Consumers versus Contracts: *Morgan Stanley*, *Maine*, and the *Mobile-Sierra* Doctrine

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I. INTRODUCTION

The Supreme Court unwittingly spawned the so-called "*Mobile-Sierra* doctrine" in 1956 with its two same-day decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp*.[1] and *Federal Power Commission v. Sierra Pacific Power Co.*[2] The doctrine creates an important restriction on the Federal Energy Regulatory Commission's (FERC)[3] ability to interfere with wholesale energy rates set forth in private contracts. It does this by triggering a heightened standard of review that applies when the Commission reviews fixed rates in private contracts; specifically, the doctrine shifts the standard from the default "just and reasonable" standard to a more rigorous "public interest" version. This special modification attempts to balance the parties' freedom of contract with the Commission's statutory obligation to ensure just and reasonable rates for consumers. For over 50 years, the doctrine has been a bedrock principle of private contract rights in the energy industry. But two recent interpretations of the doctrine by the D.C. Circuit Court of Appeals and the United States Supreme Court are likely to significantly impact its scope in the future.

In the summer of 2008, in *Morgan Stanley Capital Group, Inc. v. Public Utility District Number 1*,[4] the Supreme Court addressed the *Mobile-Sierra* doctrine for the first time since its decisions in the two cases from whence the doctrine sprang over 50 years ago. In addition to officially enshrining the doctrine in the Supreme Court's jurisprudence, it interpreted its applicability in a way that may have expanded its reach beyond what was previously acknowledged. *Morgan Stanley* held that the *Mobile-Sierra* doctrine applies before and regardless of whether FERC conducts a plenary review of a contract rate and despite the presence of abnormal market conditions, thus fixing the doctrine's trigger point at the time of contract formation.[5] Just shy of three months earlier, in *Maine Public Utilities Commission v. FERC*,[6] the D.C. Circuit confronted the novel question of whether the *Mobile-Sierra* doctrine applied to challenges brought by third parties not privy to the contract.

1. 350 U.S. 332 (1956).
2. 350 U.S. 348 (1956).
3. This Article uses the terms Commission and FERC interchangeably to refer to the agency and all of its post-Federal Power Act embodiments.
4. 128 S. Ct. 2733 (2008) [hereinafter *Morgan Stanley*]. Although the Court acknowledged that it has "seemingly blessed" certain tenets of the doctrine, *id*. at 2739-40, it also confirmed that it has never utilized the language "*Mobile-Sierra* doctrine" in its opinions prior to this decision, *id*. at 2749 n.6.
5. *Id*. at 2746-48.
6. 520 F.3d 464 (D.C. Cir. 2008), *reh'g denied*, 2008 U.S. App. LEXIS 24022 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2050 (2009).

It held that the *Mobile-Sierra* doctrine did not apply to such non-parties and could not be used to subject them to a more demanding burden of proof as it does the contract principals because the contract cannot serve to bind non-parties.[7]

These two interpretations about the doctrine's scope may conflict. While some contend that the Supreme Court's holding effectively overrules the *Maine* case, others maintain that the two cases are distinguishable because of the different types of contracts each case involved; the contract in *Maine* involved a multi-party settlement agreement while the contract in *Morgan Stanley* was a standard supply agreement.[8] Interestingly, the D.C. Circuit itself denied FERC's petition for rehearing in light of *Morgan Stanley* on this point; however, it did not explain why.[9]

Accordingly, the basic question presented here is whether a non-party challenge to a contract rate is still exempt from the *Mobile-Sierra* doctrine under *Maine* after the *Morgan Stanley* decision. The answer may have serious ramifications for a range of potential litigants, including fledgling energy outfits trying to make inroads into the competitive and monopolistic markets of this industry, state ratemaking authorities that might find their last vestiges of regulatory power over

7. *Id.* at 478.

8. *Compare* Richard P. Bress et al., *A Deal Is Still a Deal:* Morgan Stanley Capital Group v. Public Utility District No. 1, 2007-2008 SUP. CT. REV. 285, 308 (2009) (arguing that *Morgan Stanley* "requires use of the public interest standard for third-party challenges") *and* Withdrawal of Notice of Proposed Rulemaking and Termination of Rulemaking Proceeding, 125 F.E.R.C. ¶ 61,310 (2008) (repealing rulemaking to set a default standard of review in all jurisdictional agreements, considering the matter settled by the Supreme Court's decision in *Morgan Stanley*) *with* Petition of Respondent FERC for Panel Rehearing and Suggestion for Rehearing En Banc, Me. Pub. Utilities Comm'n v. FERC, 520 F.3d 464 (D.C. Cir. 2008) (No. 06-1403) (per curiam), *reh'g denied*, 2008 U.S. App. LEXIS 24022 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2050 (2009), *and* Nev. Power Co., 125 F.E.R.C. ¶ 61,312, para. 28 n.63 (2008) (responding to the Nevada Attorney General's argument that challenges brought by Nevada Consumer Protection Department are not subject to *Mobile-Sierra* presumption as too premature to address). Some of the debate centers on whether the *Maine* and *Morgan Stanley* holdings apply separately to the different "types" of agreements that were present in those cases—specifically, that *Maine* applies to settlement agreements and that *Morgan Stanley* applies to wholesale power agreements. *See, e.g.*, Coral Power, L.L.C., 125 F.E.R.C. ¶ 61,176 (2008) (Wellinghoff, Comm'r and Kelly, Comm'r, concurring in part) (distinguishing *Maine* and *Morgan Stanley* along the lines of the types of agreements involved therein).

9. *See* Order Denying Petition for Rehearing, Me. Pub. Utilities Comm'n v. FERC, 2008 U.S. App. LEXIS 24022 (D.C. Cir. 2008) (No. 06-1403) (per curiam).

interstate deliveries conclusively preempted, and consumer groups that advocate on behalf of the paying masses for fair and equitable rates.

Part II of this Article provides a brief background of the *Mobile-Sierra* doctrine, explaining its basic tenets, its effect on the standard of review in Commission proceedings, how it comes to be triggered, and how it applies. Part III sets forth the interpretations provided by *Morgan Stanley* and *Maine* and explains the ramifications these holdings may have on non-party challenges to contract rates. Part IV analyzes the significance of the Supreme Court's characterization of the *Mobile-Sierra* doctrine as representing a "presumption" about the contract rate. The Article concludes by speculating about the effects of *Morgan Stanley* and *Maine* decisions on the doctrine's application going forward. It also lays out a policy argument favoring non-party exemption from the *Mobile-Sierra* doctrine. The addendum provides a brief discussion of the current appeal of the *Maine* case to the Supreme Court, the arguments of the parties therein, and an explanation of why this Article's arguments are unique.

II. THE *MOBILE-SIERRA* DOCTRINE

A. Origins and Purpose[10]

Wholesale energy rates are typically set in one of two ways. The supplier can either set rates unilaterally by selling energy based on predetermined tariffs or can set rates bilaterally by contracting with individual buyers and fixing the rate in the terms of their agreement.[11] The Federal Power Act (FPA) charges FERC with ensuring that all rates are fair and reasonable and provides FERC with the power pursuant to this duty to review and approve tariff rates before they go into effect and to override privately negotiated rates at any time.[12] Regulated utilities are required to file all eligible rate schedules, as well as any documents affecting those rates, with the Commission.[13] Any rate that is found not

10. This synopsis of the *Mobile-Sierra* doctrine is only intended as a brief overview of the doctrine's basic tenets. For a more complete discussion of the origins, cases, and evolution of the doctrine, see generally Carmen L. Gentile, *The* Mobile-Sierra *Rule: It's Illustrious Past and Uncertain Future*, 21 ENERGY L.J. 353 (2000).

11. *See Morgan Stanley* , 128 S. Ct 2733, 2737-38 (2008).

12. Federal Power Act, 16 U.S.C. §§ 824d-e (2006). *See also* Boston Edison Co. v. FERC, 233 F.3d 60, 64 (1st Cir. 2000) ("In regulating electricity rates, the [FPA] follows . . . a well-developed model: the utility sets the rates in the first instance, subject to a basic statutory obligation that rates be just and reasonable . . . . [FERC] can investigate newly filed rate, or an existing rate, and, if the rate is inconsistent with the statutory standard, order a change in the rate to make it conform to that standard.").

13. 16 U.S.C. § 824d(c). Under § 824d, regulated utilities are required to keep on file with the Commission "schedules showing all rates and charges for any transmission

be "just and reasonable," grants "undue preference or advantage," or creates "undue prejudice or disadvantage" is unlawful and must be corrected.[14] The Commission, acting *sua sponte* or upon complaint, is authorized to temporarily suspend any new rates, pending hearings to evaluate whether they meet these criteria.[15] If *any* rate fails review—i.e., it is found to be "unjust, unreasonable, unduly discriminatory, or preferential"—the Commission can replace it with a rate that it determines will satisfy the criteria—i.e., one that is "just and reasonable."[16] Taken together, this establishes the framework of just-and-reasonable review—the standard that the Commission must apply when considering challenges brought against filed rates under sections 205 and 206 of the FPA.[17] This framework and obligation operates at all times over the background policy at the heart of the FPA: consumer protection.[18]

The *Mobile-Sierra* doctrine limits FERC's power to adjust rates in the context of rates fixed by a contract, as opposed to rates fixed by the Commission in the traditional tariff manner based on a fair rate of return.[19] As previously mentioned, the doctrine is the genesis of two Supreme Court cases decided on the same day in 1956—*Mobile* and *Sierra*—and derives its name from the Circuit Courts' shorthand reference to the rule that the two decisions created.[20]

In *Mobile*, the Court explained that the Commission's review power exists to ensure the lawfulness of rates fixed by a company, rather than

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or sale subject to the jurisdiction of the Commission . . . together with all contracts which in any manner affect or relate to such rates [and] charges." *Id.* The FPA gives FERC jurisdiction to regulate wholesale energy rates except the rates charged by local utilities to their customers. *Id.* §§ 824(a), (b)(1).

14. *Id.* §§ 824d(a)-(b), (e).

15. *Id.* § 824d(e).

16. *Id.* § 824e(a) ("Whenever the Commission . . . upon its own motion or upon complaint, shall find that any rate, charge, or classification . . . or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, or unduly discriminatory or preferential . . . [it] shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.").

17. Pac. Gas & Elec. Co. v. FERC, 306 F.3d 1112, 1118 (D.C. Cir 2002); *Boston*, 233 F.3d at 66.

18. Pub. Util. Dist. No. 1 of Snohomish County Wash. v. FERC, 471 F.3d 1053, 1058 (9th Cir. 2006), *rev'd on other grounds*, 128 S. Ct. 2733 (2008) [hereinafter *Snohomish*].

19. *Boston*, 233 F.3d at 65.

20. *Snohomish*, 471 F.3d at 1057 n.3; Potomac Elec. Power Co. v. FERC, 210 F.3d 403, 406 (D.C. Cir. 2000).

by the Commission.[21] While the Act preserves companies' powers to contract and set rates no differently than they would in absence of the Act, "the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest."[22]

In *Sierra*, the Court expanded on this new public-interest standard articulated in *Mobile*.[23] It explained that in order for a party to prevail on a unilateral request to increase a contract rate under this public-interest standard, it must show that the rate is "so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."[24] As a result, a rate that yielded a less-than-fair rate of return—sufficient grounds for revision under the traditional rate-setting model—would no longer justify invocation of the Commission's revisionary powers.

In its most narrow sense, the *Mobile-Sierra* doctrine establishes the rule that a party's unilateral request for a revision of a contract rate with another party may only proceed if the existing rate is such that it adversely affects the public interest. This creates the so-called "public interest" standard of review that applies in proceedings of this type. The public-interest standard permits a rate revision if the petitioning party can show that the existing rate: (1) impairs the financial ability of the public utility to continue its service, (2) casts an excessive burden upon other consumers, or (3) is unduly discriminatory.[25] The rule's rationale is that a mutually agreed-upon rate should not be deemed "unjust" or "unreasonable" simply because it turns out to be unprofitable for one of the parties who agreed to it in the first place.[26] The rule's policy is to "preserve the integrity of contracts [and] permit[] the stability of supply arrangements . . . [that] is essential to the health of the . . . industry."[27] Therefore, the doctrine both prevents a regulated party from (mis)using the Commission's power in order to relieve itself of its own

21. United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 341 (1956). In *Mobile*, the Court held that "[t]he scope and purpose of the Commission's review power [is] to determine whether the rate fixed by the . . . company is lawful." *Id.* While the FPA preserves the power of companies to "make rates and contracts" no differently than if they would in absence of the FPA, "the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest." *Id.* at 343-44.

22. *Id.* at 344.

23. Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 355 (1956).

24. *Id.*

25. *Id.*

26. *Id.* at 354-55.

27. *Mobile*, 350 U.S. at 380.

"improvident bargain"[28] and preserves the other party's bargained-for benefit.[29] For this reason, a petitioner has a heavy burden to overcome before the Commission will intervene to adjust a contractually set rate.

In sum, the doctrine exists to prevent contract parties from manipulating the Commission's power for their own ends and to restrain the Commission from exercising its own power unjustly. It seeks to balance private contractual rights with the Commission's regulatory mission to protect the consuming public by subordinating the statutory revision mechanism to the cannons of contract law.[30] As such, the parties' contract comes to govern the legality of the rate and defines the rights of buyer and seller, up to the point where the public interest demands otherwise.

B. The Just-and-Reasonable & Public-Interest Standards

While at least one court has called the *Mobile-Sierra* doctrine "refreshingly simple,"[31] its application has actually been fraught with ambiguity over the years, particularly regarding the different meanings and requirements of the just-and-reasonable and public-interest standards. As the First Circuit described in attempting to distinguish the standards, "Admittedly, the rates are too high for the period in question to be just and reasonable . . . but are they so high as to be contrary to the public interest—and what would this mean anyway? Very little useful precedent exists . . . ."[32] While the precise threshold dividing the two standards remains elusive, we can ascertain in at least broad strokes the major substantive difference between them.

28. *Sierra*, 350 U.S. at 355 (noting that "the purpose of the power given to the Commission by § 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities . . . ").

29. Town of Norwood v. FERC, 587 F.2d 1306, 1310 (D.C. Cir. 1978).

30. Ne. Utilities Serv. Co. v. FERC (*Northeast II*), 55 F.3d 686, 689 (1st Cir. 1995) ("[T]he *Mobile-Sierra* doctrine . . . represents the Supreme Court's attempt to strike a balance between private contractual rights and the regulatory power to modify contracts when necessary to protect the public interest."); Borough of Lansdale v. Fed. Power Comm'n, 494 F.2d 1104, 1113 (D.C. Cir. 1974) (explaining that the purpose of the *Mobile-Sierra* doctrine is to "subordinate the [revision] mechanism to the broad and familiar dictates of contract law" and, thus, "[t]he contract between the parties governs the legality of the rate").

31. *Borough of Lansdale*, 494 F.2d at 1113.

32. Boston Edison Co., v. FERC, 233 F.3d 60, 68 (1st Cir. 2000) (citation omitted).

It is important to first realize that the public-interest standard of review created by *Mobile* and *Sierra* is technically no legally different from the statutory just-and-reasonable standard.[33] While the term "public interest" does not appear anywhere in FERC's authorizing statute, apparently having been conjured by the Supreme Court,[34] and while the two standards are confusingly referred to as "the two modes of review," the public-interest standard is really just a special application of the statutory just-and-reasonable standard that applies in the context of contract rates.[35] The public-interest standard is ostensibly only a contextual tweak to the statutory standard of review for challenges of a particular nature, not an "obviously indefensible" modification of the statute itself.[36] But while the two standards are theoretically one-and-the-same, substantively, the special public-interest and plain just-and-reasonable standards entail very different burdens of proof.

Both standards leave considerable room for interpretation and involve fact-intensive inquiries.[37] Both have been the subject of confusion and varying application.[38] Without speculating on the specific facts that would be needed to prevail under each standard, it suffices to say that the public-interest standard poses a much higher burden of proof than the plain just-and-reasonable standard.[39] In the past, the burden created by the public-interest standard has even been described as "practically insurmountable," rendering the possibility of future rate modification "virtually meaningless."[40] As the Supreme Court explained, the

33. *Morgan Stanley*, 128 S. Ct. 2733, 2743 (2008) (agreeing with the Ninth Circuit's interpretation on this point).

34. *Boston*, 233 F.3d at 65.

35. *Morgan Stanley*, 128 S. Ct. at 2740.

36. *Id*. at 2743.

37. *See Morgan Stanley*, 128 S. Ct. at 2747, 2750 (agreeing with Ninth Circuit that the "three [*Sierra*] factors are in any event not the exclusive components of the public interest" in all contexts); Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968) ("[A]dministrative authorities must be permitted . . . to adapt their rules and policies to the demands of changing circumstances.").

38. *See, e.g.*, *Snohomish*, 471 F.3d 1053, 1060 n.8, 1089 (9th Cir. 2006) (adopting a "zone of reasonableness" test in a high-rate challenge); Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 708-13 (D.C. Cir. 2000) (affirming FERC's adoption of specialized "generic public interest findings" in orders imposing open access); *Northeast II*, 55 F.3d 686, 690-91 (1st Cir. 1995) (adopting a broader definition of the public interest in high-rate challenge reflects "whose ox is gored"); Kansas Cities v. FERC, 723 F.2d 82, 94-95 (D.C. Cir. 1983) (recognizing that "many courts and regulatory agencies confuse the concepts of just and reasonable rates and nondiscriminatory rates"); *see also, e.g.*, *Boston*, 233 F.3d at 64-65.

39. Atlantic City Elec. Co. v. FERC, 295 F.3d 1, 14 (D.C. Cir. 2002); *Northeast II*, 55 F.3d at 691.

40. Papago Tribal Util. Auth. v. FERC, 723 F.2d 950, 954 (D.C. Cir. 1983) (explaining that the possibility of future rate change is virtually meaningless unless it envisions a just and reasonable standard); *accord Kansas Cities*, 723 F.2d at 87-88 ("To

regulatory system "contemplates abrogation of these agreements only in circumstances of *unequivocal* public necessity."[41] In this vein, the D.C. Circuit offered an illustrative juxtaposition:

> [In promulgating a rule,] FERC's rulemaking authority requires only that it point to a generic public interest in favor of a proposed rule; the public interest necessary to override a private contract, however, is significantly more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract's deleterious effect.
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> . . . [M]ore is required to justify regulatory intervention in a private contract than a simple reference to the policies served by a particular rule.[42]

C. Triggering the Rule

As previously explained, the *Mobile-Sierra* doctrine applies to wholesale rates fixed by contract. However, the contract parties still have control over whether and to what extent it will apply to their particular agreement. According to the D.C. Circuit in *Papago*, contract parties can specify in their contract the standard of review that will govern subsequent review of any rates contained therein.[43] Under *Papago*, parties have three options to choose from: the statutory just-and-reasonable standard, the public-interest standard, or a hybrid arrangement that adopts the public-interest standard for the parties but preserves for the Commission the right to review under the just-and-reasonable standard.[44] Regardless of which approach the parties choose, the rate can always be challenged under the public-interest standard, since as the court explained:

assume that a contractual provision pertaining to rate adjustment refers to [the public interest] standard is to assume that it was intended to be virtually inoperative . . . .").

41. *Permian Basin*, 390 U.S. at 822 (citation omitted) (emphasis added) (citing United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956)), *quoted in Morgan Stanley*, 128 S. Ct at 2748.

42. Texaco Inc. v. FERC, 148 F.3d 1091, 1097 (D.C. Cir. 1998).

43. *Papago*, 723 F.2d at 953.

44. *Id.* Under the first option, the parties must obtain a preliminary approval from the Commission that the rate is just and reasonable, after which subsequent revisions are also considered under the just and reasonable standard. Federal Power Act, 16 U.S.C. § 824d (2006). The third method is also known as a "Memphis Clause," named for the case that first explained its operation. *See generally* United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div., 358 U.S. 103, 110-113 (1958).

> The Commission's obligation to insure that rates do not violate [the public interest] is imposed for the direct benefit of the public at large rather than (like the prescription of just and reasonable rates) for the direct benefit of the seller and purchaser; and it therefore cannot be waived or eliminated by agreement of the latter.[45]

If the parties are remiss to specify an arrangement, the *Mobile-Sierra* doctrine governs the rate by default. As the First Circuit explained, it is the common understanding of those "bargaining in the shadow of the doctrine" that their contracts will be governed by the *Mobile-Sierra* doctrine unless there is a specific arrangement otherwise.[46] Therefore, it is reasonable to assume that, absent language to the contrary, "the specification of a rate or formula *by itself* implicates *Mobile-Sierra*."[47]

As this illustrates, the contract principals have far reaching ability to insulate their contract rate against future challenges, but this discretion is not without limits. In *Northeast I* and *Northeast II*, the First Circuit examined how the *Mobile-Sierra* doctrine applies to FERC when it intervenes *sua sponte* to adjust a contract rate.[48] The underlying contract contained a provision that attempted to restrict any subsequent review to the public-interest standard, regardless of whether it was initiated by the contract parties or the Commission.[49] The Commission refuted the provision's applicability to the Commission itself, arguing that the principals could neither abrogate a third party's right nor the Commission's duty to review rates under the just-and-reasonable standard and that, even if they could, it could nonetheless use a more

45. *Papago*, 723 F.2d at 954.

46. Boston Edison Co., v. FERC, 233 F.3d 60, 66 (1st Cir. 2000). Drawing in part on *Papago*, the court stated, "In 1972, as today, the parties could negate the protection afforded by *Mobile-Sierra* by providing that a contract rate initially fixed by the parties and filed with FERC could be overridden by FERC at any time under the just and reasonable standard." *Id.* (citing *Memphis Light*, 358 U.S. at 112; *Papago*, 723 F.2d at 953; Kansas Cities v. FERC, 723 F.2d 82, 87 (D.C. Cir. 1983)).

47. *Id*. at 67 (citing *Texaco Inc.*, 148 F.3d at 1096; Appalachian Power Co. v. Fed. Power Comm'n, 529 F.2d 342, 348 (D.C. Cir. 1976)) (emphasis added); *accord Appalachian Power*, 529 F.2d at 348.

48. *See generally Northeast II*, 55 F.3d 686 (1st Cir. 1995); Ne. Utilities Serv. Co. v. FERC (*Northeast I*), 993 F.2d 937 (1st Cir. 1993).

49. Ne. Utilities Serv. Co., 50 F.E.R.C. ¶ 61,266, 61,838 (1990). The condition provided that:

> Further, Seller [North Atlantic], Buyer [PSNH] and [the State of New Hampshire] shall not, and each hereby waives (to the extent it may lawfully do so) any right it may have to, file a complaint with respect to the rates charged under this Agreement pursuant to Section 206 of the Federal Power Act and the Rules and Regulations of the FERC promulgated thereunder without the prior written consent of each of the others, and each further agrees that in any proceeding by the FERC under Section 206 the FERC shall not change the rate charged under this Agreement unless such rate is found to be contrary to the public interest."

Id. (citation omitted).

flexible version of the public-interest standard than the "practically insurmountable" one described in *Papago*.[50]

On appeal, the First Circuit gave mixed responses to these arguments. On one hand, in *Northeast I,* it disagreed with the Commission that the parties could not bind it to the public-interest standard of review, explaining that the Commission is obligated to "respect certain private contract rights in the exercise of its regulatory powers," including the right to fix a more rigorous standard of review.[51] Thus, *Mobile-Sierra* protects the right of the parties to stipulate which type of review they want—just-and-reasonable or the more demanding public-interest standard—by which the Commission must abide.[52] On the other hand, *in Northeast II*, it mostly agreed with the Commission that even if the public-interest standard applied, it would be a more flexible version than the "practically insurmountable" one described in *Papago*.[53] It affirmed that the Commission has discretion to determine what circumstances implicate the public interest and that the *Sierra* factors did not comprise an exhaustive list in that regard.[54] The particular application of the public-interest standard and its focus of concern "all depends on whose ox is gored and how the public interest is affected."[55] To that end, the Commission has the most authority to read additional protections into the public-interest standard when it acts to protect third-party interests adversely affected by the contract terms.[56]

III. THE SHOWDOWN

A. The Morgan Stanley *Interpretation*

In *Morgan Stanley*, the Supreme Court sought to clarify at which point in time the *Mobile-Sierra* doctrine begins to apply to a contract rate. Specifically, the court examined whether the doctrine applies prior to

50. *Id.* at paras. 61,838-39; Ne. Utilities Serv. Co, 66 F.E.R.C. ¶ 61,332, 62,076 (1994) (order on remand from *Northeast I*).

51. *Northeast I*, 993 F.2d. at 960. The court did not address the non-party issue raised by FERC, *id.* at 961-62, possibly because the challenge was not brought by a true outside party but, rather, by FERC acting *sua sponte*, *id.*

52. *Id*. at 961.

53. *Northeast II,* 55 F.3d at 689; s*ee also supra* note 24 and accompanying text (discussing *Sierra* factors).

54. *Id.* at 689-90.

55. *Id.* at 691.

56. *Id.* (citing *Northeast I*, 993 F.2d at 961).

FERC reviewing a rate for the first time.[57] The case involved a consolidated appeal of several FERC orders involving requests to modify rates set forth in contracts created during the Western Energy Crisis of 2000-2001.[58] In the administrative hearings, FERC determined that under the *Mobile-Sierra* doctrine, the modifications were not warranted because the parties failed to meet the burden of proof demanded by the public-interest standard.[59] The petitioners appealed to the Ninth Circuit, claiming that the Commission had incorrectly applied the *Mobile-Sierra* doctrine in considering their requests.[60]

One of the petitioners' central arguments, and the key issue presented to the Ninth Circuit, was that the *Mobile-Sierra* doctrine did not apply unless the Commission first had the opportunity for initial review prior to the rate going into effect.[61] The Ninth Circuit agreed. It reasoned that the application of *Mobile-Sierra* depended on "the regulatory context in which the contracts were initially formed" and whether it "provide[s] a sound basis to believe that the resulting rates are just and reasonable."[62] Assuring that this basis exists requires both "timely and procedurally effective review of rates . . . and [] meaningful substantive standards for review of the circumstances of contract formation."[63] The first element cannot be satisfied unless the Commission has the initial "opportunity for plenary, 'just and reasonable' agency review."[64] The second element cannot be satisfied unless it can be shown that the contract negotiations

57. *Morgan Stanley*, 128 S. Ct. at 2737.

58. *Snohomish*, 471 F.3d at 1067. The contracts at issue were for future supplies of energy from the wholesale energy market, which is regulated by FERC. *Id.* at 1056-57.

59. *See* Nev. Power Co., 103 F.E.R.C. ¶ 61353, para. 111 (2003), *reh'g denied*, Nev. Power Co, 105 F.E.R.C. ¶ 61185 (2003).

60. *Snohomish*, 471 F.3d at 1056-57.

61. *Id.* at 1057. The rates in issue were subject to FERC's market-based rate authorization. *Id*. at 1061. Under this mechanism, which is a result of the recent policy reforms to facilitate open access, a utility is authorized to charge whatever rate the market will bear, so long at the utility itself first meets certain structural and market-power criteria. *Id.* at 1065. This contrasts the cost-based rate mechanism whereby FERC approves a rate, should it choose to investigate it, that would allow the utility a fair rate of return while protecting ratepayers from exploitation. *Id.* at 1063. The key difference is how the rate is effectuated. In the latter mechanism, a rate becomes effective only after it has been filed with FERC and approved. *Id.* at 1060. In the former mechanism, the rate is effective immediately, so long as the utility maintains its market-based rate authorization from FERC, which is subject to re-verification. *Id.* at 1060, 1065.

62. *Id.* at 1075.

63. *Id.* at 1075-76. In the context of a market-based rate mechanism, *see supra* note 61, the court found that an initial market-based rate authorization could only qualify as sufficient prior review when "accompanied by effective oversight permitting timely reconsideration of [the] authorization if market conditions change." *Id.* at 1080. It concluded that FERC's monitoring and compliance mechanism fell short in this regard, and, therefore, invoking the *Mobile-Sierra* doctrine had the effect of FERC "abdicat[ing] its statutory responsibility . . . ." *Id.* at 1084.

64. *Id.* at 1077.

took place in a "functional marketplace;" otherwise, there can be no assurance that the rates are just and reasonable or that the policies underlying the *Mobile-Sierra* doctrine will be respected.[65] The Ninth Circuit found that FERC had failed to examine either of these preconditions and remanded the case for reconsideration.[66]

The Supreme Court rejected outright this interpretation of the doctrine, which it said had misportrayed the rule as a form of estoppel on the Commission.[67] The Court explained that the *Mobile-Sierra* doctrine provides the exclusive test of "what it means for a rate to satisfy the just-and-reasonable standard in the contract context . . . regardless of when the contract is reviewed."[68] The theory of the doctrine is "grounded in the commonsense notion that '[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a "just and reasonable" rate as between the two of them.'"[69] And under it, "the ordinary mode for evaluating contractually set rates is to look to whether the rates seriously harm the public interest, not to whether they are unfair to one of the parties that voluntarily assented to the contract."[70] The Court also disagreed with the Ninth Circuit that application of the *Mobile-Sierra* doctrine required a preliminary finding on underlying market conditions.[71] It reasoned that to require so would create a "perverse rule" that would undermine contract reliability in volatile markets despite any public-interest issues and reduce incentives to contract during turbulent markets in the future.[72] The Court noted, however, that the Commission could still set aside a contract, given evidence of misconduct at the formation stage, such as fraud, duress, bad faith, or other traditional affirmative defenses, or if there is evidence of illegal market manipulation by one of the parties, the existence of which would rebut the basis for the presumption about the contract rate.[73]

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65. *Id.*
66. *Id.* at 1085, 1090.
67. *Morgan Stanley,* 128 S. Ct. 2737, 2746 (2008).
68. *Id.*
69. *Id*. (quoting Verizon Communications, Inc. v. FCC, 535 U.S. 467, 476 (2002)) (alterations in original).
70. *Id.*
71. *Id.*
72. *Id.* at 2746-47.
73. *Id*. at 2747.

B. The Maine Exception

In March 2008, the D.C. Circuit confronted the question of whether the Commission could approve a clause in a settlement agreement, stipulating that any subsequent challenges brought by non-contracting third parties must be reviewed under the "the highly-deferential 'public interest' standard."[74] The court answered this question in the negative.[75]

The contract in question, "a comprehensive settlement agreement that had the effect of redesigning New England's capacity market,"[76] contained a clause specifying that the public-interest standard would apply to all future requests to modify its terms regardless of who brought the proposal forward—a party, non-party, or FERC.[77] In the first appeal to the D.C. Circuit, the Commission rejected the notion that it legally could be bound by the clause.[78] However, it subsequently approved the

74. Me. Pub. Utilities Comm'n v. FERC, 520 F.3d 464, 477 (2008) (per curiam), *reh'g denied*, 2008 U.S. App. LEXIS 24022 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2050 (2009).

75. *Id.*

76. *Id.* at 467. In a capacity market "'the [transmission provider] compensates the generator for the *option* of buying a specified quantity of power irrespective of whether it ultimate buys the electricity." *Maine*, 520 F.3d at 467 (alteration in original) (quoting Keyspan-Ravenswood, LLC v. FERC, 474 F.3d 804, 806 (D.C. Cir. 2007)). Transmission providers often use this as "spinning" power to deal with fluctuations in demand. *See id.* The problem was that the market was so poorly functioning that the "supply of capacity was barely sufficient to meet the region's demand," so the utilities were at risk of violating reliability criteria. *Id.* (citing Devon Power LLC, 115 F.E.R.C. ¶ 61,340, para. 63 (2006)). To address this problem, demand–supply generators sought to enter into "'Reliability Must-Run' agreements" with the New England Independent System Operator (ISO) in order to recover their full cost of service and remain in operation despite their financial challenges. *Id.* at 467-68. However, these types of contracts have the effect of hindering entrance and competition in the market. *See id.* at 468 (quoting Devon Power LLC, 103 F.E.R.C. ¶ 61,082, para. 29 (2003)). In an attempt to deal with this problem, FERC approved a limited version of the generators' initial proposal and directed the ISO to "develop a new market mechanism" that would ensure that "prices would be highest in the regions with the most severe capacity shortages, which would encourage new entry." *Id.* (citing Devon Power LLC, 103 F.E.R.C. ¶ 61,082, paras. 31-32 (2003)). In response, the ISO introduced a "demand curve" that was used to set pricing, which proved to be highly controversial. *Id.* (citing Devon Power LLC, 107 F.E.R.C. ¶ 61,240, paras. 10, 38, 53 (2004)). After months of negotiations, a settlement was reached, the key feature of which was the creation of the Forward Capacity Market, which eliminated need for a demand curve. *Id.* at 469 (citing Devon Power LLC, 115 F.E.R.C. ¶ 61,340, paras. 15-16 (2006)). However, eight parties opposed the settlement. *Id.* (citing Devon Power LLC, 115 F.E.R.C. ¶ 61,340, para. 15 (2006)). The settlement also set up a "transition payments" system to facilitate the Forward Market through a series of fixed payments to be paid to the generators during the transition period—a feature that was highly contentious. *Id.* (Devon Power LLC, 115 F.E.R.C. ¶ 61,340, paras. 30-31 (2006)).

77. *Id.* (quoting Devon Power LLC, 115 F.E.R.C. ¶ 61,340, para. 172 (2006)).

78. Me Pub. Utilities Comm'n v. FERC, 454 F.3d 278, 280, 283-84 (D.C. Cir. 2006).

clause, reasoning that the "use of the more deferential [public-interest] standard in a limited number of circumstances would promote 'rate stability.'"[79] The petitioners, various entities that were not parties to the settlement, disputed the provision arguing that it would deprive them of their statutory right to challenge rates under the just-and-reasonable standard.[80] The Court of Appeals agreed with this argument, holding that the non-parties could not be held to a provision in a contract to which they were not parties and that their challenge could not thereby be subjected to the public-interest standard of review.[81] It explained that the *Mobile-Sierra* doctrine is only meant to guarantee stability "*as between the contracting parties*."[82] It does not apply to non-contracting party challenges since that would abrogate FERC's statutory duty to review such challenges under the just-and-reasonable standard.[83] Thus, it held that the Commission's acceptance of the clause imposing a stricter standard was unlawful.[84] The court explained:

> The *Mobile-Sierra* doctrine carves out an exception to [the just-and-reasonable standard] based on the "familiar dictates of contract law." When two or more parties reach a negotiated settlement over a disputed rate, FERC applies a strong presumption that the settled rate is just and reasonable, and the Commission may only set aside the contract for the most compelling reasons. The purpose of the *Mobile-Sierra* doctrine is to "preserve the benefits of the parties' bargain as reflected in the contract, assuming that there was no reason to question what transpired at the contract formation stage."
>
> Courts have rarely mentioned the *Mobile-Sierra* doctrine without reiterating that it is premised on the existence of a voluntary contract between the parties . . . . Similarly this Court has emphasized that the deferential public-interest standard only applies to "*freely negotiated private contracts* that set firm rates or establish a specific methodology for setting the rates for service."[85]

From this, the court went on to hold that "*Mobile-Sierra* is invoked when 'one party to a rate contract on file with FERC attempts to effect a unilateral rate change by asking FERC to relieve its obligations under a

79. *Maine*, 520 F.3d at 470 (citing Devon Power LLC, 115 F.E.R.C. ¶ 61,340, paras. 183-86 (2006)).
80. *See id.* at 467.
81. *See id.* at 478.
82. *Id.* (emphasis added).
83. *Id.*
84. *Id.* at 470.
85. *Id.* at 477 (citations omitted).

contract whose terms are no longer favorable to that party.'"[86] The Commission disputed this conclusion, reiterating that the public-interest standard would only be applied to a "narrow category" of challenges,[87] and that furthermore, it still leaves the Commission with "significant authority to protect non-parties to the settlement from harm" and adequately safeguard third-party interests.[88] The court rejected both of these arguments because, in its view, adoption of either would still result in " depriv[ing]" or "derogat[ing]" the non-settling parties' statutory right to a just-and-reasonable standard of review.[89] In conclusion, the court summarized:

> [T]he *Mobile-Sierra* doctrine is designed to ensure contract stability *as between the contracting parties—i.e.*, to make it more difficult for either party to shirk its contractual obligations. It makes no sense to say that the values of "stability" and "certainty" are furthered by applying the deferential standard of review to the eight parties that *refused* to agree to the terms of the settlement.[90]

C. The Conflict

The conflict between *Morgan Stanley* and *Maine* may not be readily apparent unless one appreciates the dimensions of the questions resolved by the opinions. In *Morgan Stanley*, the Court dealt with the timing and triggering of the *Mobile-Sierra* rule.[91] The Court determined that the rule applied at the time of contract formation and regardless of preliminary agency review because the doctrine stands for the "presumption" that rates established by sophisticated parties who bargain at arm's length are per se just and reasonable.[92] Thus, the only substantive prerequisite to applying the rule is that the contract was formed through arm's-length bargaining absent circumstances that would lead one to doubt the fairness of the agreement at the outset.[93] This holding raises an important question, which is at the heart of this Article, that implicates the D.C. Circuit's analysis in *Maine*: namely, since *Morgan Stanley* held that the *Mobile-Sierra* doctrine applies from the time of contract formation, does a non-party then automatically lose the "statutory right" recognized in *Maine* to challenge the rates under the

86. *Id.* at 478 (quoting Me. Pub. Utilities Comm'n v. FERC, 454 F.3d 280, 284 (D.C. Cir. 2006)). The court also noted, "It goes without saying that a contract cannot bind a nonparty." *Id.* (quoting EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002)).
87. *Id.*
88. *Id*. at 478 n.9 (citing Devon Power LLC, 115 F.E.R.C. ¶ 61,340, para. 184 (2006).
89. *Id*. at 478 & n.9.
90. *Id.* at 479 (citation omitted).
91. *Morgan Stanley*, 128 S. Ct. 2733, 2737 (2008).
92. *Id.* at 2745-46.
93. *See supra* note 73 and accompanying text.

just-and-reasonable standard by virtue of the contract's existence? Answering this question requires further inquiry into the contours of the Court's "presumption" language, the substantive effect that a presumption would have on a non-party's challenge, and whether a far-reaching presumption can be squared with the goals of the *Mobile-Sierra* doctrine.[94]

IV. THE SIGNIFICANCE OF THE PRESUMPTION CHARACTERIZATION

Throughout the *Morgan Stanley* opinon, the Supreme Court refers to the doctrine as the "*Mobile-Sierra* presumption," insofar as it creates a legal presumption about the rate in the underlying contract.[95] Prior to the D.C. Circuit's reference in *Union Electric Co. v. FERC* to *Mobile-Sierra*, the doctrine was never directly tied to the word "presumption" in this way.[96] Interestingly, it was not so referenced again until the Ninth Circuit's usage in the cases leading up to the *Morgan Stanley* appeal.[97] Before these appearances, the Courts of Appeal commonly referred to doctrine as triggering a "standard of review."[98] The Commission also seemed to understand it as such.[99] The ultimate question regarding the change in terminology is whether it makes a substantive difference. Does rebutting a presumption require something different than satisfying a standard of review, and how might this affect non-party challenges?

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94. A common reaction, shared by at least two FERC Commissioners, is that the cases are distinguishable in terms of what "types" of contract they each are applicable to. *See supra* note 8. While this is a plausible reconciliation of the two cases, it is by no means conclusive. The D.C. Circuit never implied that it meant for its holding in *Maine* to be limited only to cases involving settlement agreements, utilized broad language in its reasoning, and interpreted the same fundamental principles as the Supreme Court did in coming to its conclusion in *Morgan Stanley*. Considering this, it is at least as plausible that the D.C. Circuit did not intend its opinion to be limited along "type-of-contract" lines. Furthermore, if it would be unfair to hold parties that were involved in the contract negotiations to the public-interest standard, how would it then be fair to apply the standard to parties who were not involved at all, but may also be affected by the contract's terms? Such a proposition would be difficult to construct.

95. *See, e.g.*, *Morgan Stanley* , 128 S. Ct. 2733, 2735 (2008).

96. 890 F.2d 1193, 1196 (D.C. Cir. 1989).

97. *See Snohomish*, 471 F.3d 1053, 1060 (9th Cir. 2006); Pub. Utilities Comm'n v. FERC, 474 F.3d 587, 590 (9th Cir. 2006).

98. *See, e.g.*, Me. Pub. Utilities Comm'n v. FERC, 520 F.3d 464, 470, 478 (D.C. Cir. 2008), *reh'g denied*, 2008 U.S. App. LEXIS 24022 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2050 (2009); Wisc. Pub. Power, Inc. v. FERC, 493 F.3d 239, 254 (D.C. Cir. 2007); Potomac Elec. Power Co. v. FERC, 210 F.3d 403, 408 (D.C. Cir. 2000); *Northeast II*, 55 F.3d 686, 692 (1st Cir. 1995).

99. *See, e.g.*, Ne. Utilities Serv. Co., 66 F.E.R.C. ¶ 61,332, 62076 (1994).

Although perhaps one of the most slippery legal terms of art, presumptions are most simply characterized as assumptions about the meaning of a certain basic fact that allow or require the fact-finder to reach a certain pre-ordained conclusion when that triggering fact is present.[100] They serve as an evidentiary short cut, substituting for proof of certain intermediary details that would otherwise be required in order to establish the inference sought. A standard of review embodies assumptions about the level of deference that should be given in evaluating the outcome of a prior adjudicative process and also defines the scope of relevant materials that may be examined during the inquiry.[101] With questions of fact, a presumption seeks to establish criteria for evaluating the validity of the fact-finder's conclusion based on the facts she had available to consider.

The important difference between these two devices is the methods and means required to prevail under each of them. To overcome a presumption, one must effectively challenge the validity of the presumptive fact itself, not the basic fact upon which it is premised.[102] In the present circumstance, the basic fact is that the parties had a contract, and the presumptive fact, or conclusion drawn, is that the rate is just and reasonable. Thus, it follows from the very creation of the contract itself that the rate therein is presumed just and reasonable. According to the Supreme Court, in order to attack the presumptive fact, one must show that the rate is not just and reasonable by either demonstrating the existence of a contract defense or absence of arm's-length bargaining.[103] If such infirmities exist at the contract formation

100. *See* MCCORMICK ON EVIDENCE § 342, at 495-96 (Kenneth S. Broun ed., 6th ed. 2006).

101. *See* STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 1.01 (3d ed. 1999). Strictly speaking, a standard of review is "[t]he criterion by which an appellate court exercising appellate jurisdiction measures the constitutionality of a statute or the propriety of an order, finding, or a judgment entered by a lower court." BLACK'S LAW DICTIONARY (8th ed. 2004). This is not a particularly accurate definition of the way the *Mobile-Sierra* doctrine has been thought to function as a standard of review since in such cases there is no statute or lower court under evaluation, only the parties' contract. *See, e.g.*, *Morgan Stanley*, 128 S. Ct. 2733, 2737 (2008). In reality, the *Mobile-Sierra* doctrine is actually a substantive standard used for evaluation of the facts in the first instance. Under it, the Commission is not so much testing the parties' decision-making process as it is the outcome of the process. To help preserve the analogy it may be useful to think of it as representing two related notions: (1) the criteria, or test, created for evaluating whether or not the rate is just and reasonable and (2) the requirement that FERC "affirm" or "defer to" any rate that meets those criteria. In this way, the rate is like a statute and the just-and-reasonable standard is like the Constitution or alternatively, the rate is like a jury verdict and the just and reasonable standard is the level of deference afforded that judgment.

102. MCCORMICK ON EVIDENCE, *supra* note 100, § 344, at 506-07.

103. *See supra* note 73 and accompanying text.

stage, then the rate cannot be assumed just and reasonable and the presumption disappears.[104] To satisfy a standard of review in a factual context, one must show that the basic facts presented, when taken as a whole, could justify the conclusion sought. Applying this to the just-and-reasonable standard of review, one must show that the basic facts as a whole could reasonably support the conclusion that the rate is "unjust, unreasonable, discriminatory, or unduly preferential."[105]

One key operative difference creates the critical substantive disparity between these two devices: the type of factual evidence one must present to prevail.[106] A presumption dramatically constricts the ambit of relevant evidence that can be introduced until the presumption is effectively rebutted. Without the presumption, the standard of review would permit a much broader range of relevant evidence to be considered initially and in the final conclusion. To rebut a "*Mobile-Sierra* presumption," one must produce circumstantial evidence about the contracting parties' incentives and negotiations—details that the presumption itself conceals. Such "intra-contractual" evidence is only likely to be available to the parties themselves, and obtaining it would pose significant challenges to outsiders. In contrast, to satisfy the standard of review, a non-party could introduce a variety of "extra-contractual" evidence concerning the detrimental outcomes and effects of the contract rate on consumers.

Introduction of the parties' contract into evidence would trigger the operation of the presumption, which would recreate the issue of

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104. The effect of successfully rebutting a presumption is actually a topic of substantial debate. Known as the "Bursting Bubble" theory, it has its proponents and detractors. *See* MCCORMICK ON EVIDENCE, *supra* note 100, § 344(A). While exploration of this debate is beyond the scope of this Article, it suffices to say that if a challenger brings forth the type of proof the Supreme Court indentified in *Morgan Stanley*, *see supra* note 73 and accompanying text, the presumption ceases to operate for purposes of the *Mobile-Sierra* doctrine.

105. This wording embodies the statutory allocation of the burden of proof on the Commission or complainant under section 205 of the FPA. Federal Power Act, 16 U.S.C. §824e(b) (2006).

106. Imagine a basic case of appellate review of a jury trial. If some presumption present in the trial required the jury to return a certain verdict, the reviewing court would ask, "What was the conclusion the jury was required to draw? Is the presumption rebuttable? If so, what must be shown to rebut it? Did the opposing party present such evidence?" In contrast, if the court were reviewing a jury verdict rendered without the mandate of a presumption, under the applicable standard of review the reviewing court would ask, "What was the evidence the jury had to consider? What is the verdict the jury drew? Was the verdict supported by the weight of the evidence considering the applicable burden of proof?" The scope of potentially relevant evidence is very different in these two situations.

accessing relevant evidence already discussed. If, by virtue of the contract being made, the conclusion automatically follows that the rate is just and reasonable, it basically forecloses any real possibility that a non-party could mount a successful challenge. The kind of circumstantial evidence needed to rebut the presumption would probably only be available to the parties themselves and could only be uncovered, if at all, through expensive and time-consuming discovery. The problem is that Congress stated that one need only show that a rate is "unjust, unreasonable, unduly discriminatory, or preferential," but the Supreme Court now requires a threshold showing of something more. Though it might be fair to apply this kind of heightened proof to parties who have affirmatively, or abstractly, indicated that they think the rate is just and reasonable under some sort of waiver theory, or to those otherwise responsible for creating the presumption, it is questionable whether it would be fair to abrogate the statutory rights of non-parties in the same fashion. For either the party or the non-party to rebut the *Mobile-Sierra* presumption, it would have to show that the proper incentives did not exist at the time of the contract formation—i.e., the absence of arm's-length bargaining. For this, it would have its arsenal of traditional contract defenses for unfair dealing—fraud, duress, etc.—as well as the option of proving that "market dysfunction" is caused by "illegal action by one of the parties."[107] However, as the dissent in *Morgan Stanley* points out, "By including contracts within the scope of [section] 206(a) . . . Congress must have concluded that the contract defenses are insufficient to protect the public interest."[108] The dissent also noted that "the fact that the FPA tolerates contracts does not make it subservient to [them]."[109] The *Maine* court also seems to have been aware of this alternate avenue of redress but obviously thought that it required a different solution.[110]

Another argument in favor of the presumption understanding is based on the idea that the *Mobile-Sierra* doctrine is not really a standard of review at all. Representing this view are a small number of courts that have referenced the *Mobile-Sierra* doctrine in conjunction with a "burden of proof," recognizing the substantive change to the level of

107. *Morgan Stanley*, 128 S. Ct. 2733, 2747 (2008); *see supra* note 73 and accompanying text.

108. *Id.* at 2758 (Stevens, J., dissenting).

109. *Id.*

110. *See* Me. Pub. Utilities Comm'n v. FERC, 520 F.3d 464, 477 (D.C. Cir. 2008) ("The purpose of the *Mobile-Sierra* doctrine is to 'preserve the benefits of the parties' bargain as reflected in the contract, *assuming that there was no reason to question what transpired at the contract formation stage*.'") (emphasis added) (quoting Atlantic City. Elec. Co. v. F.E.R.C., 295 F.3d 1, 14 (D.C. Cir. 2002)), *reh'g denied*, 2008 U.S. App. LEXIS 24022 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2050 (2009).

evidence required to prevail;[111] even though, in this context, those courts probably are more specifically referring to the burden of production.[112] Nonetheless, doctrinally, a standard of review and a burden of proof are not the same thing.[113] Regardless of the persuasion/production distinction, the *Morgan Stanley* presumption language is still problematic under this alternate reading of the *Mobile-Sierra* doctrine. A presumption operates to shift the burden of production, and perhaps the burden of persuasion, on the party that it operates against.[114] As Professor McCormick points out:

> Assignments of the burdens of proof prior to trial are not based on presumptions. Before trial no evidence has been introduced from which other facts are to be inferred. The assignment [of the burden of proof] is made on the basis of a rule of substantive law providing that one party or the other ought to have one or both of the burdens with regard to an issue.[115]

The Supreme Court agreed that the burden of proof is indeed defined by the substantive law governing the case—i.e., the statute.[116] As previously noted, the statute in this context—the FPA—creates a burden of proof that obligates a challenger to show that the rate is "unjust, unreasonable, unduly discriminatory, or preferential." If the *Mobile-Sierra* doctrine in fact creates a legal presumption that effectively modifies the burden of proof prior to trial, it would alter the rights of all challengers under the statute, effectively subjugating the entire clause of the statute to the filing mechanism at the sole discretion of private parties.[117]

111. Texaco Inc. v. FERC, 148 F.3d 1091, 1095 (D.C. Cir. 1998); City of Frankfort v. FERC, 678 F.2d 699, 705 n.9 (7th. Cir. 1982); Pub. Serv. Co. of N.M. v. Fed. Power Comm'n, 557 F.2d 227, 229 (10th. Cir. 1977).

112. *See* Schaffer v. Weast, 546 U.S. 49, 56 (2005); Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986); *see also* BLACK'S LAW DICTIONARY (8th ed. 2004) (burden of production).

113. *See* Adefemi v. Ashcroft, 386 F.3d 1022, 1027 n.9 (11th Cir. 2004).

114. MCCORMICK ON EVIDENCE, *supra* note 100, § 343, at 500.

115. *Id.* § 342, at 499.

116. *Schaffer*, 546 U.S. at 55 (2005).

117. At least two justices think this is exactly what is going on. In his dissent, Justice Stevens points out that even though the Court claims the presumption does not supplant, but is merely a "'differing application" of the statutory just and reasonable standard, in reality "[t]here is no significant difference between requiring a heightened showing to overcome an otherwise conclusive presumption and imposing a heightened standard of review." *Morgan Stanley*, 128 S. Ct. 2733, 2752 (2008) (Stevens J., dissenting). This, he believes, is the Court doing exactly what it said was "'obviously indefensible'" in applying what is in effect a *separate* standard of review through the presumption. *Id.*

Of course, it is not as if the statutory standard of review disappears entirely under a *Mobile-Sierra* presumption. Rather, it is just repackaged as the public-interest standard the same way as always. From this, one might argue that even though the Supreme Court has elucidated a new evidentiary route to remove the *Mobile-Sierra* doctrine, one can still challenge the rate under the public-interest standard using all matter of extra-contractual circumstantial evidence—that, in effect, any disparity created by the presumption is immaterial. The obvious response to this is that even if the public-interest standard preserves the relevance of extra-contractual evidence, it still poses a much higher evidentiary burden than the naked just-and-reasonable standard and is just as, if not more, substantively different.

V. CONCLUSION

*A. The Post-*Morgan Stanley *Landscape*

Although a clear answer to the question originally presented may not be possible at this point, several observations from the foregoing may be helpful in at least discerning guiding principles that may help resolve the dispute.

If the words of the *Morgan Stanley* Court are taken at face value and if the *Mobile-Sierra* doctrine does signify a far-reaching presumption about the contract rate, it seems clear that, in effect, the Supreme Court has redefined what initially qualifies as relevant evidence. The conflict here is that Congress explicitly set forth the burden of proof and evidentiary requirements in the statute. Even if the presumption was not strictly a legal one, operating only to shift the burden of proof during trial once the contract is introduced into evidence, one has to ask what relevance the contract would have to a party who had nothing to do with its making. If the contract embodies the thoughts and agreements of the signatory parties, of what relevance is this to an outside party challenging the soundness of that judgment? To allow a biased contract to stand for evidence of good judgment when an outside party seeks to challenge the very judgment that produced the contract is a circular conundrum. Unless used to impeach the argument of one of its principals to the contrary, the contract itself provides little probative value to test the allegation that it was poorly conceived in the first place.

The *Morgan Stanley* Court did not address whether, by using the word "presumption," it intended to go as far as altering the rights of non-parties. Although the repeated use of the construction may suggest an intent to drive that very point home, it is undercut by the Court's core rational for assuming the presumption applies—"'the party charging the rate and the party charged [are] often sophisticated businesses, enjoying presumptively equal bargaining power, who could be expected to negotiate a "just and reasonable" rate *as between the two of them*.'"[118] This suggests that the Court only had the contracting parties in mind when considering how the presumption would operate.[119] To parse the phrase even further, the presumption may even be borne from the phrase "presumptively equal bargaining power," which would obviously be nonsensical when applied to parties outside of the negotiations. The idea that the Court would likewise endorse such a robust, far-reaching presumption that would not just simply affect the contract principals but substantively alter rights of non-participatory third parties outright is doubtful considering the Court's position that such an interpretation would be "obviously indefensible."[120]

Perhaps the most important question is whether these inferences are enough to displace the direct and clear words of the D.C. Circuit that the *Mobile-Sierra* doctrine is binding only "*as between the contracting parties*."[121] The *Maine* court even embraced the idea that *Mobile-Sierra* creates a presumption, a "strong presumption" that negotiations will produce a "settled rate [that] is just and reasonable, [that] the Commission may only set aside . . . for the most compelling reasons."[122] Nonetheless, it still concluded that the *Mobile-Sierra* doctrine exists to "preserve the benefits of the parties' bargain" and is limited to parties sharing a voluntary contract.[123]

Absent explicit language in *Morgan Stanley* to rebut the clear assertion of *Maine* and the grant of the FPA, any inference made from

118. *Morgan Stanley*, 128 S. Ct. 2737, 2746 (2008) (quoting Verizon Communications, Inc. v. FCC, 535 U.S. 467, 476 (2002)) (alteration in original).

119. Consider also the Court's statement that "[in] evaluating contractually sets rates [the ordinary mode] is to look to whether the rates seriously harm the public interest, not whether they are unfair to one of the parties that voluntarily assented to the contract," *id.*, which seems to imply the Court's primary concern is with preventing "parties that voluntarily assented to the contract," *id.*, from escaping their liabilities for anything less than a very good reason. But does that also mean those who did not voluntarily assent to the contract could challenge it as unfair or unreasonable?

120. *Id.* at 2740.

121. Me. Pub. Utilities Comm'n v. FERC, 520 F.3d 464, 479 (D.C. Cir. 2008), *reh'g denied*, 2008 U.S. App. LEXIS 24022 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2050 (2009).

122. *Id.* at 477.

123. *Id.*

the "presumption" language will have to be strong enough not only to displace the D.C. Circuit's clear and narrow analysis of the precise issue but also to rebut the statutory presumption that non-parties retain a right to use the unabridged just-and-reasonable standard in the interest of consumer protection. By the analysis here, it doesn't seem like such an outcome is likely.

Assuming then that the Court meant to establish a more limited presumption, applicable primarily to the contract principals, then application of the *Mobile-Sierra* doctrine will depend on two considerations: the source of the challenge and the independence of the challenger's interests from those of the contract principals. Essentially, how and if the rule will apply depends on who initiates the challenge. As the *Maine* court observed, the doctrine exists to protect the interests of the parties as between themselves and perhaps against FERC as well, should it decide to intervene.[124] If one of the principals or the Commission itself brings the challenge, the *Mobile-Sierra* doctrine most likely applies since the principals are entitled and expect to prospectively insulate their bargain from further interference from these sources, as established in *Papago*.[125] But if the Commission merely acts as a forum for a challenge by an outside party, the doctrine is probably out of place because those interests never had a say in determining the level of protection that the agreement deserves. This accords with the position of the *Maine* court that the doctrine is not designed to protect the interests of total outsider non-parties; rather, it is the statute that provides these protections.[126] As the *Northeast II* court observed, the primary consideration in adapting the public-interest standard for atypical circumstances is determining who stands to lose out under the contract.[127] If a contracting party loses out, it should be solely accountable for its own mistake, and the Commission should not intervene short of what is necessary to prevent extraordinary harm to third parties that might flow from the contract. But if the contract directly harms outside parties, the Commission must be given the right to intervene with broader discretion under a more

124. *See supra* Part I(C).

125. Papago Tribal Util. Auth. v. FERC, 723 F.2d 950, 954 (D.C. Cir. 1983).

126. *Maine*, 520 F.3d at 478. Of course, this seems at odds with the *Papago* court's statement that the backstop public interest standard, not the just and reasonable standard, exists to protect external parties. *Papago*, 723 F.2d 950, 953 n.4 (D.C. Cir. 1983). Whether or not this is a correct appraisal of the FPA's intent, the *Maine* court might respond that, although such a position is certainly supportable when the challenge is brought by one of the contract principals, a different treatment is still justified when outside interests bring a challenge on their own accord.

127. *See supra* Part I(C).

relaxed standard of review to protect those unrepresented interests.[128] This again supports the notion that outsider interests deserve different treatment than insider ones when questioning the justness and reasonableness of a contract rate.[129]

Together these understandings of the doctrine's application appear to establish a trend. Under this trend, the Commission is afforded minimum discretion to alter the rate when one of the principals asks it to do so, intermediate discretion when it acts on its own accord to protect the generalized public interest, and maximum discretion when it acts pursuant to a third-party challenge and seeks to vindicate a particularized interest or grievance. In this last circumstance, perhaps FERC's discretion extends so far as to review under the unabridged just-and-reasonable standard. Adapting this trend to presumption terminology, if the negotiations establish the presumption that the rate is just and reasonable, then that presumption runs most strongly against the contract principals, less strongly against FERC, and perhaps least strongly—if that, according to *Maine*—against non-parties.

B. What is the Best Policy?

The patterns explained fit with the sometimes-conflicting goals emphasized by both the FPA and the *Mobile-Sierra* doctrine: respectively,

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128. *See Northeast II*, 55 F.3d 686, 690-91 (1st Cir. 1995). Under the rationale of *Northeast I* and *Northeast II*, this relaxation of the "practically insurmountable" public interest standard is justified because in these circumstances FERC has supposedly identified some genuine problem with the rate. *See id.* at 691. Thus, the concern that the contract parties are just attempting to use the Commission's powers to bail them out of their own bad deal is not present.

129. Another interesting feature in this vein is that both the statute and the *Sierra* factors mention undue discrimination as one of the considerations in determining whether a rate is lawful. *See* Federal Power Act, 16 U.S.C. § 824d(b) (2006); Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 353 (1956). The position shared by the Commission and the *Papago* court regarding undue discrimination is that its focus changes in each context depending on who bears the brunt of the discrimination. *See Papago*, 723 F.2d at 953 n.4. Under the statutory mode of review, the Commission may consider if one of the parties to the contract is the recipient of undue discrimination and modify the contract accordingly. 16 U.S.C. § 824e(a). However, under *Mobile-Sierra* review, the parties are deemed to have waived that protection and, provided that the externalities do not surpass a certain threshold, the analysis of undue discrimination comes to focus solely on those who are "not parties to the contract." *Papago*, 723 F.2d at 953 & n.4. The interesting feature in this is that while the parties to the contract lose their statutory protections, non-parties do not and arguably become the chief concern as the *Mobile-Sierra* doctrine takes over. *See id.*

consumer protection and contract stability. The contract concerns underlying the doctrine and the consumer protection concerns at the heart of the FPA will most likely be aligned in a functioning market with proper incentives but may be discordant in situations where those conditions are absent. The pattern attempts to strike a balance between contract stability and consumer protection, depending on the parties and the interests in play.

According to the *Morgan Stanley* Court, the *Mobile-Sierra* doctrine allows greater freedom of contract, which is important to supporting the role of contracts in the FPA's statutory scheme.[130] It held that "[t]he FPA recognizes that contract stability ultimately benefits consumers, even if short-term rates for a subset of the public might be high by historical standards—which is why it permits rates to be set by contract and not just by tariff."[131] To this end, it reasoned that "the FPA intended to reserve the Commission's contract-abrogation power for those extraordinary circumstances where the public will be severely harmed."[132] This assertion accords with all the cases previously discussed and with the *Maine* court's observation that the doctrine recognizes "the superior efficiency of private bargaining[] and . . . subordinate[s] the statutory filing mechanism to the broad and familiar dictates of contract law."[133] However, the *Maine* court doubted that applying the public-interest standard of review to non-parties would further "stability" and "certainty."[134]

These concerns are as old as the doctrine itself.[135] Strong arguments can and have been made for assuring certainty and stability in order to encourage future bargaining between sophisticated parties. But it is another question how these concerns are manifested in regard to non-parties. Assuming the non-party brings forth a valid concern—that it is not merely serving as a proxy for one of the contract principals—it must have some independent interest significant enough to motivate it to

130. *Morgan Stanley* , 128 S. Ct. 2737, 2739, 2747 (2008).
131. *Id*, at 2749.
132. *Id*.
133. Me. Pub. Utilities Comm'n v. FERC, 520 F.3d 464, 476 (D.C. Cir. 2008) (quoting Borough of Lansdale v. Fed. Power Comm'n, 494 F.2d 1104, 1113 (D.C. Cir. 1974)), *reh'g denied*, 2008 U.S. App. LEXIS 24022 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2050 (2009).
134. *See id*. at 479. The court held specifically that "[i]t makes no sense" to apply the public interest standard "to the eight parties that *refused* to agree to the terms of the settlement." *Id.* While this would seem to limit the court's assertion to circumstances where the non-parties previously objected to the terms, the broad language used by the court leading up the conclusion, which discusses non-parties in general terms, probably negates this inference. *See id*. at 478-79.
135. *See* United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 322, 344, 380 (1956).

undertake the costs of litigation that was not considered by the parties who created the agreement. Such non-parties could consist of organized consumer groups or other similar state-sponsored consumer protection authorities, whose members would ultimately bear the costs of the contracting parties' bad bargain.[136] State public utilities commissions (PUCs) that are responsible for setting tariffs to provide a reasonable rate of return or new and struggling competitors protesting unjust rates could also fit this bill.

One might say that such hypothetical parties are still protected by the ever-present public-interest standard, which by its very name implies that it is designed to safeguard these groups' interests. The problem, of course, is that the public-interest standard is still extremely onerous such that the concerns of the affected group, while valid in their own right, may not rise to the level that the standard demands. Moreover, state ratemaking agencies are already significantly restrained under the "filed rate doctrine" (FRD) from exercising regulatory authority over FERC-approved interstate rates. The FRD requires that "interstate power rates filed with or fixed by FERC must be given binding effect by state utilities commissions determining intrastate rates" as a matter of federal supremacy under the Constitution.[137] The FRD, handed down by the Supreme Court in *Nantahala Power and Light Co. v. Thornburg*,[138] prohibits any second-guessing or modification for any reason by the state agency of the federally approved wholesale rate as to not upset Congress's unified and plenary federal scheme of regulation.[139] Thus, all state regulatory agencies are required to pass through any and all charges that FERC deems to be just and reasonable to the retail rates charged to end-use customers.[140] While a full discussion of *Nantahala* and market-based rate authority is beyond the scope of this Article, it suffices to say that state utility agencies don't have many tools at their disposal to protect their populace from exploitative or otherwise imprudent rates charged by interstate energy providers. Taking away what is essentially their only way to effectively challenge a federal rate determination would leave state regulatory agencies charged with consumer protection with little choice but to make due regardless of

136. *See, e.g.*, Nev. Power Co., 125 F.E.R.C. ¶ 61,312, para. 30 n.63 (2008).
137. 23A FEDERAL PROCEDURE, LAWYERS EDITION § 56:431 (West 2009).
138. 476 U.S. 953 (1986).
139. *Id.* at 967.
140. *Id.* at 969-72.

rate's unfairness applied to their jurisdiction. While the Court in *Nantahala* expressly discussed the topic of federal preemption, there is no similar consideration found in *Morgan Stanley*, which again calls into question whether the *Mobile-Sierra* doctrine can be inferred to extend to non-party challenges.[141]

One might also argue that the interests of public groups are already adequately protected under the existing anti-trust laws. However, anti-trust laws existed at the time Congress passed the FPA, and by including explicit provisions governing proof for the causes of action created therein, perhaps it thought something more was required in this special context.[142] Of course, to ensure that the exception would not swallow the rule, FERC would have to closely screen these hypothetical parties' claims in order to uncover any conflicts, determine whether a claim is genuine, and discern under which standard of review it rightfully belongs. Even if the contract principals are forced to defend their agreement against a non-party, they should have nothing to fear so long as the rate is just and reasonable, as it should be.

With respect to the public groups' concerns, it is doubtful whether a far-reaching *Mobile-Sierra* presumption would engender the right incentives vis-à-vis the FPA's goal of consumer protection or provide appropriate deference to the Commission in carrying out its regulatory mission. As recent experience bears out, the bad decisions made by blue-chip megaliths are often borne by the average joe.[143] In some sense, the Commission exists as a forum, sometimes the only forum, that the public can use to enter into the fray and represent its interests in the costs of this indispensable resource. Absent market choices, it may indeed be the only venue by which they can hope to influence their own bottom lines. By insulating the contracting parties from all but the most

141. *See generally* Steven Ferrey, *Sustainable Energy, Environmental Policy, and States' Rights: Discerning the Energy Future Through the Eye of the Dormant Commerce Clause*, 12 N.Y.U. ENVTL. L.J. 507 (2000) (discussing in greater detail national energy policy and federal preemption of state authority in the area).

142. The "filed-rate doctrine" creates other complications and obstacles in pursing this avenue of relief as well. *See generally* Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for the Deregulatory Era*, 56 VAND. L. REV. 1591 (2003).

143. The reference here is to the recent financial crisis and resulting recession/ depression brought on by unregulated mortgage-backed securities and their related derivatives. While during their heyday such instruments created windfall profits which translated into exorbitant Wall Street salaries and bonuses, in the aftermath of their decline it is the average citizen that is left to live with and clean up the rubble from the collapse. As millions of citizens lose their jobs they are simultaneously being asked to foot the bill to save the very companies that invented the maelstrom in order to avoid further ruin for all. It is these sorts of disproportionate benefits and burdens that justify close and scrutinizing regulation of companies wielding such huge market and economic influence, a trait that is not unique to financial conglomerates.

extraordinary challenges, it would allow them to effectively subvert the statute's mechanism providing for rate challenges initiated by a complaint. While the goals of "stability" and "certainty" are no doubt valuable, it is not to say that they will be jeopardized by placing additional incentives on parties to negotiate contracts, bearing in mind the interests of their captive customers under threat of just-and-reasonable review upon complaint. Arguably, even if FERC acting *sua sponte* is limited to the public-interest standard, the possibility that contracted rates would be subject to ratepayer attack under the just-and-reasonable standard would encourage utilities to achieve rates that best respect the public interest in the just-and-reasonable sense of the word. Considering the monopolistic status of many players in the energy industry and the so-far failed efforts at deregulation, such a scepter, could be a useful check on consumer exploitation.

The question of "best policy" may actually be beside the point insofar as the law is concerned, since technically it's the Commission and not the judiciary that should be trusted with these types of decisions in both setting the policy and determining how to apply it.[144] However, a discussion of administrative deference in this area is beyond the scope of this Article. Whatever the entity charged with casting the final word on the matter is, it is important to realize that contract stability and consumer protection will occupy the same space sometimes and other times refuse to coalesce. This supports the notion that non-parties should not be bound by the *Mobile-Sierra* doctrine because one can't count on the contracting parties to act in the best interests of non-parties, absent incentives to do so. In reality, investor-owned utility buyers cannot be counted on to look out for the interests of end-use customers. Giving state PUCs and consumer groups the ability to counterbalance such inequities in representation at the contract stage with the threat of just-and-reasonable review, absent the restrictions of the *Mobile-Sierra* doctrine, could provide the necessary incentive. At the end of the day, the policy argument over whether and how the *Mobile-Sierra* doctrine should apply must center on which choice better serves the interests of the consuming public in the long run: contract stability or consumer protection.

144. *See generally* SEC v. Chenery Corp., 332 U.S. 194 (1947) (holding that it is within the discretion of the agency to determine how to proceed in creating a new policy or regulation especially in complex regulatory schemes); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding that any agency's reasonable interpretation of its own statute should be allowed to stand).

VI. ADDENDUM

The Supreme Court granted the *Maine* case certiorari on April 27, 2009.[145] The case was argued November 3, 2009, shortly before this Article went to print.[146] The briefs of both the petitioners and respondents and the oral arguments focused on two issues: (1) whether the *Maine* court's holding even applied to contract rates or to only those set by tariff and (2) whether allowing non-parties to challenge a contract rate under a more lenient standard of review than FERC or the contract principals was the best way to further the doctrine's goal of contract certainty and stability.[147] While this Article also touches on these issues, it raises another important consideration not addressed by the parties: namely, whether establishing a legal presumption based on the *Mobile-Sierra* doctrine would effectively override the burden of proof specified by Congress in the FPA. This precise question was not presented in the appeal, so resolution of this issue may have to wait for another day. As such, this line of inquiry is likely to retain its vitality after the Court's decision, within both this particular realm of jurisprudence and perhaps beyond.

145. NRG Power Mktg., LLC v. Me. Pub. Utilities Comm'n, 129 S. Ct. 2050 (2009) (mem.), *argued* Transcript of Oral Argument, NRG Power Mktg., LLC v. Me. Pub. Utilities Comm'n, 2009 WL 3612508 (Nov. 3, 2009).

146. Transcript of Oral Argument, NRG Power Mktg., 2009 WL 3612508 (Nov. 3, 2009).

147. *See generally id.*; Brief for Petitioners, NRG Power Mktg., 2009 WL 1994752 (July 7, 2009); Brief for Respondents, NRG Power Mktg., 2009 WL 2896320 (Sept. 4, 2009).