? What do
15 you mean, an exemption for noncontracting parties?

16 MR. LAMKEN: Simply to say that the
17 Mobile-Sierra doctrine can't apply when the challenge is
18 brought by a noncontracting party, but rather what FERC
19 wrote into the contracts effectively was the highest
20 standard permitted by law will be applied to them. And
21 nobody sitting at these tables can tell this Court what
22 that standard would be, which is precisely why this is
23 an important issue.

24 CHIEF JUSTICE ROBERTS: You don't agree that
25 FERC has the authority to exempt noncontracting parties

1 from the binding effect of the contract rates, do you?

2 MR. LAMKEN: No, we don't, which is
3 precisely one of the -- we don't believe that the court
4 had authority to announce that rule. We actually
5 believe the court erred in announcing that rule. It --

6 JUSTICE BREYER: It isn't in the case.

7 MR. LAMKEN: Yes. Whether or not these are
8 contracted --

9 JUSTICE BREYER: This is a case in which, as
10 I think most cases where they approve contracts, what
11 they're finding is that the contract rate in this
12 circumstance, or here the settlement rate in this
13 circumstance, is a just and reasonable rate, because.
14 All right? So what are we supposed to do? I mean, are
15 you going to say he's wrong, the lower court's wrong,
16 because they got the whole thing mixed up. I mean --
17 could we say that?

18 MR. LAMKEN: Yes. The lower court got
19 everything wrong, it got the whole thing mixed up; send
20 it back.

21 (Laughter.)

22 MR. LAMKEN: Very simple and very
23 straightforward.

24 JUSTICE BREYER: But then if we were to do
25 that --

1 JUSTICE SCALIA: He took the words right out
2 of your mouth.

3 (Laughter.)

4 MR. LAMKEN: Thank you, Justice Breyer.

5 JUSTICE BREYER: But you would -- would you
6 agree with my assumptions there?

7 MR. LAMKEN: Yes.

8 JUSTICE BREYER: That what this case is
9 about -- and it's a fortiori from the ordinary contract
10 case -- is that sometimes an agency, because of
11 particular economic circumstances, concludes that a
12 particular rate-setting system is a just and reasonable
13 system, and once that's in place, then as part of that
14 system is the rule you can only challenge it when it
15 violates the public interest, for example.

16 Now, you can go and attack the whole
17 business on the ground the whole business is an abuse of
18 discretion or it departs from the statute. But if the
19 whole business is okay, that's the end of it.

20 MR. LAMKEN: Right. I --

21 JUSTICE BREYER: Now, have I just said the
22 correct law in your view or not?

23 MR. LAMKEN: We would not -- that, Justice
24 Breyer, in fact would be our back-up position.

25 JUSTICE BREYER: Sorry?

1 MR. LAMKEN: That would be our back-up
2 position. Our position is once you have --

3 JUSTICE BREYER: But I'm not interested in
4 if you have a back-up or not. I'm interested in, is it
5 correct or not?

6 MR. LAMKEN: Yes, we would agree with it,
7 that that is a correct statement of law. But our
8 primary position and the primary error in the court
9 below was it said even when you have a contract rate,
10 nonparty -- there is an exemption based on the identity
11 of the challenging party. And that simply cannot be
12 reconciled with --

13 JUSTICE SOTOMAYOR: But you just said to
14 Justice Scalia that the court below didn't find that
15 this was a contract rate.

16 MR. LAMKEN: That's right. It merely
17 assumed it. And this Court --

18 JUSTICE SOTOMAYOR: It assumed it, so you're
19 asking us to assume the same thing and announce --

20 MR. LAMKEN: Well --

21 JUSTICE SOTOMAYOR: -- an advisory opinion
22 that if these are contract rates, they're bound by
23 Mobile-Sierra; and if they're not, what are we supposed
24 to do?

25 MR. LAMKEN: Well, the answer is that this

1 Court regularly, regularly, addresses the question
2 presented and the issue answered below without delving
3 into underlying assumptions.

4 JUSTICE SCALIA: You could call them all
5 advisory opinions if you want.

6 MR. LAMKEN: That's right.

7 JUSTICE SCALIA: Whenever there is another
8 issue in the case --

9 MR. LAMKEN: Right, and one example --

10 JUSTICE SCALIA: -- for which we remand, you
11 could say, oh, we're just giving an advisory opinion on
12 the issue that --

13 MR. LAMKEN: That's precisely right. A good
14 example would be *Jama v. Immigration and Customs*
15 *Enforcement*, where the question was whether the Attorney
16 General could deport an alien to a foreign country
17 without making sure the country would accept him. And
18 the Court said: We're not going to address whether the
19 person is an alien; we won't address whether Somalia is
20 a country; we're not going to even address whether this
21 person is removable -- that's all for the court on
22 remand; we're only going to address whether or not there
23 has to be a prior determination that the country will
24 accept him. The same rule would apply --

25 JUSTICE STEVENS: Could you give me an

1 example of a -- of a challenge to a rate that's set
2 under this whole program that would succeed under the
3 just and reasonable standard and fail under the public
4 interest standard, or vice versa?

5 MR. LAMKEN: Are you asking me can I
6 conceive of such a rate that would fail and succeed
7 under one?

8 JUSTICE STEVENS: Yes.

9 MR. LAMKEN: I think that -- one of the -
10 one of the interesting things about the just and
11 reasonable standard, the ordinary just and reasonable
12 standard, is you can actually look at the interests of
13 the contracting parties to a degree that you cannot
14 under the public interest standard. The point of the
15 public interest standard is it has to adversely affect
16 the interests of the public. The whole point --

17 JUSTICE STEVENS: I'm not sure that answers
18 my question. Could there be -- could there be a rate
19 that would violate one standard and not the other?

20 MR. LAMKEN: Well, they are both the just
21 and reasonable standard. And the one could violate one
22 application --

23 JUSTICE SCALIA: Yes or no?

24 MR. LAMKEN: Yes.

25 JUSTICE SCALIA: Okay.

1 MR. LAMKEN: If I may reserve the remainder
2 of the time for rebuttal.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Miller.

5 ORAL ARGUMENT OF ERIC D. MILLER
6 ON BEHALF OF RESPONDENT FERC,
7 IN SUPPORT OF THE PETITIONERS

8 MR. MILLER: Mr. Chief Justice, and may it
9 please the Court:

10 The court of appeals erred in holding that
11 the Mobile-Sierra public interest standard is
12 inapplicable when contract rates are challenged by a
13 noncontracting third party. That error provides a
14 sufficient basis for reversing the judgment below, and
15 although there are other issues in the case, those
16 issues were not addressed by the court of appeals, and
17 this Court should remand and allow them to be resolved
18 by the court of appeals rather than addressing them
19 itself in the first instance.

20 JUSTICE KENNEDY: Were the -- are the
21 Respondents correct and was the court of appeals correct
22 in calling this a presumption?

23 MR. MILLER: This Court in Morgan Stanley
24 described --

25 JUSTICE KENNEDY: In -- in calling the rate

1 that was agreed upon a presumption of a reasonable rate?

2 MR. MILLER: Well, the -- the Court in
3 Morgan Stanley held that Mobile-Sierra rests in part on
4 the idea that when wholesale businesses negotiate a
5 contract for the sale of power, that that can be
6 presumed to be just and reasonable.

7 JUSTICE KENNEDY: So you don't quarrel with
8 that word --

9 MR. MILLER: No. We quarrel --

10 JUSTICE KENNEDY: -- or would you quarrel
11 with that characterization?

12 MR. MILLER: That's the way that this
13 Court has described the standard. Now, of course, in
14 this case the Commission looked at the mechanism
15 created, the forward capacity auction, and it looked at
16 the transition rates, and it didn't simply presume them
17 to be just and reasonable. It -- based on its
18 examination of them -- determined that the rates set out
19 in the settlement and the rates that would be
20 established under the mechanism created by the
21 settlement would be just and reasonable.

22 JUSTICE SCALIA: Just and reasonable, or
23 would comply with the public interest standard?

24 MR. MILLER: The --

25 JUSTICE SCALIA: I mean, what's the use of

1 having Mobile-Sierra if -- if they're going to reexamine
2 the thing under the usual standard anyway?

3 MR. MILLER: Well, the settlement -- no one
4 is suggesting that the settlement agreement itself is a
5 Mobile-Sierra contract. The settlement was a resolution
6 of a disputed proceeding before the Commission. It's
7 sort of analogous to a consent decree. The Commission
8 had to approve that before it became effective. By its
9 own terms, the settlement agreement wouldn't become
10 effective as binding between the parties unless the
11 Commission approved it.

12 CHIEF JUSTICE ROBERTS: Your -- your opening
13 statement about what this Court should do is a change
14 from your statement of what we should do in your briefs.

15 In your -- you just said the Court should
16 remand for further considerations other issues. In your
17 brief, you say the judgment of the court of appeals
18 should be reversed insofar as it granted the petitions
19 for review. You've changed your position on what we
20 should do.

21 MR. MILLER: Well, we -- we do think that
22 you should reverse the holding of the court of appeals.
23 To the extent that you think that there are other issues
24 that are presented other than the question presented as
25 stated by the petition.

1 CHIEF JUSTICE ROBERTS: But that's a change.
2 Before you didn't think there were other issues that
3 affected the determination or might. You said we should
4 grant -- reverse the determination insofar as it granted
5 the petitions for review.

6 If we say that the petitions for review
7 should have been denied, then we don't send it back.

8 MR. MILLER: Should have been granted.
9 Right. Yes. Right. That's right.

10 It -- I mean, our view is that the
11 appropriate disposition is a remand to the court of
12 appeals to allow it to decide whether these other issues
13 are properly before it, and the answer to that may be --
14 be no, but the court of appeals should have an
15 opportunity to consider that in the first instance.

16 The reason that, in our view, the court of
17 appeals was wrong in holding that there's a third-party
18 exception to Mobile-Sierra is that, as I said a moment
19 ago, the Court in Morgan Stanley recognized that
20 Mobile-Sierra rests on a presumption that the rates
21 negotiated between sophisticated wholesale businesses
22 can be presumed to be just and reasonable. That's a
23 feature of the rate. There is no reason why the same
24 rate for the same power could be just and reasonable
25 when it's challenged by one person, but not when it's

1 challenged by somebody else.

2 Second, the purpose of the public interest
3 test under Mobile-Sierra is to allow contract
4 modification only when it's necessary to protect third
5 parties; that is, members of the public. So it doesn't
6 make sense to say that that test is inapplicable
7 whenever you have a challenge that's presented by one of
8 those third parties or a member of the public.

9 JUSTICE SOTOMAYOR: Is there -- what would
10 happen in a situation in which there's a tariff price
11 instead of a contract price? In those situations, the
12 buyer could come in, presumably, and say: It's not a
13 fair and just price vis-à-vis me; I didn't agree to it;
14 it's not.

15 In a normal situation with a contract price,
16 third parties, many not -- not the main -- main
17 parties, like the Maine Public Utilities Commission,
18 could come in and say what? It's not fair to the public
19 in general?

20 MR. MILLER: In the contract setting?

21 JUSTICE SOTOMAYOR: Yes.

22 MR. MILLER: Yes, third parties could come
23 in, and if they -- they would have to satisfy the public
24 interest test. They would have to show that there are
25 -- the Court has described it variously as extraordinary

1 circumstances, severe impact on the public interest.

2 JUSTICE SOTOMAYOR: Could they come in and
3 show that between the contracting parties the price is
4 unfair? Is that what this is about, that they would try
5 to come in and somehow define the public interest as
6 being informed by the unfairness to the individual
7 parties?

8 MR. MILLER: I think that sort of argument
9 would be foreclosed by Sierra.

10 JUSTICE SOTOMAYOR: Well, but that's the
11 question before us.

12 MR. MILLER: Well, you have --

13 JUSTICE SOTOMAYOR: The D.C. Circuit said
14 they shouldn't be bound by that determination, and
15 you're arguing that they should be because --

16 MR. MILLER: What -- what the Court said in
17 Sierra is that mere unfairness, one of the -- the fact
18 that one of the contracting parties got a bad bargain is
19 not a reason to set aside the contract, except for the
20 Court did reserve the extraordinary circumstance where
21 it's going to put the supplier out of business, which
22 would adversely affect the public interest if they can
23 no longer deliver power at that rate.

24 JUSTICE STEVENS: May I --

25 JUSTICE SOTOMAYOR: So it goes back to my

1 original question with your adversary, which is: Is
2 there a difference among the objectors here, between
3 those who are objecting to the terms between the two
4 contracting parties as outsiders, as members of the
5 public, and those who are objecting because this
6 settlement agreement does something different? It binds
7 them personally to a buying price, and so why shouldn't
8 there be a different approach to those individuals?

9 MR. MILLER: I think there are two responses
10 to that, Your Honor. The first is that the reasoning of
11 the court of appeals draws no distinction between those
12 two --

13 JUSTICE SOTOMAYOR: I agree.

14 MR. MILLER: Okay.

15 JUSTICE SOTOMAYOR: And so the
16 question is: Should there be a distinction?

17 MR. MILLER: Yes. And I think certainly the
18 Commission appreciates the idea that there's something
19 wrong about -- or there's something unfair about A and B
20 getting together and deciding on the rate that C is
21 going to pay. And to the extent that you're concerned
22 about that situation, the answer to that is that when A
23 and B set the rate that C has to pay, C is not paying a
24 contract rate in the Mobile-Sierra sense, because C is
25 not -- C is paying a rate it has not agreed to.

1 JUSTICE SOTOMAYOR: And that's what the
2 Third Circuit -- I'm sorry, that's what the court below
3 didn't --

4 MR. MILLER: The court did not use that mode
5 of analysis. The court below said that we were talking
6 about contract rates and their being challenged by
7 nonparties to the contract, and the court thought that
8 in that context the Mobile-Sierra public interest
9 standard doesn't apply, and that --

10 JUSTICE SCALIA: You're saying, in effect,
11 that Mobile-Sierra does not apply to an agreement
12 between A and B that not only sets the rate between the
13 two, but also fixes the rate that one of them will
14 charge to C?

15 The last feature is not a Mobile-Sierra --
16 is not eligible for Mobile-Sierra treatment.

17 MR. MILLER: That's right, because C's rate
18 in that scenario is not a rate that it has agreed to.
19 It's being set unilaterally by people other than it, and
20 so it's in our view more appropriately characterized as
21 a tariff rate that is not subject to the --

22 JUSTICE SCALIA: Right. But that's -- but
23 that's not what the D.C. Circuit said.

24 MR. MILLER: No, that is --

25 JUSTICE SCALIA: The D.C. Circuit said that

1 the entire -- there is no application of Mobile-Sierra
2 at all.

3 MR. MILLER: That's right. And the
4 D.C. Circuit made that quite clear, particularly on page
5 20a of the petition appendix in its opinion, where it
6 described the question before it, yes.

7 JUSTICE STEVENS: But it is your view, is it
8 not, that the rates that result from the auction are not
9 contract rates within the meaning of Mobile-Sierra?

10 MR. MILLER: That -- that is our view, that
11 that's -- it's not the basis for the court of appeals'
12 decision.

13 JUSTICE GINSBURG: The court of appeals
14 never got to what FERC thinks is the heart of the case,
15 whether this is a contract rate, whether -- you say it
16 is not -- and whether FERC has the authority nonetheless
17 to apply the public interest standard. But none of
18 those have been addressed by the D.C. Circuit.

19 MR. MILLER: That's -- that's exactly right,
20 Your Honor. The court didn't reach --

21 CHIEF JUSTICE ROBERTS: And just to follow
22 up, you think we should not address either of those --

23 MR. MILLER: No --

24 CHIEF JUSTICE ROBERTS: -- whether it's a
25 contract or whether you have authority to make an

1 exception to the Mobile-Sierra doctrine?

2 MR. MILLER: No, we think the Court should
3 answer only the question that was ruled upon below and
4 leave those other issues to the extent that they have
5 been properly --

6 JUSTICE BREYER: How can we? I mean, that's
7 a -- why not answer a case -- a question about
8 employment discrimination law? Where -- where in this
9 FERC thing does this say that these are contracts of a
10 kind that Mobile-Sierra was about? I mean, I don't even
11 know if Mobile-Sierra -- whether you could -- a third
12 party could attack such a contract under public -- under
13 a just and reasonable standard, unless I knew first what
14 the Commission thought about it in this context, because
15 then the Commission's question would be: Is that a
16 reasonable view? So what am I supposed to do here?

17 MR. MILLER: Well, I think we agree with
18 Petitioners that it is quite common for this Court to
19 decide a case, taking the case on the same assumption
20 that the court of appeals did, and answer the questions
21 that are raised --

22 JUSTICE BREYER: We would have to take it on
23 the assumption -- wait, I don't want -- you have 5
24 minutes left that you're reserving?

25 MR. MILLER: I'm not --

1 CHIEF JUSTICE ROBERTS: You don't get to
2 reserve time.

3 MR. MILLER: Right. Right.

4 (Laughter.)

5 JUSTICE BREYER: What's the assumption? The
6 assumption is the court of appeals thinks that the
7 contract between -- among the generating -- the
8 generators, that that is a Mobile-Sierra contract. So
9 we're supposed to say, if that were a Mobile-Sierra
10 contract, which it isn't, then we should decide whether
11 a third party could attack it, about which the
12 Commission has said nothing. Is that right?

13 MR. MILLER: No, Your Honor, because we do
14 agree that at least some of the rates that are covered
15 by the public interest review clause in the settlement
16 --

17 JUSTICE BREYER: The transition rates?

18 MR. MILLER: The transition rates as between
19 the settling parties.

20 JUSTICE BREYER: But the reasonableness
21 depends upon the other. The validity depends upon the
22 other. It's all part of a package.

23 MR. MILLER: Well, their validity doesn't --
24 their validity depends upon the mechanism that's created
25 by the settlement, which the Commission reviewed under

1 the ordinary just and reasonable standard. It doesn't
2 depend on the clearing prices of the auctions, which
3 are the -- I mean, what the --

4 JUSTICE BREYER: That's all true, but I
5 would want to know what the Commission thought about
6 that one, too.

7 MR. MILLER: What -- what the Commission
8 thought is that the -- the Commission looked at the
9 auction mechanism and determined that it was likely to
10 produce just and reasonable results. And the Commission
11 emphasized that at any point anybody can come in and
12 challenge the auction rules and say that they're not
13 just and reasonable, and the Commission will review that
14 entirely unencumbered by this provision of the
15 settlement. And, in addition, within 45 days after each
16 auction, anybody can come in and challenge those
17 results. And only after that 45-day period does the
18 public interest review clause become effective.

19 The -- the last point I would like to make
20 about the court of appeals' analysis is that this Court
21 made clear in Morgan Stanley that Mobile-Sierra applies
22 to the Commission when it is acting sua sponte, and
23 there is no reason why FERC's power should depend on
24 whether somebody has filed a complaint. If FERC is
25 bound, public interest standard, under Mobile-Sierra

1 when there is a Mobile-Sierra contract, it makes very
2 little sense to say that it ceases to be bound by that
3 as long as anybody in the world other than the
4 contracting party comes in and files the complaint to
5 initiate the FERC investigation.

6 JUSTICE SCALIA: Well, we -- we don't know
7 that that's the other side's position. I was going to
8 ask him that. Their position is that the third party
9 can -- can attack the -- the agreement without being
10 encumbered by Mobile-Sierra, but I don't know that
11 they've said that once a third party does mount such an
12 attack the Commission is suddenly also unencumbered by
13 Mobile-Sierra.

14 MR. MILLER: Well, the --

15 JUSTICE SCALIA: I have assumed that their
16 position is the Commission remains bound by Mobile-
17 Sierra, but these third parties can -- can demand a
18 court -- that a court apply a different standard.

19 MR. MILLER: I had not understood that to be
20 their position, but I think it would be very strange --

21 JUSTICE SCALIA: We can --

22 MR. MILLER: -- if the Commission had one
23 Standard, and on review of the Commission order, the
24 court were to apply a standard different from what --

25 JUSTICE SCALIA: I'm not sure that's any

1 stranger than saying the Commission has one standard
2 until somebody else challenges it, whereupon the
3 Commission has a different standard. You don't think
4 that's strange?

5 MR. MILLER: I -- I think we would agree
6 that they're both quite strange.

7 JUSTICE SCALIA: Yes.

8 (Laughter.)

9 MR. MILLER: If there are no further
10 questions --

11 CHIEF JUSTICE ROBERTS: Thank you, Mr.
12 Miller.

13 MR. MILLER: Thank you.

14 CHIEF JUSTICE ROBERTS: General Blumenthal.

15 ORAL ARGUMENT OF GEN. RICHARD BLUMENTHAL

16 ON BEHALF OF THE RESPONDENTS

17 MR. BLUMENTHAL: Thank you, Mr. Chief
18 Justice. Mr. Chief Justice, and may it please the
19 Court:

20 There is one central truth here on which we
21 and the government agree. These are not contract rates
22 at issue here. They are tariff rates. That is a
23 central truth that unites the government and the
24 Respondents, because these rates out of the auction
25 process will be rates of general applicability, applying

1 not only to those contractors, the parties who agreed to
2 the contract, but they will be binding on NSTAR, which
3 sells 25 percent of the power in the New England market;
4 they will be binding on the other five Respondents,
5 including Maine and Massachusetts as well as
6 Connecticut.

7 JUSTICE SOTOMAYOR: Well, they can
8 self-supply, can't they?

9 MR. BLUMENTHAL: Even if they had that
10 option, Justice Sotomayor, it would not change a tariff
11 into a contract. Just because there is the option of
12 self-supply doesn't mean that parties who are disputing
13 the contract, disagreeing with it, not to mention not
14 contracting, should be bound to it as though it were a
15 contract. The option of --

16 JUSTICE SCALIA: They're not bound to it.
17 They -- they are saying that -- claiming -- that their
18 rates are too high because the contract was too high, so
19 -- and therefore, their rates are unreasonable. And
20 what Mobile-Sierra says -- it certainly says it as
21 between the two contracting parties -- that if it's at
22 arm-length between sophisticated seller and buyer
23 of -- of the power, they are bound by it, and
24 the -- and the issue is here is whether somebody
25 downstream who says that since this contract is so

1 exorbitant, the rates are too high, whether that person
2 is likewise bound by Mobile-Sierra. Isn't that right?

3 MR. BLUMENTHAL: Justice Scalia, with all
4 due respect, that situation is not here.

5 JUSTICE GINSBURG: But that's what the court
6 of appeals decided. Their simple question was
7 Mobile-Sierra binds the contracting parties, and it
8 doesn't -- the rate doesn't stick for anybody else.
9 That's all they decided.

10 And the question that you're asking
11 certainly is looming over this whole case, but it isn't
12 presented to us because it wasn't even dealt with in any
13 way, shape, or manner by the D.C. Circuit.

14 MR. BLUMENTHAL: Absolutely correct, Justice
15 Ginsburg. The D.C. Circuit's reasoning here was based
16 on facts that were, in fact, not present here. We
17 agreed then, we argued to the FERC, we argued to the
18 court of appeals, we argued in opposition to certiorari,
19 that what's involved here are tariff rates.

20 And the D.C. Circuit's ruling in our view
21 was correct, and its reasoning was correct insofar as
22 Mobile-Sierra binds contracting parties, as Justice
23 Scalia has just articulated and Morgan Stanley
24 reiterated. It involves parties trying to escape an
25 improvident bargain.

1 What we have here is an auction system that
2 sets rules of general applicability.

3 JUSTICE GINSBURG: But I thought one large
4 difference -- I thought Justice Scalia suggested that
5 the rate negotiated by -- in that bilateral agreement,
6 that that rate would not be subject to just and
7 reasonable attack by anyone, that the public interest
8 standard attaches to that rate and FERC can't abrogate
9 it. It's a rate that's set, it's binding on FERC, and
10 FERC presumably, because it has no authority to abrogate
11 it, could not entertain any complaint that would ask to
12 have it abrogated.

13 MR. BLUMENTHAL: Section 4.C of the
14 settlement agreement that FERC approved under the just
15 and reasonable standard says to the world: We can make
16 an exception for ourselves under the just and
17 reasonable -- under the Memphis rule. We can make an
18 exception to the public interest standard. The
19 government says it can make an exception for itself.
20 The only ones powerless to invoke --

21 JUSTICE GINSBURG: I didn't -- I didn't
22 follow. I didn't think there was -- was there a Memphis
23 clause in this settlement?

24 MR. BLUMENTHAL: There is. There is in
25 section 4.C in effect a modified Memphis clause which

1 says that the parties can come together and agree to a
2 different standard, Justice Ginsburg.

3 So, in a sense, the irony here, if the Court
4 were to reverse and apply Morgan Stanley -- I'm sorry,
5 Mobile-Sierra and Morgan Stanley -- would be that the
6 only ones powerless to invoke the just and reasonable
7 standard to review the auction rates would be the
8 Respondents --

9 JUSTICE BREYER: Why?

10 MR. BLUMENTHAL: -- who never agreed to this
11 supposed contract.

12 JUSTICE BREYER: Why are you powerless?

13 MR. BLUMENTHAL: I'm sorry.

14 JUSTICE BREYER: Why don't you to go to the
15 Commission and say: Commission, there is always special
16 circumstances. You may think that in this kind of
17 situation, which is a special situation, that the public
18 interest standard, whether it's in a contract or whether
19 it's in a tariff or wherever you want to put it, is the
20 right standard for review. You may think that. But you
21 don't think it for yourselves, you don't think it for
22 somebody else, and here's some reasons why you don't
23 think it for us.

24 And if they agree with your reasons, they'll
25 say: Fine, go ahead. And if they don't, they don't.

1 Why aren't you exactly as powerful or powerless as
2 anybody else?

3 MR. BLUMENTHAL: Justice Breyer, there is an
4 immense difference, as you and the Court is well aware
5 because it has been articulated in opinions, between the
6 public interest standard and the ordinary just and
7 reasonable standard, and the government would like that
8 discretion to say in effect --

9 JUSTICE BREYER: My point is if you don't
10 like that as applied to your situation, you have a
11 remedy. That's what the public -- that's why they're
12 there, agencies. They are there to listen to you and
13 give you a remedy, and the remedy is, if you convince
14 them you shouldn't be subject to that, they'll say fine;
15 and otherwise not. Why are you coming to us who know
16 nothing about natural gas and asking us to do it?

17 MR. BLUMENTHAL: We're not here by choice,
18 Your Honor.

19 (Laughter.)

20 JUSTICE BREYER: It's electricity.

21 MR. BLUMENTHAL: If you tell me at this
22 point to go home, I'm happy to do it.

23 (Laughter.)

24 MR. BLUMENTHAL: We're here because we
25 believe that the section 4.C establishes a standard that

1 is contrary to the statute, the just and reasonable
2 standard.

3 JUSTICE BREYER: Then you're going to say
4 you mean they never can do it, but it's well settled.
5 It's well settled that they sometimes can say -- I mean,
6 my point is this: I just found the quote I was looking
7 for. So I was thinking natural gas. It applies to
8 electricity capacity, too. Justice Jackson: "The
9 wealth of Midas and the wit of man cannot produce or
10 reproduce a natural gas field."

11 That applies to electricity capacity. We
12 can't reproduce it. You can't. The Commission devises
13 a system for trying to get it done, and if they do it
14 reasonably, they win.

15 MR. BLUMENTHAL: But the -- the Commission
16 should not be accorded discretion to adopt a standard
17 that contravenes the statute. We're dealing here --

18 JUSTICE BREYER: The standard -- the statute
19 is "just and reasonable." That calls up a whole
20 mechanism from the 1930s. I thought that it is long --
21 we're long past that point, that -- that whatever
22 Brandeis thought it was, which they did in the thirties
23 and forties, that it has also been interpreted to
24 include the power to the Commission to deviate from
25 that, because they find, for example, contract rates

1 under certain circumstances to be just and reasonable,
2 even though you don't use cost-of-service ratemaking.

3 MR. BLUMENTHAL: What we're dealing with in
4 this case is the question of whether the government and
5 the Commission should have virtually unbridled
6 discretion to adopt a standard that has been called
7 "practically insurmountable," as recently as Morgan
8 Stanley. It was --

9 JUSTICE SCALIA: But that -- that's because
10 of section 4.C, you say?

11 MR. BLUMENTHAL: Section 4.C of the
12 agreement --

13 JUSTICE SCALIA: Right. Which -- which
14 gives the Commission a good deal of flexibility, which
15 you say you -- your clients don't have or your State
16 doesn't have. But that isn't the basis on which this
17 case was decided below. It was decided on the very
18 simple basis that the Mobile-Sierra doctrine simply does
19 not apply to challenges by third parties. It had
20 nothing to do with the details of 4.C and the -- the
21 excessive discretion given -- given to the Commission
22 but not to you.

23 It was a very simple proposition on which we
24 granted cert, whether Mobile-Sierra's public interest
25 standard applies when a contract rate is challenged by

1 an entity that was not a party to the contract. That's
2 the question. And what's your answer to that?

3 MR. BLUMENTHAL: Our answer is --

4 JUSTICE SCALIA: Do you support the opinion
5 of the -- of the court below?

6 MR. BLUMENTHAL: We do support it, Justice
7 Scalia, and the reason we do is that Mobile-Sierra is
8 about contracts. And --

9 JUSTICE SCALIA: It isn't about contracts.
10 It's about reasonable rates. I thought what it was, was
11 a determination by the Commission, approved by -- by
12 this Court, that when two giants of the industry, very
13 knowledgeable, deal at arm's-length and come up with --
14 with a contract, that is presumptively reasonable, and
15 unless it contravenes the public interest, that rate
16 will -- will be upheld.

17 Now, you say it should be upheld only
18 between the two contracting parties. What good does
19 that do?

20 MR. BLUMENTHAL: It -- it can be held --
21 upheld only between the two contracting parties if
22 they're the ones who have agreed to it. Under
23 Mobile-Sierra, there is a presumption of free
24 negotiation and consent.

25 JUSTICE KENNEDY: But the rationale is the

1 commonsense notion that it's a presumptively reasonable
2 rate, and if that's true, how is that altered by the
3 identity of the party that attacks it?

4 MR. BLUMENTHAL: Because, Your Honor, the
5 question also is what the standard should be if it's
6 presumptively reasonable; and it is taken as such,
7 because it is freely negotiated, because there is
8 consent to it. Because one of them is seeking to escape
9 it, and use the Commission to escape it, then
10 Mobile-Sierra says it should be presumed just and
11 reasonable, and only when the public interest is
12 seriously harmed --

13 JUSTICE KENNEDY: Well, why is -- why is it
14 not presumptively a commonsense notion when some
15 different party attacks it? It -- it's still a
16 determination that this rate, as a commonsense matter,
17 is presumptively reasonable.

18 MR. BLUMENTHAL: As to this case, again,
19 there are no rates yet. We're talking about an auction
20 mechanism that will not even involve a contract, and the
21 government says so as well, that -- we and the
22 government agree that it will not involve a contract.
23 So how can --

24 JUSTICE KENNEDY: Yes. That's different
25 than Mobile-Sierra, although Mobile-Sierra did invoke

1 market forces of another kind -- of another kind.

2 MR. BLUMENTHAL: Well, you know, I feel,
3 with all due respect, that we are talking in alternate
4 universes here, the government and the Petitioners and
5 we; and the reason is, as the Court has quite aptly
6 identified, the court of appeals used a rationale that
7 simply is not wholly fitting to the facts here.

8 JUSTICE GINSBURG: Why shouldn't we tell
9 them that, and then they can pick it up from there?

10 MR. BLUMENTHAL: Well --

11 JUSTICE GINSBURG: Because what they did say
12 could be -- have heavy consequences. We know that that
13 has already happened. FERC has revised a number of
14 contracts to conform to the D.C. Circuit's idea that
15 it's the parties to the -- to the contract, not the rate
16 that's sheltered by Mobile-Sierra. That's a very
17 consequential decision, and so we would tell the D.C.
18 Circuit, if we agreed with FERC and the Petitioners on
19 that: D.C. Circuit, you've got that wrong.

20 Now, there may be other matters, other
21 issues like the ones that you would like us to decide as
22 a matter of first view, but as Justice Scalia has
23 pointed out more than once, we have a question. It is
24 the very question that the D.C. Circuit decided. Why
25 should we go beyond that?

1 MR. BLUMENTHAL: Because addressing that
2 question, Justice Ginsburg, as Justice Breyer said, is
3 not the question that the Commission addressed. It
4 isn't the question in terms of the factual situation
5 here that is really at issue. We're dealing here with
6 tariff rates that are set through the auction mechanism.
7 If the Court --

8 JUSTICE SCALIA: Yes, but we don't like to
9 decide these questions, you know, initially. We -- we
10 like to have some lower court do the dirty work, and we
11 can correct them.

12 (Laughter.)

13 JUSTICE SCALIA: It's -- it's a lot easier
14 that way, and we're more likely to reach a correct
15 result, rather than -- than wading in with, you know,
16 -- from scratch. That's our usual practice.

17 MR. BLUMENTHAL: And the government's
18 position on certiorari was that there should be a remand
19 without reversal for reconsideration in light of Morgan
20 Stanley.

21 CHIEF JUSTICE ROBERTS: You're in a very
22 tough position because of the way this has progressed.
23 I think you can make a strong argument that you
24 shouldn't be bound by these contract rates if FERC
25 doesn't have a lot of discretion to let you go. If FERC

1 has a lot of discretion to let you go, your argument
2 that you shouldn't be bound is a lot weaker. And the
3 way the case has been presented, we're pushing on only
4 one -- one side of that.

5 MR. BLUMENTHAL: And I recognize that fact,
6 Mr. Chief Justice, that the Court is presented with a
7 dilemma here because it's dealing with tariff rates when
8 the question presented talks about contract rates.

9 JUSTICE BREYER: So is the answer then
10 maybe where Justice Ginsburg and Justice Scalia were
11 going, that -- because where I'm coming from, why I have
12 been asking this, is I actually think the answer to the
13 question so far on the question presented is
14 "sometimes." Sometimes you can't; sometimes you can.
15 And it depends on a lot of things -- situations,
16 circumstances, arguments to commissions, what they held,
17 et cetera.

18 So maybe that's the thing to do, you answer
19 the question, say "sometimes." Sometimes they can use
20 one; sometimes it's the other. Indeed, in this very
21 case, they've argued that it's -- that it's not even
22 within the mainstream of Mobile-Sierra. And maybe
23 that's so, maybe it's not. Send it back, say it depends
24 on circumstances, time, et cetera. And then they can
25 argue all these things out that we've just been hearing.

1 What about that?

2 MR. BLUMENTHAL: And, Justice Breyer, the
3 "sometimes" is absolutely right from our standpoint.

4 CHIEF JUSTICE ROBERTS: Well, but if we
5 ruled that --

6 MR. BLUMENTHAL: There may be --

7 CHIEF JUSTICE ROBERTS: If we decided it on
8 that basis, we would be giving FERC a victory on the
9 question of its authority to depart from Mobile-Sierra,
10 even though that wasn't presented in this case.

11 MR. BLUMENTHAL: No. In our view, Mr. Chief
12 Justice, noncontracting parties under Mobile-Sierra
13 cannot be bound --

14 CHIEF JUSTICE ROBERTS: Oh, I know --

15 MR. BLUMENTHAL: -- by tariff rates.

16 CHIEF JUSTICE ROBERTS: -- but Justice
17 Breyer was hypothesizing that sometimes they can be, and
18 sometimes they can't be. And you accepted his
19 proposition.

20 And what I'm saying is that's a very
21 significant question. FERC wants to argue it here, but
22 it's not before us.

23 MR. BLUMENTHAL: The "sometimes" -- if I
24 could complete the answer, Mr. Chief Justice, is that
25 the "sometimes" would include contract rates. In other

1 words, where there are strictly contract rates --
2 whereas, here, we have tariff rates -- FERC would not
3 have that discretion. It cannot have discretion to
4 apply the public interest standard to tariff rates any
5 more than it could apply the ordinary just and
6 reasonable standard to contract rates which --

7 JUSTICE SCALIA: Has anybody before --

8 MR. BLUMENTHAL: -- Mobile-Sierra fits.

9 JUSTICE SCALIA: -- even suggested that
10 Mobile-Sierra is a "sometimes" thing? Do -- did
11 any of our opinions say that it's a "sometimes" thing,
12 except in one respect, and that is the doctrine does not
13 apply when -- when, downstream, the rates -- or even
14 between the parties, the rates would violate the public
15 interest?

16 That's a "sometimes." It won't apply then,
17 but have we ever suggested that, you know, today it
18 may; tomorrow it -- it won't? Or have we ever suggested
19 what standards might determine the "sometimes" question?

20 MR. BLUMENTHAL: Mobile- --

21 JUSTICE SCALIA: Have we ever suggested how
22 you can -- you can have a "sometimes" doctrine which
23 will produce the stability in the industry that Mobile-
24 Sierra was intended to produce?

25 I mean, that was the whole purpose of

1 Mobile-Sierra. People had to be able to predict whether
2 they can take natural gas out of the ground, how much
3 they can make on it, and once they enter into an
4 arm's-length contract, they should be able to rely on
5 it.

6 That was the whole purpose. And, now, you
7 want to us say, well, sometimes it will work, and
8 sometimes it won't. And we're not going to say when;
9 we're going to leave it to the D.C. Circuit to invent
10 some "sometimes."

11 That doesn't make any sense, does it?

12 MR. BLUMENTHAL: Again, I may have been
13 unclear, and I apologize if I was, in response to
14 Justice Breyer and the Chief Justice's question, but the
15 point is that the "sometimes" would not apply to the
16 situation that we have here, where there are rates of
17 general applicability and tariffs.

18 JUSTICE SOTOMAYOR: Can I -- can I go --
19 stop you there, just so that we're all on the same page?
20 If this were, hypothetically, a contract rate -- some of
21 the transition fees appear to be. The parties to that
22 agreement are saying, we're going to pay, in transition
23 fees, X amount.

24 Assuming, for the sake of argument, that the
25 transition fees are contract rates, are you disputing

1 the circuit court's analysis that the Mobile-Sierra
2 doctrine applies to those contract rates and binds third
3 parties who are challenging that particular rate between
4 those two parties?

5 MR. BLUMENTHAL: Justice Sotomayor, we are
6 not challenging that a contract should bind those two
7 parties or those hundred-plus parties that agree to the
8 contract.

9 JUSTICE SOTOMAYOR: Well, that -- you
10 can't because that's the doctrine. Okay.

11 Under what circumstances could a third party
12 challenge that rate as not fair and reasonable, as
13 opposed to being contrary to the public interest?

14 MR. BLUMENTHAL: Well, the public interest
15 standard, as articulated in Morgan Stanley, would
16 require showing an extraordinarily high burden of proof.

17 JUSTICE SOTOMAYOR: You haven't answered my
18 question.

19 Under what circumstances -- I've given you
20 the absolute minimum example.

21 MR. BLUMENTHAL: If --

22 JUSTICE SOTOMAYOR: There's a rate set
23 between two parties, what third parties -- under what
24 circumstances could a third party come in and say -- on
25 some standard different than contrary to the public

1 interest, how could they prove other that that rate's
2 not fair and reasonable?

3 MR. BLUMENTHAL: If that party were directly
4 affected --

5 JUSTICE SOTOMAYOR: What does the word
6 "directly affected" mean to you?

7 MR. BLUMENTHAL: It would mean having to pay
8 rates that flow inevitably --

9 JUSTICE SOTOMAYOR: No. Now, you're trying
10 to confuse the issue. Yes, that's the auction question
11 and whether that auction is a contract price subject to
12 the Mobile-Sierra doctrine at all. That's a different
13 issue.

14 I've given you the simple hypothetical.
15 Could all of those other respondents -- except NSTAR --
16 come in and say that it's not fair and reasonable
17 to me because, at the end, I'm going to pay more; I'm
18 going to do something -- it's going to affect me in some
19 indirect way.

20 Are you taking the position that there's
21 something else that FERC must do when those third
22 parties come into -- into that simple situation?

23 MR. BLUMENTHAL: Our position, Justice
24 Sotomayor -- and it's a hypothetical here because,
25 again -- and I apologize for belaboring the point, but

1 what we have here are rates of general applicability.

2 JUSTICE SOTOMAYOR: You want to keep going
3 back to the facts, and I'm dealing with a
4 hypothetical.

5 MR. BLUMENTHAL: And the hypothetical, I
6 would say, is answerable that the just and reasonable
7 standard, as it was applied in Bridgeport Energy and
8 Milford Power and tens of other cases --

9 JUSTICE SOTOMAYOR: So you are taking the
10 extreme -- you are accepting that -- what the lower
11 court said? Under every circumstance, if it involves a
12 contract price, fair and reasonable being something
13 other than contrary to the public interest?

14 MR. BLUMENTHAL: Fair and reasonable is a
15 standard different from the public interest standard.
16 That's a matter of law.

17 JUSTICE SOTOMAYOR: So your adversary's
18 arguments that what you're really saying is you can
19 never have finality to a contract agreement between
20 parties because any third party can come in and raise --
21 stand in the shoes of the contracting parties and argue
22 the rate's not fair and reasonable?

23 JUSTICE SCALIA: But FERC can't -- can FERC
24 -- can FERC challenge, too? Because FERC's a -- sort of
25 a third party.

1 MR. BLUMENTHAL: Well, FERC is -- is bound
2 by the same law that applies to third parties, which is
3 --

4 JUSTICE SCALIA: Okay. So -- so
5 Mobile-Sierra doesn't apply to FERC, even?

6 MR. BLUMENTHAL: Mobile-Sierra applies --

7 JUSTICE SCALIA: Who does it apply to? I
8 mean, it's just -- just the two parties?

9 MR. BLUMENTHAL: Mobile-Sierra effectively
10 says those two parties are bound by the contract, and
11 FERC is bound by it -- that's Morgan Stanley -- no
12 matter when the issue is raised.

13 JUSTICE SCALIA: Okay.

14 MR. BLUMENTHAL: And a noncontracting party,
15 if it is a rate that applies generally, can challenge
16 it.

17 JUSTICE SCALIA: Can a noncontracting party
18 go to FERC and challenge it before FERC, whereupon FERC
19 is no longer bound by Mobile-Sierra? Or is FERC
20 suddenly unchained when a third party brings a
21 proceeding before FERC? It's a strange situation.

22 MR. BLUMENTHAL: FERC is bound by the just
23 and reasonable standard. That's what the law says.
24 This law is a public -- is a consumer protection statute
25 that says, upon complaint or upon FERC's own motion, it

1 may apply that just and reasonable standard.

2 Now, the public interest standard looks for
3 serious harm to the public.

4 JUSTICE SCALIA: No, no. The public
5 interest standard is a just and reasonable standard.
6 What -- what it amounts to is saying, when -- when you
7 have a contract rate that's been negotiated between
8 sophisticated parties, that rate is presumptively just
9 and reasonable, and the only way you can show that it is
10 not just and reasonable is to show that the public
11 interest is harmed.

12 It's -- it's not something different from
13 the just and reasonable standard, or it would be
14 contrary to -- to the statute because the statute
15 requires that the rates be just and reasonable, right?

16 MR. BLUMENTHAL: It -- it is part -- they
17 are one standard, as Morgan Stanley very clearly says,
18 and the question of what noncontracting parties can
19 challenge a statute depends on who the noncontracting
20 party is, the nature of the contract, what interest is
21 affected, and I would presume some of those factors
22 might affect FERC's judgment.

23 JUSTICE BREYER: So are you aware of any law
24 or any statement by any judge, ever, that exempts the --
25 the FERC from the basic requirement that its rules,

1 regulations, and everything else not be arbitrary,
2 capricious, abuse of discretion?

3 MR. BLUMENTHAL: The answer to that question
4 is no.

5 JUSTICE BREYER: No. Okay. Thank you.

6 (Laughter.)

7 JUSTICE BREYER: And so, as long as that's
8 so, I guess you could mount a challenge on the ground
9 that to apply the contract regime system to circumstance
10 X, Y, and Z, without permitting your challenge that you
11 want, is, in fact, a violation of the APA, at the least.
12 Okay?

13 Now, that's why I say "sometimes." Could
14 you imagine such a situation, which I think is what
15 Justice Sotomayor was getting at, or do you want it all
16 the time? If you want it all the time, I'm not --
17 you're not getting sympathy from me. If want to say
18 there could be such a time, maybe. I think I could
19 think of five. All right?

20 So -- so where are we?

21 MR. BLUMENTHAL: Where we are is, if Your
22 Honor please, if the Court were to modify or clarify the
23 public interest standard to make it more accommodating
24 to the kinds of challenges we've been discussing, that
25 could be one outcome here.

1 JUSTICE GINSBURG: That's a third standard
2 between just and reasonable and public interest? You
3 want us to add another tier?

4 MR. BLUMENTHAL: Well, simply to clarify
5 that it involves not necessarily an insurmountable
6 barrier.

7 CHIEF JUSTICE ROBERTS: It's also a third
8 question that's not presented, right?

9 MR. BLUMENTHAL: It is again a question not
10 presented, and none of us so far on this side of the
11 table has mentioned the Chenery doctrine, but perhaps
12 that also should be considered, that the agency made a
13 decision on a different basis than it is now advocating
14 before the Court.

15 JUSTICE GINSBURG: But you are defending the
16 D.C. Circuit's decision? I mean, you are up here saying
17 that was the right judgment, Sierra-Mobile --
18 Mobile-Sierra has to do with the two contracting
19 parties. It doesn't, as the counterargument goes,
20 shelter the rate from any attack by anyone, including
21 FERC. It's put in terms of FERC cannot abrogate that
22 rate. But your -- you are defending the position that
23 it's just as between the contracting parties; it's not
24 the rate itself that is sheltered by Mobile-Sierra,
25 because that's what the D.C. Circuit decided?

1 MR. BLUMENTHAL: And -- yes, Justice
2 Ginsburg, we're defending the D.C. Circuit's ruling and
3 decision. The question presented, in a sense, takes a
4 different view of the factual situation that the
5 government and we agree prevails here, and we are
6 suggesting that perhaps for the D.C. Circuit to have
7 said in its opinion Mobile-Sierra does not apply to
8 noncontracting parties when there are contracts that
9 produce tariff rates.

10 JUSTICE GINSBURG: It didn't say that.

11 MR. BLUMENTHAL: And one modifier would have
12 spared this Court and ourselves the difficulties that we
13 now have, but it is that modifier that would, in effect,
14 surmount the very difficult and thorny issues that the
15 Court has well identified here.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Lamken, you have 3 minutes.

19 REBUTTAL ARGUMENT OF JEFFREY A. LAMKEN

20 ON BEHALF OF THE PETITIONERS

21 MR. LAMKEN: Thank you, Your Honor.

22 JUSTICE KENNEDY: Does anything in your
23 argument turn on the fact that the Respondents were
24 parties to the settlement process?

25 MR. LAMKEN: No, Your Honor. The fact that

1 they were parties to the settlement process simply shows
2 that they've met the sort of broad administrative law
3 standing requirements. It does not show they were an
4 actual purchaser under the agreements here.

5 And I think that is actually part of the nub
6 of what was bothering the D.C. Circuit. The D.C.
7 Circuit may have been bothered that there might be
8 actual purchasers here, people who directly themselves
9 purchase under the rate who haven't agreed to it. But
10 that concern is wholly subsumed within the notion of
11 whether or not the rate that entity is paying is a
12 contract rate. But which rates here are contract rates
13 or not contract rates is an issue the D.C. Circuit
14 didn't actually get to. It's not clear it was properly
15 preserved before the D.C. Circuit, because the claim
16 that some of the rates are not contract rates was
17 raised only by intervenors.

18 So while we adhere to our view that these
19 are contract rates, this Court need not get to it. It
20 need only address the issue the court addressed below,
21 which is whether there is a broad-based, third-party
22 exception to Mobile-Sierra.

23 And the answer is no. Mobile-Sierra can't
24 be energy law's equivalent of the Maginot Line, that it
25 protects against direct assaults from the contracting

1 parties themselves but provides no protection, not
2 whatsoever, if it's flanked by noncontracting parties to
3 the --

4 JUSTICE SCALIA: I like that. That's very
5 imaginative.

6 (Laughter.)

7 MR. LAMKEN: I hope you use it. Thank you,
8 Your Honor.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 The case is submitted.

11 (Whereupon, at 11:00 a.m., the case in the
12 above-entitled matter was submitted.)

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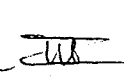
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of; NRG POWER MARKETING, LLC, ET AL., Petitioners, v. MAINE PUBLIC UTILITIES COMMISSION, ET AL.; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Raymond R. Heer 

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