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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NRG POWER MARKETING, :

4 LLC, ET AL., :

5 Petitioners :

6 v. : No. 08-674

7 MAINE PUBLIC UTILITIES :

8 COMMISSION, ET AL. :

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10 Washington, D.C.

11 Tuesday, November 3, 2009

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:02 a.m.

16 APPEARANCES:

17 JEFFREY A. LAMKEN, ESQ., Washington, D.C.; on behalf of
18 the Petitioners.

19 ERIC D. MILLER, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington,
21 D.C.; on behalf of respondent FERC, supporting the
22 Petitioners.

23 GEN. RICHARD BLUMENTHAL, ESQ., Attorney General,
24 Hartford, Conn.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

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

Mr. Lamken.

ORAL ARGUMENT OF JEFFREY A. LAMKEN

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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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 entered 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. We are
17 not a challenger. We are --

18 JUSTICE GINSBURG: The question relates to
19 the other side --

20 MR. LAMKEN: Right.

21 JUSTICE GINSBURG: Not to his side --

22 JUSTICE SOTOMAYOR: No. I do understand
23 that, but that's what I'm trying to get to. The D.C.
24 Circuit Court's reasoning was very simple: You're a
25 contracting party; you're bound to it. Why should the

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1 others who didn't agree to this term be bound by
2 Mobile-Sierra? That's the essence of their holding.

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

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

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

18 And --

19 JUSTICE SOTOMAYOR: So then does that bind
20 to all types of third parties?

21 MR. LAMKEN: It certainly applies to the
22 Federal Energy Regulatory Commission, and it would be a
23 rather odd rule that the agency which is in charge with
24 Congress with administering the statute, has the
25 greatest expertise, is bound by a more demanding

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1 standard, but an entity, an outsider with no such
2 statutory mandate and no such expertise, is subject to a
3 lower standard when it comes in and asks for a contract
4 rate to be overturned or abrogated.

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

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

21 MR. LAMKEN: Well, the nonparty isn't
22 actually paying the rate. The two parties are paying
23 the rate. The nonparty is saying: I'm adversely
24 affected by that rate indirectly. We're all regularly
25 adversely affected by contracts we didn't enter into.

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1 The example we give in our brief is the theatergoers
2 affected by the amount the theater pays for the movies
3 and the popcorn and things like that. But the question
4 is what's the standard for that outsider to abrogate a
5 rate the two, a willing buyer and a willing seller, have
6 entered into?

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

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

20 JUSTICE ALITO: Is there any other area of
21 the law in which the parties to a contract can, in
22 effect, dictate the substantive standard of the
23 administrative review for challenges raised by
24 nonparties?

25 MR. LAMKEN: I think the answer is I don't

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1 know if there is other areas where there there's a
2 possibility of a Memphis clause, if that's what you're
3 referring to, where the parties can actually, when they
4 enter into a contract, they can actually lower the
5 standard. But the general rule is that when a party
6 comes in and tries to abrogate a contract, they have no
7 greater rights to challenge the contract than the
8 parties who entered it themselves. If you are a
9 third-party beneficiary, it's the same right. And if
10 they're a nonparty, at least so far as we can tell, they
11 have no right to challenge the validity of the contract,
12 at least as a matter of contract law.

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

19 MR. LAMKEN: No. There is certainly no such
20 claim before this Court, and I'm not aware of any such
21 one. But what came out of the process were agreements
22 with respect to rates, and the settled rule is that such
23 agreements cannot be abrogated unless the public
24 interest would be severely harmed.

25 JUSTICE GINSBURG: Well, what's really

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1 lurking behind this case is whether this is a contract
2 rate, and there FERC disagrees with you, I take it. You
3 were talking about that the rate that emerges from a
4 contract between two people -- nobody else is party to
5 it, but you say the rate stands; FERC cannot abrogate
6 the rate; Nobody can ask FERC to abrogate that bilateral
7 contract rate. But here we're not talking about a
8 bilateral contract, where how many people are involved
9 in the settlement? Well over a hundred.

10 MR. LAMKEN: Scores, yes.

11 JUSTICE GINSBURG: So that's quite a
12 different picture than the bilateral contracts that were
13 at issue in Sierra and Mobile.

14 MR. LAMKEN: Certainly FERC agrees with us
15 that at least some of the rates before this Court are
16 contract rates.

17 JUSTICE SCALIA: Did the lower court reach
18 that question?

19 MR. LAMKEN: No, the lower court didn't
20 address the question.

21 JUSTICE SCALIA: Did we grant cert on that
22 question?

23 MR. LAMKEN: You did not, and this Court
24 regularly declines to address matters that were merely
25 assumed or presumed by the court below and instead

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1 answers the question that was actually answered by the
2 court below, which in this case is an important and
3 recurring question. Based on the decision below, FERC
4 has actually gone back and rewritten more than 50
5 contracts to create an exemption for noncontracting
6 parties, including contracts that are clearly bilateral
7 contracts, Your Honor.

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

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

18 CHIEF JUSTICE ROBERTS: You don't agree that
19 FERC has the authority to exempt noncontracting parties
20 from the binding effect of the contract rates, do you?

21 MR. LAMKEN: No, we don't, which is
22 precisely -- we don't believe that the court had the
23 authority to announce that rule. Actually, we believe
24 the Court erred in announcing that rule.

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

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1 MR. LAMKEN: Yes. Whether or not these are
2 --

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

12 MR. LAMKEN: Yes. The lower court got
13 everything wrong, it got the whole thing mixed up; send
14 it back.

15 (Laughter.)

16 MR. LAMKEN: Very simple and very
17 straightforward.

18 JUSTICE BREYER: But then if we --

19 JUSTICE SCALIA: He took the words right out
20 of your mouth.

21 MR. LAMKEN: Thank you, Justice Breyer.

22 JUSTICE BREYER: But would you agree with my
23 assumptions there?

24 MR. LAMKEN: Yes.

25 JUSTICE BREYER: That what this case is

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1 about -- and it's a fortiori from the ordinary contract
2 case -- is that sometimes an agency because of
3 particular economic circumstances concludes that a
4 particular rate-setting system is a just and reasonable
5 system, and once that's in place, then as part of that
6 system is the rule you can only challenge it when it
7 violates the public interest, for example.

8 Now, you can go in and attack the whole
9 business on the ground the whole business is an abuse of
10 discretion or it departs from the statute. But if the
11 whole business is okay, that's the end of it. Have I
12 just said the correct law in your view or not?

13 MR. LAMKEN: We would -- that, Justice
14 Breyer, in fact would be our back-up position. That
15 would be our back-up position.

16 JUSTICE BREYER: I'm not interested in if
17 you have a back-up or not. I'm interested in is it
18 correct or not?

19 MR. LAMKEN: Yes, we would agree with it,
20 that is a correct statement of law. But our primary
21 position and the primary error in the court below was it
22 said even when you have a contract rate, nonparty --
23 there is an exemption based on the identity of the
24 challenging party and that simply cannot be reconciled
25 with --

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

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

6 JUSTICE SOTOMAYOR: It assumed it, so you're
7 asking us to assume the same thing and announce an
8 advisory opinion that if these are contract rates
9 they're bound by Mobile-Sierra; and if they're not, what
10 are we supposed to do?

11 MR. LAMKEN: Well, the answer is that this
12 Court regularly, regularly addresses the question
13 presented and the issue answered below without delving
14 into underlying assumptions.

15 JUSTICE SCALIA: You could call them all
16 advisory opinions if you want.

17 MR. LAMKEN: That's right.

18 JUSTICE SCALIA: Whenever there is another
19 issue in the case --

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

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

24 MR. LAMKEN: That's precisely right. A good
25 example would be Jama v. Immigration and Customs

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1 enforcement, where the question was whether the attorney
2 general could deport an alien to a foreign country
3 without making sure the country would accept him. The
4 court said: We're not going to address whether the
5 person is an alien, we won't address whether Somalia is
6 a country, we're not going to even address whether this
7 person is removable; that's all for the court on remand;
8 we're only going to address whether or not there has to
9 be a prior determination that the country will accept
10 him.

11 JUSTICE STEVENS: Could you give me an
12 example of a challenge to a rate that's set under this
13 whole program that would succeed under the just and
14 reasonable standard and fail under the public interest
15 standard, or vice versa?

16 MR. LAMKEN: Are you asking me can I
17 conceive of such a rate that would fail and succeed
18 under one?

19 JUSTICE STEVENS: Yes.

20 MR. LAMKEN: I think one of -- one of the
21 interesting things about the just and reasonable
22 standard, the ordinary just and reasonable standard, is
23 you can actually look at the interests of the
24 contracting parties to a degree that you cannot under
25 the public interest standard. The point of the public

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1 interest standard is it has to adversely affect the
2 interests of the public. The whole point --

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

6 MR. LAMKEN: Well, they are both a "just and
7 reasonable" standard. One could violate one application
8 --

9 JUSTICE SCALIA: Yes or no?

10 MR. LAMKEN: Yes.

11 JUSTICE SCALIA: Okay.

12 MR. LAMKEN: If I may reserve the remainder
13 of the time for rebuttal.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Miller.

16 ORAL ARGUMENT OF ERIC D. MILLER

17 ON BEHALF OF RESPONDENT FERC,

18 IN SUPPORT OF THE PETITIONERS

19 MR. MILLER: Mr. Chief Justice, and may it
20 please the Court:

21 The court erred in holding that the
22 Mobile-Sierra public interest standard is inapplicable
23 when contract rates are challenged by a noncontracting
24 third party. That error provides a sufficient basis for
25 reversing the judgment below and, although there are

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1 other issues in the case, those issues were not
2 addressed by the court of appeals and this Court should
3 remand and allow them to be resolved by the court of
4 appeals rather than addressing them itself in the first
5 instance.

6 JUSTICE KENNEDY: Are the Respondents
7 correct and was the court of appeals correct in calling
8 this a presumption?

9 MR. MILLER: This Court in Morgan Stanley
10 described --

11 JUSTICE KENNEDY: In calling the rate that
12 was agreed upon a presumption of a reasonable rate?

13 MR. MILLER: Well, the, the Court in Morgan
14 Stanley held that Mobile-Sierra rests in part on the
15 idea that when wholesale businesses negotiate a contract
16 for the sale of power, that that can be presumed to be
17 just and reasonable.

18 JUSTICE KENNEDY: So you don't quarrel with
19 that word or with that characterization?

20 MR. MILLER: No. That's the way that this
21 Court has described the standard. Now, of course, in
22 this case the commission looked at the mechanism
23 created, the forward capacity auction, and it looked at
24 the transition rates, and it didn't simply presume them
25 to be just and reasonable. It, based on its examination

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1 of them, determined that the rates set out in the
2 settlement and the rates that would be established under
3 the mechanism created by the settlement would be just
4 and reasonable.

5 JUSTICE SCALIA: Just and reasonable, or
6 would comply with the public interest standard? I mean,
7 what's the use of having Mobile-Sierra if -- if they're
8 going to reexamine the thing under the usual standard
9 anyway?

10 MR. MILLER: Well, the settlement -- no one
11 is suggesting that the settlement agreement itself is a
12 Mobile-Sierra contract. The settlement was a resolution
13 of a disputed proceeding before the commission. It's
14 sort of analogous to a consent decree. The commission
15 had to approve that before it became effective. By its
16 own terms, the settlement agreement wouldn't become
17 effective as binding between the parties unless the
18 commission approved it.

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

22 In your -- you just said the Court should
23 remand for further considerations other issues. In your
24 brief, you say the judgment of the court of appeals
25 should be reversed insofar as it granted the petitions

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1 for review. You've changed your position on what we
2 should do.

3 MR. MILLER: Well, we -- we do think that
4 you should reverse the holding of the court of appeals.
5 To the extent that you think that there are other issues
6 that are presented other than the question presented as
7 stated by --

8 CHIEF JUSTICE ROBERTS: But that's a change.
9 Before you didn't think there were other issues that
10 affected the determination or might. You said we should
11 grant -- reverse the determination insofar as it granted
12 the petitions for review.

13 If we say that the petitions for review
14 should have been denied, then we don't send it back.
15 Should have been granted.

16 MR. MILLER: Right. That's right.

17 I mean, our view is that the appropriate
18 disposition is a remand to the court of appeals to allow
19 it to decide whether these other issues are properly
20 before it, and the answer to that may be -- be no, but
21 the court of appeals should have an opportunity to
22 consider that in the first instance.

23 The reason that, in our view, the court of
24 appeals was wrong in holding that there's a third party
25 exception to Mobile-Sierra is that, as I said a moment

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1 ago, the Court in Morgan Stanley recognized that
2 Mobile-Sierra rests on a presumption that the rates
3 negotiated between sophisticated wholesale businesses
4 can be presumed to be just and reasonable. That's a
5 feature of the rate. There is no reason why the same
6 rate for the same power could be just and reasonable
7 when it's challenged by one person, but not when it's
8 challenged by somebody else.

9 Second, the purpose of the public interest
10 test under Mobile-Sierra is to allow contract
11 modification only when it's necessary to protect third
12 parties, that is members of the public. So it doesn't
13 make sense to say that that test is inapplicable
14 whenever you have a challenge that's presented by one of
15 those third parties or a member of the public.

16 JUSTICE SOTOMAYOR: Is there -- what would
17 happen in a situation in which there's a tariff price
18 instead of a contract price? In those situations, the
19 buyer could come in, presumably, and say: It's not a
20 fair and just price vis-à-vis me; I didn't agree to it;
21 it's not.

22 In a normal situation with a contract price,
23 third parties, many not -- not the main -- Maine
24 parties, like the Maine Public Utilities Commission,
25 could come in and say what? It's not fair to the public

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1 in general?

2 MR. MILLER: In the contract setting?

3 JUSTICE SOTOMAYOR: Yes.

4 MR. MILLER: Yes, third parties could come
5 in and if they -- they would have to satisfy the public
6 interest test. They would have to show that there are
7 -- the Court has described it variously as extraordinary
8 circumstances, severe impact on the public interest.

9 JUSTICE SOTOMAYOR: Could they come in and
10 show that between the contracting parties the price is
11 unfair? Is that what this is about, that they would try
12 to come in and somehow define the public interest as
13 being informed by the unfairness to the individual
14 parties?

15 MR. MILLER: I think that sort of argument
16 would be foreclosed by Sierra.

17 JUSTICE SOTOMAYOR: Well, but that's the
18 question before us. The D.C. Circuit said they
19 shouldn't be bound by that determination, and you're
20 arguing that they should be because --

21 MR. MILLER: What the Court said in Sierra
22 is that mere unfairness, one of the -- the fact that one
23 of the contracting parties got a bad bargain is not a
24 reason to set aside the contract, except for the Court
25 did reserve the extraordinary circumstance where it's

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1 going to put the supplier out of business, which would
2 adversely affect the public interest if they can no
3 longer deliver power at that rate.

4 JUSTICE SOTOMAYOR: So it goes back to my
5 original question with your adversary, which is: Is
6 there a difference among the objectors here between
7 those who are objecting to the terms between the two
8 contracts in the parties as outsiders, as members of the
9 public, and those who are objecting because this
10 settlement agreement does something different? It binds
11 them personally to a buying price, and so why shouldn't
12 there be a different approach to those individuals?

13 MR. MILLER: I think there are two responses
14 to that, Your Honor. The first is that the reasoning of
15 the court of appeals draws no distinction between those
16 --

17 JUSTICE SOTOMAYOR: I agree. And so the
18 question is: Should there be a distinction?

19 MR. MILLER: And I think certainly the
20 commission appreciates the idea that there's something
21 wrong about, or there's something unfair about A and B
22 getting together and deciding on the rate that C is
23 going to pay. And to the extent you're concerned about
24 that situation, the answer to that is that when A and B
25 set the rate that C has to pay, C is not paying a

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1 contract rate in the Mobile-Sierra sense, because he's
2 not -- C's paying a rate he has not agreed to.

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

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

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

17 The last feature is not a Mobile-Sierra --
18 is not eligible for Mobile-Sierra treatment.

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

24 JUSTICE SCALIA: Right. But that's -- but
25 that's not what the D.C. Circuit said. The D.C. Circuit

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

3 MR. MILLER: That's right. And the
4 D.C. Circuit made that quite clear, particularly on page
5 28 of the petition appendix in its opinion, where it
6 describes the question --

7 JUSTICE STEVENS: But it's 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 is our view, that that's
11 -- it's not the basis for the court of appeals decision.

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

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

20 CHIEF JUSTICE ROBERTS: And just to follow
21 up, you think we should not address either of those,
22 whether it's a contract or whether you have authority to
23 make an exception to the Mobile-Sierra doctrine?

24 MR. MILLER: No, we think the Court should
25 answer only the question that was ruled upon below and

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1 leave those other issues to the extent that --

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

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

18 JUSTICE BREYER: And we would have to take
19 it on the assumption -- wait, I don't want -- do you
20 have five minutes left that you're reserving?

21 MR. MILLER: I don't --

22 CHIEF JUSTICE ROBERTS: You don't get to
23 reserve time.

24 JUSTICE BREYER: What's the assumption? The
25 assumption is the court of appeals thinks that the

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1 contract between -- among the generating -- the
2 generators, that that is a Mobile-Sierra contract. So
3 we're supposed to say, if that were a Mobile-Sierra
4 contract, which it isn't, then we should decide whether
5 a third party could attack it, about which the
6 commission has said nothing. Is that right?

7 MR. MILLER: No, Your Honor, because we do
8 agree that at least some of the rates that are covered
9 by the public interest review clause in the settlement
10 --

11 JUSTICE BREYER: The transition rates?

12 MR. MILLER: The transition rates as between
13 the settling parties.

14 JUSTICE BREYER: The reasonableness depends
15 upon the other. The validity depends upon the other.
16 It's all part of a package.

17 MR. MILLER: Their validity doesn't -- their
18 validity depends upon the mechanism that's created by
19 the settlement, which the commission reviewed under the
20 ordinary just and reasonable standard. It doesn't
21 depend on the clearing prices of the auctions, which
22 are -- I mean, what the --

23 JUSTICE BREYER: That's all true, but I
24 would want to know what the commission thought about
25 that one, too.

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

13 The -- the last point I would like to make
14 about the court of appeals' analysis is that this Court
15 made clear in Morgan Stanley that Mobile-Sierra applies
16 to the commission when it is acting sua sponte, and
17 there is no reason why FERC's power should depend on
18 whether somebody has filed a complaint. If FERC is
19 bound, public interest standard, under Mobile-Sierra
20 when there is a Mobile-Sierra contract, it makes very
21 little sense to say that it ceases to be bound by that
22 as long as anybody in the world other than the
23 contracting parties comes in and files a complaint to
24 initiate the FERC investigation.

25 JUSTICE SCALIA: Well, we -- we don't know

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1 that that's the other side's position. I was going to
2 ask. Their position is that the third party can -- can
3 attack the -- the agreement without being encumbered by
4 Mobile-Sierra, but I don't know that they've said that
5 once a third party does mount such an attack the
6 commission is suddenly also unencumbered by
7 Mobile-Sierra.

8 I would assume that their position is the
9 commission remains bound by Mobile-Sierra, but these
10 third parties can -- can demand a court -- that a court
11 apply a different standard.

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

14 JUSTICE SCALIA: We --

15 MR. MILLER: -- if the commission had one
16 standard and on review of the commission order the court
17 were to apply a standard different from what --

18 JUSTICE SCALIA: I'm not sure that's any
19 stranger than saying the commission has one standard
20 until somebody else challenges it, whereupon the
21 commission has a different standard. You don't think
22 that's strange?

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

25 (Laughter.)

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1 MR. MILLER: If there are no further
2 questions --

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

5 General Blumenthal.

6 ORAL ARGUMENT OF GEN. RICHARD BLUMENTHAL
7 ON BEHALF OF THE RESPONDENTS

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

11 There is one central truth here on which we
12 and the government agree. These are not contract rates
13 at issue here. They are tariff rates. That is a
14 central truth that unites the government and the
15 Respondent, because these rates out of the auction
16 process will be rates of general applicability, applying
17 not only to those contractors, the parties who agreed to
18 the contract, but they will be binding on NSTAR, which
19 sells 25 percent of the power in the New England market;
20 they will be binding on the other five Respondents,
21 including Maine and Massachusetts as well as
22 Connecticut.

23 JUSTICE SOTOMAYOR: Well, they can
24 self-supply, can't they?

25 MR. BLUMENTHAL: Even if they had that

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1 option, Justice Sotomayor, it would not change a tariff
2 into a contract. Just because there is the option of
3 self-supply doesn't mean that parties who are disputing
4 the contract, disagreeing with it, not to mention not
5 contracting, should be bound to it as though it were a
6 contract. The option --

7 JUSTICE SCALIA: They're not bound to it.
8 They -- they are saying that -- claiming that their
9 rates are too high because the contract was too high, so
10 -- and therefore, their rates are unreasonable. And
11 what Mobile-Sierra says -- it certainly says it as
12 between the two contracting parties -- that if it's at
13 arm's length between sophisticated seller and buyer
14 of -- of -- of the power, they are bound by it, and
15 the -- and the issue is here is whether somebody
16 downstream who says that since this contract is so
17 exorbitant, the rates are too high, whether that person
18 is likewise bound by Mobile-Sierra. Isn't that right?

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

21 JUSTICE GINSBURG: But that's what the court
22 of appeals decided. Their simple question was
23 Mobile-Sierra binds the contracting parties and it
24 doesn't -- the rate doesn't stick for anybody else.
25 That's all they decided.

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

5 MR. BLUMENTHAL: Absolutely correct, Justice
6 Ginsburg. The D.C. Circuit's reasoning here was based
7 on facts that were, in fact, not present here. We
8 agreed then, we argued to the FERC, we argued to the
9 court of appeals, we argued in opposition to certiorari,
10 that what's involved here are tariff rates.

11 And the D.C. Circuit's ruling in our view
12 was correct, and its reasoning was correct, insofar as
13 Mobile-Sierra binds contracting parties, as Justice
14 Scalia has just articulated and Morgan Stanley
15 reiterated. It involved parties trying to escape an
16 improvident bargain.

17 What we have here is an auction system that
18 sets rules of general applicability.

19 JUSTICE GINSBURG: But I thought one large
20 difference -- I thought Justice Scalia suggested that
21 the rate negotiated by -- in that bilateral agreement,
22 that that rate would not be subject to just and
23 reasonable attack by anyone, that the public interest
24 standard attaches to that rate and FERC can't abrogate
25 it. It's a rate that's set, it's binding on FERC, and

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1 FERC presumably, because it has no authority to abrogate
2 it, could not entertain any complaint that would ask to
3 have it abrogated.

4 MR. BLUMENTHAL: Section 4(c) of the
5 settlement agreement that FERC approved under the just
6 and reasonable standard says to the world: We can make
7 an exception for ourselves under the just and
8 reasonable -- under the Memphis rule, we can make an
9 exception to the public interest standard. The
10 government says it can make an exception for itself.
11 The only ones powerless to invoke --

12 JUSTICE GINSBURG: I didn't follow. I
13 didn't think that it was -- was there a Memphis clause
14 in this settlement?

15 MR. BLUMENTHAL: There is. There is in
16 Section 4(c) in effect a modified Memphis clause which
17 says that the parties can come together and agree to a
18 different standard, Justice Ginsburg.

19 So, in a sense, the irony here, if the Court
20 were to reverse and apply Morgan Stanley -- I'm sorry,
21 Mobile-Sierra and Morgan Stanley -- would be that the
22 only ones powerless to invoke the just and reasonable
23 standard to review the auction rates would be the
24 Respondents, who never agreed to this supposed contract.

25 JUSTICE BREYER: Why? Why are you

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1 powerless? Why don't you to go to the commission and
2 say: Commission, there is always special circumstances.
3 You may think that in this kind of situation, which is a
4 special situation, that the public interest standard,
5 whether it's in a contract or whether it's in a tariff
6 or wherever you want to put it, is the right standard
7 for review? You may think that. If you don't think it
8 for yourselves, you don't think it for somebody else,
9 and here's some reasons why you don't think it for us.

10 And if they agree with your reasons, they'll
11 say: Fine, go ahead. And if they don't, they don't.
12 Why aren't you exactly as powerful or powerless as
13 anybody else?

14 MR. BLUMENTHAL: Justice Breyer, there is an
15 immense difference, as you and the Court is well aware
16 because it has been articulated in opinions, between the
17 public interest standard and the ordinary just and
18 reasonable standard, and the government would like that
19 discretion to say in effect --

20 JUSTICE BREYER: My point is if you don't
21 like that as applied to your situation, you have a
22 remedy. That's what the public -- that's why they're
23 there, agencies. They are there to listen to you and
24 give you a remedy, and the remedy is, if you convince
25 them you shouldn't be subject to that, they'll say fine;

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1 and otherwise not. Why are you coming to us who know
2 nothing about natural gas and asking us to do it?

3 MR. BLUMENTHAL: We're not here by choice,
4 Your Honor.

5 (Laughter.)

6 JUSTICE BREYER: It's electricity.

7 MR. BLUMENTHAL: If you tell me at this
8 point to go home, I'm happy to do it. We're here
9 because we believe that the section 4(c) establishes a
10 standard that is contrary to the statute, the just and
11 reasonable standard.

12 JUSTICE BREYER: Then you're going to say
13 they never can do it, but it's well settled. It's well
14 settled that they sometimes can say -- I mean, my point
15 is this. I just found the quote I was looking for. I
16 have been sort of thinking sort of thinking natural gas.
17 It applies to electricity capacity, too. Justice
18 Jackson: "The wealth of Midas and the wit of man cannot
19 produce or reproduce a natural gas field."

20 That applies to electricity capacity. We
21 can't reproduce it. You can't. The commission devises
22 a system for trying to get it done, and if they do it
23 reasonably, they win.

24 MR. BLUMENTHAL: But the -- the commission
25 should not be accorded discretion to adopt a standard

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1 that contravenes the statute. We're dealing here --

2 JUSTICE BREYER: The standard -- the statute
3 is "just and reasonable." That calls up a whole
4 mechanism from the 1930s. I thought that it is long --
5 we're long past that point, that -- that whatever
6 Brandeis thought it was, which they did in the '30s and
7 '40s, that it has also been interpreted to include the
8 power of the commission to deviate from that, because
9 they find, for example, contract rates under certain
10 circumstances to be just and reasonable. Even though
11 you don't use cost-of-service ratemaking.

12 MR. BLUMENTHAL: What we're dealing with in
13 this case is the question of whether the government and
14 the commission should have virtually unbridled
15 discretion to adopt a standard that has been called
16 "practically insurmountable," as recently as Morgan
17 Stanley.

18 JUSTICE SCALIA: But that -- that's because
19 of section 4(c), you say?

20 MR. BLUMENTHAL: Section 4(c) of the
21 agreement --

22 JUSTICE SCALIA: Right. Which -- which
23 gives the commission a good deal of flexibility, which
24 you say you -- your clients don't have or your State
25 doesn't have. But that isn't the basis on which this

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1 case was decided below. It was decided on the very
2 simple basis that the Mobile-Sierra doctrine simply does
3 not apply to challenges by third parties. It had
4 nothing to do with the details of 4(c) and the -- the
5 excessive discretion given to -- given to the commission
6 but not to you.

7 It was a very simple proposition on which we
8 granted cert, whether Mobile-Sierra's "public interest"
9 standard applies when a contract rate is challenged by
10 an entity that was not a party to the contract. That's
11 the question. And what's your answer to that?

12 MR. BLUMENTHAL: Our answer is --

13 JUSTICE SCALIA: Do you support the opinion
14 of the -- of the court below?

15 MR. BLUMENTHAL: We do support it, Justice
16 Scalia, and the reason we do it is Mobile-Sierra is
17 about contracts.

18 JUSTICE SCALIA: It isn't about contracts.
19 It's about reasonable rates. I thought what it was was
20 a determination by the commission, approved by -- by
21 this Court, that when two giants of the industry, very
22 knowledgeable, deal in arm's length and come up with --
23 with a contract, that is presumptively reasonable, and
24 unless it contravenes the public interest, that rate
25 will -- will be upheld.

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1 Now, you say it should be upheld only
2 between the two contracting parties. What good does
3 that do?

4 MR. BLUMENTHAL: It -- it can be held --
5 upheld only between the two contracting parties if
6 they're the ones who have agreed to it. Under
7 Mobile-Sierra there is a presumption of free negotiation
8 and consent.

9 JUSTICE KENNEDY: But the rationale is the
10 commonsense notion that it's a presumptively reasonable
11 rate, and if that's true, how is that altered by the
12 identity of the party that attacks it?

13 MR. BLUMENTHAL: Because, Your Honor, the
14 question also is what the standard should be if it's
15 presumptively reasonable; and it is taken as such,
16 because it is freely negotiated, because there is
17 consent to it. Because one of them is seeking to escape
18 it, and use the commission to escape it, then
19 Mobile-Sierra says it should be presumed just and
20 reasonable, and only when the public interest is --

21 JUSTICE KENNEDY: Well, why is -- why is it
22 not presumptively a commonsense notion when some
23 different party attacks it? It -- it's still the
24 determination that this rate, as a commonsense matter,
25 is presumptively legal.

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1 MR. BLUMENTHAL: As to this case, again,
2 there are no rates yet. We're talking about an auction
3 mechanism that will not even involve a contract, and the
4 government says so as well, that we in the government
5 agree that it will not involve a contract. So how --

6 JUSTICE KENNEDY: Yes, that's different than
7 Mobile-Sierra, although Mobile-Sierra did invoke market
8 forces of another kind -- of another kind.

9 MR. BLUMENTHAL: Well, you know, I feel,
10 with all due respect, that we are talking in alternate
11 universes here, the government and the Petitioners and
12 we; and the reason is, as the Court has quite aptly
13 identified, the court of appeals used a rationale that
14 simply is not wholly fitting.

15 JUSTICE GINSBURG: Should we tell them that,
16 and then they can pick it up from there?

17 MR. BLUMENTHAL: Well --

18 JUSTICE GINSBURG: Because what they did say
19 could be -- have heavy consequences. We know that that
20 has already happened. FERC has revised a number of
21 contracts to conform to the D.C. Circuit's idea that
22 it's the parties to the -- to the contract, not the rate
23 that's sheltered by Mobile-Sierra. That's a very
24 consequential decision, and so we would tell the D.C.
25 Circuit, if we agreed with FERC and the Petitioners on

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1 that, D.C. Circuit, you've got that wrong.

2 Now, there may be other matters, other
3 issues like the ones that you would like us to decide as
4 a matter of first view, but as Justice Scalia has
5 pointed out more than once, we have a question. It is
6 the very question that the D.C. Circuit decided, why
7 should we go beyond that?

8 MR. BLUMENTHAL: Because addressing that
9 question, Justice Ginsburg, as Justice Breyer said, is
10 not the question that the commission addressed. It
11 isn't the question in terms of the factual situation
12 here that is really at issue. We're dealing here with
13 tariff rates that are set through the auction mechanism.

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

18 (Laughter.)

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

23 MR. BLUMENTHAL: And the government's
24 position on certiorari was that there should be a remand
25 without reversal for reconsideration in light of Morgan

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1 Stanley.

2 CHIEF JUSTICE ROBERTS: You're in a very
3 tough position because of the way this has progressed.
4 I think you can make a strong argument that you
5 shouldn't be bound by these contract rates if FERC
6 doesn't have a lot of discretion to let you go. If FERC
7 has a lot of discretion to let you go, your argument
8 that you shouldn't be bound is a lot weaker. And the
9 way the case has been presented, we're pushing on only
10 one -- one side of that.

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

15 JUSTICE BREYER: So is the answer then,
16 maybe where Justice Ginsburg and Justice Scalia were
17 going, that -- well, I was coming from, why I have been
18 asking this, us I actually think the answer to the
19 question so far on the question presented is
20 "sometimes." Sometimes you can't, sometimes you can.
21 It depends on a lot of things, situations,
22 circumstances, arguments to commissions, what they held,
23 et cetera. So maybe that's the thing to do, you answer
24 the question, say "sometimes." Sometimes they can use
25 one, sometimes it's the other. Indeed, in this very

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1 case, they've argued that it's -- that it's not even
2 within the mainstream of Mobile-Sierra, and maybe that's
3 so, maybe it's not. Send it back, say it depends on
4 circumstances, time, et cetera, and then they can argue
5 all these things out that we've just been hearing.

6 What about that?

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

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

14 MR. BLUMENTHAL: No. In our view, Mr. Chief
15 Justice, noncontracting parties under Mobile-Sierra
16 cannot be bound --

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

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

24 MR. BLUMENTHAL: The sometimes -- if I could
25 completely answer, Mr. Chief Justice, is that the

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1 sometimes would include contract rates. In other words,
2 where there are strictly contract rates, whereas, here,
3 we have tariff rates, FERC would not have that
4 discretion.

5 It cannot have discretion to apply the
6 public interest standard to tariff rates any more than
7 it could apply the ordinary just and reasonable standard
8 to contract rates, which Mobile-Sierra --

9 JUSTICE SCALIA: Has anybody before even
10 suggested that Mobile-Sierra is a sometimes thing? Does
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, downstream, the rates -- or even between the
14 parties, the rates would violate the public interest?

15 That's a sometimes. It won't apply then,
16 but have we ever suggested that -- you know, today, it
17 may; tomorrow, it -- it won't?

18 Are we ever suggesting what standards might
19 determine the sometimes question?

20 MR. BLUMENTHAL: Mobile --

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

25 I mean, that was the whole purpose of

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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 go -- can I stop
19 you there, just so that we're all on the same page? If
20 this were, hypothetically, a contract brief, some of the
21 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

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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's -- 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 a showing in high extraordinary 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: -- to rates set between
23 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

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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 flowed --

9 JUSTICE SOTOMAYOR: Now, you're trying to
10 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 the 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

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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 the
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 --

9 JUSTICE SOTOMAYOR: So you are taking the
10 extreme -- you are accepting what the lower court said?
11 Under every circumstance, if it involves a contract
12 price, fair and reasonable being something other than
13 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 that the rate's not fair and reasonable?

23 JUSTICE SCALIA: But FERC can -- can FERC --
24 can FERC challenge, too? Because FERC's a -- sort of a
25 third party.

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

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

5 MR. BLUMENTHAL: Mobile-Sierra applies --

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

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

12 JUSTICE SCALIA: Okay.

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

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

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

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

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

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

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

22 JUSTICE BREYER: So are you aware of any law
23 or any statement by any judge, ever, that exempts the --
24 the FERC from the basic requirement that it -- its
25 rules, regulations, and everything else, not the

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1 arbitrary and capricious use of discretion?

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

4 JUSTICE BREYER: No. Okay. Thank you.
5 (Laughter.)

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

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

19 So -- so where are we?

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

25 JUSTICE GINSBURG: That's a third standard

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1 between just and reasonable and public interest? You
2 want us to add another tier?

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

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

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

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

25 MR. BLUMENTHAL: And -- yes, Justice

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

9 JUSTICE GINSBURG: Didn't say that.

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

15 Thank you, Your Honor.

16 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

17 Mr. Lamken, you have three minutes.

18 REBUTTAL ARGUMENT OF JEFFREY A. LAMKEN

19 ON BEHALF OF THE PETITIONERS

20 MR. LAMKEN: Thank you, Your Honor.

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

24 MR. LAMKEN: No, Your Honor. The fact that
25 they were parties to the settlement process simply shows

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1 that they've met the sort of broad administrative law
2 standing requirement. It does not show they were an
3 actual purchaser under the agreements here.

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

17 So while we adhere to our view that these
18 are contract rates, this Court need not get to it. It
19 need only address the issue the Court addressed below,
20 which is whether there is a broad-based, third-party
21 exception to Mobile-Sierra. And the answer is no.
22 Mobile-Sierra can't be the energy law equivalent of the
23 Maginot Line, that protects against direct results from
24 the parties themselves but provides no protection, not
25 whatsoever, against complaints by noncontracting

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1 parties.

2 JUSTICE SCALIA: I like that. That's very
3 imaginative.

4 MR. LAMKEN: Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
6 The case is submitted.

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

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