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The Federal Power Act's Double Standard: Unwinding the Mobile-Sierra Doctrine after Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1

John M. White

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Abstract
Emerging from two Supreme Court opinions decided in the 1950's, the Mobile-Sierra doctrine has evolved to stand for a principle of contract sanctity in public utility rate setting. The courts have largely come to the conclusion that the Federal Energy Regulatory Commission (the Commission) has less authority to modify rates set by contract, as compared to unilaterally-filed tariff rates, when the contract is the result of arm's-length negotiations between sophisticated parties of equal bargaining power, unless the contract indicates otherwise. Only in "extraordinary circumstances," the Court has found, may the Commission step in to modify any such "Mobile-Sierra contract."

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COMMENT

THE FEDERAL POWER ACT'S DOUBLE STANDARD: UNWINDING THE *MOBILE-SIERRA* DOCTRINE AFTER *MORGAN STANLEY CAPITAL GROUP, INC. V. PUBLIC UTILITY DISTRICT NO. 1*

JOHN M. WHITE*

Emerging from two Supreme Court opinions decided in the 1950s, the Mobile-Sierra *doctrine has evolved to stand for a principle of contract sanctity in public utility rate setting. The courts have largely come to the conclusion that the Federal Energy Regulatory Commission (the Commission) has less authority to modify rates set by contract, as compared to unilaterally-filed tariff rates, when the contract is the result of arm's-length negotiations between sophisticated parties of equal bargaining power, unless the contract indicates otherwise. Only in "extraordinary circumstances," the Court has found, may the Commission step in to modify any such "*Mobile-Sierra *contract."*

This Comment argues that the Mobile-Sierra *doctrine, as interpreted recently in* Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1, *departs from both the statutory intent of the Federal Power Act and the original cases from which the doctrine derived its name. The Federal Power Act does not contemplate imposing any extraordinary barriers to Commission modification of contract rates. Similarly, the two cases from which the doctrine derived its name,* United Gas Pipe Line Co. v. Mobile Gas Service Corp. *and* Federal Power Commission v. Sierra Pacific Power Co.*, sought to protect the public interest by restraining a*

* Junior Staff Member, *American University Law Review*, Volume 61; J.D. Candidate, May 2013, *American University, Washington College of Law*; B.S., Economics, 2006, *Pennsylvania State University*. Thank you to Meredith Goldich, my Note and Comment editor, and the *Law Review* staff for your significant effort in preparing this piece for publication. I would also like to give a special thanks to my friends and family, especially my parents, for your endless support.

utility's ability to unilaterally raise prices set in a contract, but they did not seek to limit the Commission's authority to modify contracts generally. By further limiting the Commission's authority to modify contracts, Morgan Stanley *has encroached on the Commission's ability to fulfill its statutory obligation to protect the public interest.*

TABLE OF CONTENTS

INTRODUCTION

"[I]t doesn't matter what you crazy people in California do, because I got smart guys out there who can always figure out how to make money."[1]

-Kenneth Lay, former CEO of Enron Corporation, speaking to David Freeman, then-Chairman of the California Power Authority

On several occasions during 2000 and 2001, the lights went out in California, affecting businesses and everyday life and raising public ire.[2] In Irvine, for example, computer-operated traffic lights went out in May 2001, turning freeways into parking lots and bringing much of

1. Peter H. King et al., *Paper Trail Points to Roots of Energy Crisis*, L.A. TIMES, June 16, 2002, at A1.

2. *See* John M. Broder, *California Power Failures Linked to Energy Companies*, N.Y. TIMES, Sept. 18, 2002, at A22 (explaining that the first blackouts in California since World War II caused thousands of businesses to close and interrupted power to homes, hospitals, schools, and shopping malls).

life there to a halt.[3] A confluence of factors had caused rolling blackouts[4] in the region,[5] as prices for power rose to extraordinarily high levels at both wholesale and retail levels.[6] Enron Corporation—a major player in the newly-deregulated wholesale power markets and a behemoth once respected for its wealth and competence—subsequently went into bankruptcy amid reports of scandal.[7]

In the midst of this environment, and at the urging of the Federal Energy Regulatory Commission (Commission),[8] several utilities attempted to hedge the escalating prices in the wholesale electric power spot market by entering into contractual agreements with power sellers.[9] Seeking relief from the rising prices, these utilities eventually agreed to buy power through long-term contracts at rates that dwarfed traditional levels, but were still considerably lower than the spot market prices during the crisis.[10]

After the crisis passed and prices approached historical levels, three western utilities asked the Commission to modify the long-term power contracts they had entered into during the crisis.[11] The utilities argued that the prices and terms in their contracts were unlawful as a result of the crisis conditions in western power markets

3. James Sterngold, *Blackout Plans of Little Help in California's Energy Crisis*, N.Y. TIMES, May 14, 2001, at A1.

4. *See* San Diego Gas & Elec. Co., 93 FERC ¶ 61,121, at 61,353–55 (2000) (noting that Pacific Gas & Electric Company had to institute rolling blackouts in the San Francisco area on June 14, 2000, and summarizing a Federal Energy Regulatory Commission Staff Report concluding that several factors contributed to the energy crisis, including increased demand due to high temperatures, insufficient generation resources, flawed regulatory policies, and the exercise of seller market power).

5. California belongs to a larger, regional electricity grid, so the problems in California extended beyond the borders of that state to others in the region. Pub. Util. Dist. No. 1 v. FERC, 471 F.3d 1053, 1069 (9th Cir. 2006), *vacated*, 547 F.3d 1081 (9th Cir. 2008).

6. *See, e.g.*, *In re* Cal. Power Exch. Corp., 245 F.3d 1110, 1115 (9th Cir. 2001) (noting that retail customers of San Diego Gas & Electric company, for example, experienced rate increases of 200–300 percent); *see also id.* (explaining that, depending on whether a particular utility was still subject to a retail rate cap, utilities either passed the high wholesale rates on to retail customers or else were forced to assume tremendous debt themselves).

7. *See generally* Kurt Eichenwald, *Audacious Climb to Success Ended in a Dizzying Plunge*, N.Y. TIMES, Jan. 13, 2002, at A1 (detailing the rise and fall of Enron).

8. *See* San Diego Gas & Elec. Co., 93 FERC ¶ 61,294, at 61,993 (2000) (encouraging utilities, in response to the crisis, to enter into contracts of two years or more).

9. *See Pub. Util. Dist. No. 1*, 471 F.3d at 1068–72 (describing how the sudden spike in prices in the California spot market, an auction for day-ahead and day-of trading in wholesale electricity, led the various parties to seek alternative ways to secure their power needs).

10. *See id.* (explaining the bidding process that buyers encountered during the crisis when attempting to secure sufficient power through a long-term agreement).

11. *See id.* at 1069–72 (detailing the contractual arrangements, the three appellants, Snohomish, Southern Cal Water, and Nevada Power Companies, asked the Commission to modify).

at the time they executed their contracts.[12] Relying on two cases from the 1950s, which together have formed what courts and other commentators refer to as the "*Mobile-Sierra* doctrine," the Supreme Court held in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1*[13] that the Commission could relieve utilities of their contractual purchase obligations only after a finding of "unequivocal public necessity" or "extraordinary circumstances," regardless of the type of contract at issue[14] or the underlying market conditions.[15] The Court concluded that the fact that the markets were chaotic when the parties entered into the agreements did not warrant undermining the "stabilizing force of contracts."[16]

This Comment will argue that the prevailing characterization of the *Mobile-Sierra* doctrine articulated in *Morgan Stanley* contradicts the Federal Power Act (FPA) and misinterprets the relevant case law by creating a separate statutory review process for contract rates. While contracts play an important role in setting rates in the energy industry, the Commission possesses a clear statutory responsibility to protect consumers, and this responsibility requires the flexibility to adjust contract rates to account for changing conditions in the markets and among consumers. The intent of this Comment is not to necessarily argue the merits of the particular contract challenges involved in *Morgan Stanley*. Rather, the purpose is to examine the prevailing interpretation of the *Mobile-Sierra* doctrine as articulated in *Morgan Stanley* and how that interpretation departs from the statutory intent and the case law.

Part I of this Comment will explain the statutory background of federal power regulation, including the need for, and challenges of, regulation in this industry. It will then discuss the development of the *Mobile-Sierra* doctrine and the factual background of *Morgan Stanley*. Part II will argue that the Supreme Court erred in *Morgan Stanley* because its holding departs from the intent of the FPA. The

12. *See, e.g.*, Nev. Power Co., 99 FERC ¶ 61,047, at 61,185 (2002), *order on reh'g*, 100 FERC ¶ 61,273, at 61,273 (2002) (seeking relief for certain contracts on the basis that prices charged based on a Commission-found dysfunctional market are per se unlawful).

13. 554 U.S. 527 (2008).

14. *See id.* at 528 (internal citations omitted) (holding that the Commission cannot modify a contract without meeting this high burden, even when a buyer challenges a contract rate that allegedly results in unreasonably high rates for consumers).

15. *See id.* at 547 (disagreeing with the Ninth Circuit's holding that the Commission must determine whether the parties formed the contracts at issue under a dysfunctional market before applying the presumption of reasonableness required by the *Mobile-Sierra* doctrine).

16. *Id.* at 547–48.

FPA places no higher burden on the Commission's authority to modify contract rates as compared to tariff rates, and the statute's stated intent to protect the public interest requires the Commission to have the ability to modify contracts when necessary to fulfill that duty. Part III will contend that *Morgan Stanley* misinterpreted the two Supreme Court decisions that created the *Mobile-Sierra* doctrine when concluding that these cases stood for an affirmation of contract sanctity. This Comment will conclude by discussing how the unique characteristics of electricity require regulators to protect the public interest, an effort that *Morgan Stanley* hinders.

I. BACKGROUND

A. *History of Federal Regulation of Electricity*

Electricity regulation developed according to what some scholars call the "utility consensus."[17] Under this philosophy, the duplication of running physical wires across the ground to allow for the competitive supply of energy would be redundant and inefficient.[18] As a result, policymakers allow for the formation of franchised monopolies and substitute regulation of these monopolies for direct competition.[19] Several industries, including rail and telecommunications, have operated under similar regulatory schemes.[20]

Electricity service generally involves three stages: production (or generation) of power; long-distance transmission of power over high-voltage lines; and local distribution of power over low-voltage lines to end-users.[21] In the United States, predominantly private, investor-

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17. *See generally* Timothy P. Duane, *Regulation's Rationale: Learning from the California Energy Crisis*, 19 YALE J. ON REG. 471, 476–82 (2002) (explaining the beginning of public utility regulation and questioning the accepted economic logic of regulating privately-owned natural monopolies as opposed to having full public ownership of electric utilities).

18. *Id.* at 476.

19. *Id.*; *see also* David B. Spence, *Can Law Manage Competitive Energy Markets*, 93 CORNELL L. REV. 765, 767–68 (2008) (noting that, in many parts of the world, state-owned utilities have provided this service, but the United States has predominantly used a model that allows for publicly regulated, privately-owned utilities instead). *But see* FRED BOSSELMAN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT 811 (2d ed. 2006) (arguing that, despite the assumption of the industry's monopoly status, some competition has been present historically because electricity still competes with alternate energy sources such as oil and natural gas).

20. *See* Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 477 (2002) (discussing how telecommunications historically have been regulated as monopolistic public utilities); Boston Edison Co. v. FERC, 233 F.3d 60, 64 n.3 (1st Cir. 2000) (explaining that the Interstate Commerce Act of 1887, 24 Stat. 379, provided the model for electricity regulation and interstate telephone service, among others).

21. BOSSELMAN, *supra* note 19, at 748.

owned entities have traditionally had control over particular geographic service areas and have been vertically integrated, i.e., they have owned or operated all parts of the system.[22] An investor-owned utility would therefore traditionally produce its own power, transmit the power over its own transmission and distribution systems, and then sell the power directly to retail customers.[23] Under this model, regulators determine the proper rates for such service based on the "cost-of-service," including both the cost of the company's investment and a fair return on that investment.[24]

Legislative and regulatory efforts, however, have led the industry to undergo substantial deregulatory reforms in the past few decades.[25] While both the transmission and local distribution of power possess the characteristics of a natural monopoly—building duplicate transmission and local distribution lines to allow for competition would clearly result in large-scale inefficiencies—the actual production of power does not have the same natural characteristics.[26] Thus, in recent decades, many independent generators and power marketers[27] have entered the marketplace, and many of the large, vertically-integrated utilities[28] have sold their generation resources. Such transactions promote competition in the production of

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22. *Id.* at 751. *But see id.* at 756–59 (noting exceptions to the privately-owned model, including public power systems, rural electric cooperatives, federal power systems, power marketers, and independent power producers).

23. *Id.* at 809.

24. *Id.* *See generally id.* at 78–79 (discussing the theory behind cost-of-service regulation).

25. *See, e.g.*, Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3(a) (Supp. V 1981) (authorizing the Commission to, among other things, require utilities to purchase or sell electricity from non-traditional providers of power); Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540–01 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385) (hereinafter Order No. 888) (fostering competitive markets for wholesale power by requiring transmission owners to offer access to their transmission facilities on a non-discriminatory basis, thus preventing transmission owners from offering unduly preferential treatment to themselves and their affiliates); *see also* Spence, *supra* note 19, at 767–76 (describing the transition from publicly-regulated, vertically-integrated utilities to competition in the production of power).

26. *See* Spence, *supra* note 19, at 772 (describing how economists began to challenge the long-held view that the entire process of providing power was a natural monopoly with the realization that the production of power could be separated from the transmission and distribution functions).

27. Power marketers are market participants that do not own or operate any physical electric facilities; instead, they simply buy and re-sell power in the various markets. BOSSELMAN, *supra* note 19, at 758.

28. *Id.* at 757. Vertically-integrated utilities own all parts of electric service, from the generation of the power through the transmission and local distribution to the ultimate customers.

wholesale power.[29] Further, the Commission has required investor-owned utilities to provide non-discriminatory open access to their transmission facilities to foster competition in wholesale power markets.[30] In many parts of the country, investor-owned utilities have voluntarily turned over functional operation of their transmission facilities to independent regional transmission operators.[31] As such, the era in which nearly all generating resources were owned by vertically-integrated incumbent utilities controlling all three steps of the process (generation, transmission, and distribution) is largely over.[32]

B. The Federal Power Act

As technological advances enabled electricity to travel over longer distances, communities and businesses began to realize that they could procure power from resources in other states rather than relying exclusively on resources in their own state, which may have been farther away or more expensive.[33] Due to the absence of a federal regulatory structure for the increasingly inter-state industry,[34] and a belief that the Interstate Commerce Act and other anti-trust statutes would not sufficiently protect consumers from the abuses of monopolists,[35] Congress enacted Part II of the FPA in 1935.[36] The

29. *See id.* at 773 (describing how federal policies encouraging unbundling of wholesale power led many traditional utilities to sell or "spin off" their generating resources).

30. *See* Order No. 888, 61 Fed. Reg. at 21,540 (summarizing the Commission's goal in the Final Rule as removing impediments to competition in wholesale power markets by requiring all transmission owners to file with the Commission an "Open Access Transmission Tariff," which sets forth terms and conditions for non-discriminatory transmission service).

31. *See id.* at 21,593–94 (encouraging, though not requiring, the formation of independent system operators as a means of achieving the Final Rule's goal of having open, non-discriminatory access to transmission facilities).

32. *See* Joseph T. Kelliher & Maria Farinella, *The Changing Landscape of Federal Energy Law*, 61 ADMIN. L. REV. 611, 616–17 (2009) (noting that, while vertically-integrated utilities owned 97 percent of generation in 1978, independent power producers have accounted for the majority of new resources since then).

33. BOSSELMAN, *supra* note 19, at 743.

34. *See id.* at 747 (explaining that the Supreme Court's determination that the Constitution limits states' ability to regulate interstate sales of electricity contributed to the creation of a federal entity to regulate the sale for resale of electric energy in interstate commerce); *see also* Pub. Utils. Comm'n of R.I. v. Attleboro Steam and Elec. Co., 273 U.S. 83, 89–90 (1927) (holding that regulation of rates charged for interstate service places a direct burden upon interstate commerce and therefore the Commerce Clause restrains the ability of states to regulate such business).

35. *See* Duane, *supra* note 17, at 477 (noting that the need to instantaneously produce power combined with the interconnectedness of the power grid allows for significant opportunity for the exercise of market power, including the ability to cause (or threaten to cause) blackouts by withholding power in times of shortage).

36. 16 U.S.C. § 824 (2006). While the Court's decision in *Mobile* involved the

FPA authorizes the Commission[37] to regulate the transmission of electric energy in interstate commerce as well as the sale of such energy at the wholesale level by public utilities.[38] In enacting this statute, Congress declared that the public interest is affected by the business of interstate transmission and the wholesale sale of energy, giving rise to the need for federal regulation.[39] The statute requires the Commission to ensure that all rates within its jurisdiction are "just and reasonable" and not unduly discriminatory or preferential.[40]

The "just and reasonable" statutory phrase did not originate in the FPA; statutes governing the regulation of public utilities and common carriers in a variety of industries have often used the same language.[41] While the text of the FPA provides little guidance on how to apply this broad standard,[42] the Constitution does impose some limitations.[43] For example, the Supreme Court has interpreted the Fifth and Fourteenth Amendments[44] to the Constitution as barring "confiscatory rates" in the public utilities context.[45] Under this

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natural gas industry and the NGA, *Morgan Stanley* involved electricity contracts, and thus the *Mobile-Sierra* doctrine will be discussed herein as such. Moreover, courts generally cite decisions interpreting the relevant provisions of the FPA and the NGA interchangeably because, in most respects, they are substantially identical. Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981).

37. The Federal Water Power Act of 1920 (FWPA) created the Federal Power Commission to oversee the construction of hydroelectric dams. 16 U.S.C. § 792 (1925 & Supp. VII 1933). The 1935 statute combined with the FWPA to create a new statute, called the Federal Power Act. BOSSELMAN, *supra* note 19, at 747 n.1. Congress later changed the name of the Federal Power Commission to the Federal Energy Regulatory Commission. *Id.*

38. 16 U.S.C. § 824(a). The term "wholesale" means the sale of electric energy for resale. *Id.* § 824(d). States, not the federal government, regulate retail rates, or the rates charged directly to the public. *Id.* § 824(b)(1). In this way, then, the FPA protects consumers indirectly: the FPA seeks to ensure that purchasers of wholesale power purchase power at just and reasonable rates so that when those purchasers pass on their costs to retail customers, the costs are not excessive.

39. *Id.* § 824(a).

40. *Id.* § 824a-3(b)(1)–(2).

41. *See, e.g.*, Communications Act of 1934, 47 U.S.C. § 201(b) (1934) ("All charges, practices, classifications, and regulations for and in connection with [interstate or foreign communication by wire or radio], shall be just and reasonable . . . ."); *see also* Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 477 (2002) (referring to the "just and reasonable" standard as a "familiar mandate" in the context of public utility regulation).

42. *See* Patrick J. McCormick III & Sean B. Cunningham, *The Requirements of the "Just and Reasonable Standard": Legal Bases for Reform of Electric Transmission Rates*, 21 ENERGY L.J. 389, 410 (2000) (stating that neither the statute nor its legislative history provide much explanation of how to apply this standard).

43. *See generally id.* at 397–410 (discussing the Constitution's implications on the just and reasonable standard).

44. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. The Fifth and Fourteenth Amendments address property interests with respect to the federal government and state governments, respectively.

45. *See* Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n, 262 U.S. 679, 690 (1923) (holding that the validity of the West Virginia Public Service

reasoning, a rate low enough to be labeled "confiscatory," i.e., a rate that would prevent the utility from staying in business, would violate the Constitution's prohibition on taking private property for public use without just compensation or due process of law.[46] Due to the complexity of rate regulation, however, statutory reasonableness requires only that rates fall within a so-called "zone of reasonableness" rather than at a particular point.[47] This zone is "bounded at one end by the investor interest against confiscation and at the other by the consumer interest against exorbitant rates."[48] The Commission retains broad authority to exercise its discretion in setting rates within this zone.[49]

Two provisions of the FPA, sections 205[50] and 206,[51] govern the Commission's obligation to regulate rates for the transmission and wholesale sale of electric energy in interstate commerce.[52] Pursuant to section 205, all public utilities[53] must file with the Commission compilations of their rate schedules setting forth the prices and terms

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Commission's order prescribing rates turned on whether the rates would yield a sufficient return for rendering service, as failing to do so would deprive the utility of its property under the Fourteenth Amendment).

46. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

47. *See* Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 251 (1951) (characterizing statutory reasonableness as an "abstract quality" that allows for a substantial range between what is unreasonably low and what is unreasonably high); *see also* Fed. Power Comm'n v. Conway Corp., 426 U.S. 271, 277–79 (1976) (rejecting the Commission's contention that attempting to remedy a discriminatory rate by lowering it would always result in an unjustly low rate by noting that there is a "zone of reasonableness" rather than a single reasonable rate).

48. Jersey Cent. Power & Light Co. v. FERC, 810 F.2d 1168, 1176–77 (D.C. Cir. 1987) (citing Wash. Gas Light Co. v. Baker, 188 F.2d 11, 15 (D.C. Cir. 1950)).

49. *See* Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944) (holding that the statute does not bind the Commission to any specific formula for setting rates and that the effect of the final rate, not the methods employed, determines the lawfulness).

50. 16 U.S.C. § 824d (2006).

51. *Id.* § 824e.

52. The NGA contains analogous provisions governing the setting of rates for the sale and transmission of natural gas in interstate commerce. *Compare id.* § 824d ("All rates . . . shall be just and reasonable . . . ."), *and id.* § 824e ("Whenever the Commission . . . shall find that any rate, . . . is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, . . . to be thereafter observed and in force, and shall fix the same by order."), *with* 15 U.S.C. § 717c (2006) ("All rates . . . shall be just and reasonable . . . ."), *and id.* § 717d ("Whenever the Commission . . . shall find that any rate, . . . is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate . . . to be thereafter observed and in force, and shall fix the same by order.").

53. The FPA defines "public utility" as any entity that "owns or operates facilities subject to the jurisdiction of the Commission . . . ." *Id.* § 824e.

of service.[54] These rate schedules typically come in the form of "tariffs," which are essentially offers to serve at the particular rates and terms specified therein.[55] The utility may unilaterally propose changes to its tariffs under section 205 at any time, provided that it gives sixty days prior notice to the public before the proposed changes go into effect.[56] Interested parties may comment on the proposed changes, and the Commission may investigate whether the proposed rate is just and reasonable.[57] The utility bears the burden of demonstrating that the proposed rate or charge meets the statutory just and reasonable standard, but the utility need not show that its proposed rate is *more* just and reasonable than other possible rates or that the rate or charge already on file is unjust and unreasonable.[58]

Aside from the express authority under section 205 to reject a utility's proposed change to a rate on file if the utility fails to demonstrate its reasonableness, the Commission has the authority under section 206 to modify an existing rate.[59] As a precondition to making such a change pursuant to section 206, however, the Commission first must find, in response to a complaint or upon its own motion, that the existing rate is unjust, unreasonable, unduly discriminatory or preferential and that the proposed rate is just and reasonable.[60] Changing an existing rate under section 206 therefore requires a different showing than accepting a proposal as just and reasonable under section 205.

Importantly, in addition to the utility setting rates by unilateral tariff filing, which sets forth the rates and terms of service available to any purchaser that wishes to do business with the utility, section 205 contemplates a role for privately-negotiated bilateral contracts.[61] Utilities can therefore negotiate and enter into contractual agreements for rates and terms of service with individual purchasers, and, like tariffs, the utility must file such contracts with the

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54. *Id.* § 824d(c).
55. Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 531 (2008).
56. *See* Me. Pub. Utils. Comm'n v. FERC, 454 F.3d 278, 282 (D.C. Cir. 2006) (summarizing the statutory procedure for setting rates).
57. *See* § 824d(e) (stating that the Commission may hold a hearing to determine the lawfulness of the rate and may suspend the rate for up to five months).
58. *Id.*
59. *See* § 824e(a) (allowing the Commission to determine the "just and reasonable" rate upon finding that a rate is unreasonable).
60. *Id.*; *see also* Boston Edison Co. v. FERC, 233 F.3d 60, 64 (1st Cir. 2000) (stating that the Commission or the complaining customer bears the burden of proof under section 206 to show that the existing rate is in fact unlawful).
61. *See* § 824d(c) ("[E]very public utility shall file with the Commission . . . all rates . . . together with all contracts which in any manner affect or relate to such rates . . . .").

Commission.[62] In this respect, the FPA differs notably from other federal rate-regulation statutes.[63] Indeed, courts have generally disfavored rates set by contract because such rates often lead to treating similarly-situated customers differently.[64] When Congress included in the FPA the allowance for contract rates, it implicitly acknowledged that negotiated contracts could serve as a useful means of allocating risk in the sale for resale and transmission of electric energy in interstate commerce, in contrast to rates for other utilities or common carriers.[65] Nevertheless, the FPA on its face does not distinguish between contract and tariff rates with respect to the requirement that all rates must be just and reasonable and not unduly discriminatory or preferential.[66]

As the power markets have become more competition-oriented and less regulated, market-based rates have emerged as an alternative to traditional cost-of-service regulation.[67] With market-based rates, rather than setting rate schedules based on the cost of providing service, a seller can file a tariff that essentially states that the seller will enter into freely-negotiated contracts with purchasers.[68] This procedure largely eliminates the need to file individual contracts with the Commission for review and approval before they go into effect.[69] Before receiving market-based rate authority, however, the utility

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62. *Id.*

63. *See* Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 478 (2002) (noting that the traditional regulatory scheme for rates at the federal level called for a purely tariff-based system in which the utility filed the rate schedule, parties had the right to comment, and then the regulatory authority accepted the rate if it was just and reasonable).

64. *See Boston Edison*, 233 F.3d at 64 (describing how the individualized nature of contracts, as opposed to one-size-fits-all tariffs, inevitably results in different rates for similar service, a result that, by definition, is discriminatory); *cf.* Interstate Commerce Act, 49 U.S.C. § 10741(2) (2000) (prohibiting a rail carrier from charging a compensation for its service different than it would charge another person for performing a "like and contemporaneous service").

65. *See Boston Edison*, 233 F.3d at 64–65 (differentiating electric utilities from other utilities by noting that electric utilities tend to be large companies for which negotiated contracts form a useful means of allocating risk). The NGA, 15 U.S.C. § 717, similarly allows for rates set by contract. *See* United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 338–39 (1956) (explaining that the sheer number of railroad transactions required compliance with a single schedule of rates applicable to all, while a much smaller number of wholesale transactions regulated by the Natural Gas Act allowed for individualized arrangements between producers and distributors).

66. § 824d(a).

67. *See* Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 535–37 (2008) (describing how technological change led the Commission to permit sellers of wholesale power to operate pursuant to market-based tariffs).

68. *Id.* at 537.

69. *See id.* (noting that the Commission does not subject rates entered into under market-based tariffs to the requirement of immediate filing).

must demonstrate a lack of market power[70] in generation and transmission (or sufficient mitigation thereof), and the utility must thereafter file quarterly reports with the Commission containing Commission-specified contract information.[71] Courts have upheld the market-based rate regulatory option, holding that it does not conflict with the FPA's requirement that the Commission ensure the lawfulness of all rates.[72] Despite this change in how many utilities set rates, the *Mobile-Sierra* doctrine remains equally as applicable in the market-based rate context.[73]

C. *Origin of the* Mobile-Sierra *Doctrine*

The Supreme Court issued two opinions in 1956 during the era of traditional cost-of-service regulation, which created what the courts and the Commission have come to call the *Mobile-Sierra* doctrine.[74] With the FPA and the Natural Gas Act (NGA), the analogous statute governing the Commission's regulation of the natural gas industry, allowing private contractual arrangements to play a role in rate-setting, these twin decisions grappled with the inherent conflict between maintaining the integrity of private contractual agreements and the need to regulate a public good.[75] Over the years, courts have come to interpret these two cases as erring on the side of contract stability and constraining the Commission's regulatory authority to modify contracts when such contracts are the product of arm's-length, bilateral negotiations between sophisticated parties of equal bargaining power.[76] According to this interpretation of the doctrine,

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70. Possessing "market power" means that an entity has the ability to set prices above a competitive level. BOSSELMAN, *supra* note 19, at 155.

71. Cal. *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1009 (9th Cir. 2004).

72. *See id.* at 1011–13 (holding on appeal that the preliminary demonstration of a lack of market power combined with the Commission's reporting requirements suffice to comply with the statutory scheme).

73. *See* David G. Tewksbury & Stephanie S. Lim, *Applying the* Mobile-Sierra *Doctrine to Market-Based Rate Contracts*, 26 ENERGY L.J. 437, 439 (2005) (concluding that the distinctions between cost-based and market-based contracts are largely meaningless in the *Mobile-Sierra* context).

74. United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348 (1956).

75. *See Mobile*, 350 U.S. at 344 (explaining that the NGA affords a "reasonable accommodation" between contract stability and public regulation by limiting the unilateral modification of contracts while maintaining the Commission's authority to oversee contract rates); *see also* Boston Edison Co. v. FERC, 233 F.3d 60, 65 (1st Cir. 2000) (contending that the *Mobile* and *Sierra* decisions attempted to mesh a newly-forming respect for contracts in public utility regulation with the traditional, tariff-based scheme of utility regulation); Ne. Utils. Serv. Co. v. FERC, 55 F.3d 686, 689 (1st Cir. 1995) (stating that the *Mobile-Sierra* doctrine represents the Court's attempt to balance private contractual rights and the Commission's regulatory authority).

76. *See* NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n, 130 S. Ct. 693, 699 (2010) (defining the *Mobile-Sierra* doctrine as a presumption that contract rates freely

rates set by contract, as opposed to by tariff, carry a heavy presumption of reasonableness, and the Commission has to overcome a more demanding standard of review to modify any such contract.[77] The reasoning underlying this standard is that the parties to such a contractual agreement presumably possess equal bargaining power and can be expected to negotiate a just and reasonable rate between them.[78] Parties can "contract out" of the *Mobile-Sierra* doctrine,[79] but it remains the default rule if the contract is silent as to the review standard that will apply.[80]

In *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*,[81] Mobile Gas Service Corporation (Mobile), a natural gas distributor, entered into a ten-year deal with a cement company in which Mobile would furnish gas at 12 cents per thousand cubic feet to the cement company.[82] To fulfill its obligation to supply gas to the cement company, Mobile also entered into a ten-year contract with United Gas Pipe Line Company (United) in which it would purchase gas from United at the equivalent of 10.7 cents per thousand cubic feet.[83] By contracting to buy gas at a relatively low price and to sell it at a higher price, Mobile stood to profit from these two arrangements.

Several years before the end of the term of the contract with Mobile, however, United unilaterally filed rate schedules (tariffs) with the Commission that would have increased the price Mobile paid for gas to 14.5 cents per thousand cubic feet, thus modifying the existing contract.[84] Mobile petitioned the Commission to reject United's filing, arguing that United could not unilaterally alter the contract, but the Commission declined, holding that the new rate became effective unless the Commission found the new rate to be unlawful,

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negotiated between sophisticated parties meet the just and reasonable standard).

77. *Id.*

78. *See* Verizon Commc'ns Inc. v. FCC, 535 U.S. 467, 479 (2002) (differentiating the way the government regulates business-to-business rates from how the government regulates rates charged by businesses to the public).

79. *See* United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div., 358 U.S. 103, 109–13 (1958) (clarifying that a pipeline company could file unilaterally to increase a contract rate when the contract itself states that the customers would pay the pipeline's "going rate" for service); *see also* Papago Tribal Util. Auth. v. FERC, 723 F.2d 950, 953 (D.C. Cir. 1983) (describing a "middle ground" between *Memphis Light* and *Mobile-Sierra* in which parties agree that the utility cannot unilaterally file a rate to supersede a contract rate but that the Commission can set aside the rate if it results in an unfair return, not just if it violates the *Mobile-Sierra* public interest standard).

80. Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 537 (2008).

81. 350 U.S. 332 (1956).

82. *Id.* at 336.

83. *Id.*

84. *Id.* at 336.

which it did not.[85]

The Supreme Court ultimately overturned the Commission's finding, holding that the NGA did not replace the law of private contracts; rather, the Act intended to incorporate the private law of contracts into the regulatory scheme.[86] The Court thus held that a utility could not violate well-known contract principles by changing a rate contract unilaterally through a tariff filing.[87] Such a holding promoted the intent of the statute, the Court reasoned, because although it preserved the integrity of contracts by precluding unilateral modification by one party to the contract, it still maintained the Commission's "paramount authority" to modify rates when necessary in the public interest.[88]

Although the Court did not define the "public interest" in *Mobile*, it went on to do so in the companion opinion *Federal Power Commission v. Sierra Pacific Power Co.*[89] *Sierra* involved similar facts to *Mobile*.[90] In *Sierra*, Sierra Pacific Power Company (Sierra) was an electricity distributor that had historically purchased most of its power from Pacific Gas and Electric Company (PG&E), a public utility.[91] Seeing an increase in demand for power after the end of World War II, Sierra began to negotiate with other suppliers.[92] Concerned about losing its customer, PG&E offered, and Sierra accepted, a fifteen-year purchase agreement for power at a special low rate.[93] The parties then filed the contract with the Commission.[94] About halfway through the term of the contract, PG&E unilaterally filed with the Commission under section 205 of the FPA a tariff that purported to increase its contract rate with Sierra by approximately 28 percent.[95]

As in the Mobile/United proceeding, the Commission initiated a hearing pursuant to section 205 to determine the new rate's reasonableness.[96] The Commission ultimately accepted the new rate, finding that it was not unjust, unreasonable, unduly discriminatory or

85. *Id.* at 336–37.
86. *See id.* at 338–39 (noting that the NGA evinced no clear intent to abrogate contract rates and that the express role for contracts in the statute, in contrast to the Interstate Commerce Act, suggests that Congress indeed contemplated a role for private contracts in setting rates).
87. *Id.* at 337.
88. *Id.* at 344.
89. 350 U.S. 348 (1956).
90. *Sierra* involved contracts related to the sale of electric power while *Mobile* involved the sale of natural gas.
91. *Id.* at 351.
92. *Id.* at 351–52.
93. *Id.* at 352.
94. *Id.*
95. *Id.*
96. *Id.*

preferential.[97] On appeal, mirroring its holding in *Mobile*,[98] the Supreme Court ultimately held that PG&E's unilateral filing under section 205 could not supersede the contract rate simply on a Commission finding that the new rate was just and reasonable.[99] Either the Commission or the party seeking a rate change would have to first make a showing that the rate on file was unjust and unreasonable.[100]

The Court in *Sierra* then went a step further. Although the Commission found the contract rate unjust and unreasonable in its order, the Court held that it did so by applying an erroneous standard.[101] The Commission had found the contract rate unreasonable solely because it resulted in a less than fair return on PG&E's net invested capital.[102] The Court concluded that:

> [W]hile it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain.[103]

The Court continued by noting that, in such circumstances—where the seller's contract proves less profitable than desired—the Commission's sole concern should be whether the rate is so low as to adversely affect the public interest.[104] Putting this idea of affecting the "public interest" into context, a phrase taken directly from the FPA,[105] the Court explained that circumstances affecting the public interest could include instances when the low rate would impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.[106] The Court reasoned that, because the Commission's authority under

97. *Id.*; *see In re* Pac. Gas & Elec. Co., 13 F.P.C. 200, 203–10 (1954), *set aside by* Sierra Pac. Power Co. v. Fed. Power Comm'n, 223 F.2d 605 (D.C. Cir. 1955) (finding that the proposed rate change provided a reasonable return on PG&E's net investment and was consistent with the only other rate schedule PG&E had on file with the Commission).

98. *Sierra*, 350 U.S. at 353 (holding that the Court's interpretation of the NGA in *Mobile* applied to the analogous provisions of the FPA).

99. *Id.*

100. *See id.* (noting that the condition precedent to the Commission exercising its section 206 authority to modify rates is a finding that the existing rate is not just and reasonable).

101. *Id.* at 354.

102. *Id.* at 354–55.

103. *Id.*

104. *Id.* at 372.

105. *See, e.g.*, 16 U.S.C. § 824 (2006) (declaring that the "business of transmitting and selling electric energy . . . is affected with a *public interest* . . . .") (emphasis added).

106. *Sierra*, 350 U.S. at 355.

section 206 to modify rates is premised on its obligation to protect the *public* interest, the Commission cannot find a contract unjust or unreasonable simply because the contract proves unprofitable to the utility.[107]

In the ensuing years after *Mobile* and *Sierra*, the Supreme Court had little to say about the implication of these decisions, leaving the matter largely in the hands of the U.S. Courts of Appeals.[108] The courts struggled to interpret this rule, particularly in contexts that differed from *Mobile* and *Sierra*, which both involved a seller asking the Commission to increase rates set by contracts that were already on file with the Commission.[109]

The Commission[110] and the U.S. Courts of Appeals[111] soon began referring to two different standards of review for rates: the ordinary just and reasonable standard for tariff rates, and a stricter, more deferential, *Mobile-Sierra* "public interest standard" for contract rates.[112] The prevailing characterization of *Mobile* and *Sierra* therefore became that those decisions placed significant restrictions on the Commission's ability to modify contract rates that did not explicitly reserve the Commission's ordinary just and reasonable standard of review.[113] Indeed, some have characterized the *Mobile-Sierra* doctrine as erecting a "practically insurmountable" barrier to contract modification.[114]

107. *Id.*

108. *See* John E. McCaffrey, Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 *Revisits the* Mobile-Sierra *Doctrine: Some Answers, More Questions*, 30 ENERGY L.J. 53, 57 (2009) (explaining that the Supreme Court only issued a handful of opinions discussing the *Mobile-Sierra* doctrine and provided limited guidance on how to apply the doctrine in varying contexts).

109. *See generally* Carmen L. Gentile, *The* Mobile-Sierra *Rule: Its Illustrious Past and Uncertain Future*, 21 ENERGY L.J. 353, 358–63 (2000) (detailing the "middle age[s]" of the doctrine and explaining that courts have interpreted and applied the rule differently depending on the particular context of the case).

110. *See, e.g.*, Gulf States Utils. Co. v. S. Co. Servs., Inc., 39 FERC ¶ 63,026, at 65,141 (1987) (stating that two of the parties relied "upon the 'just and reasonable' standard, rather than upon the stricter 'public interest' standard set forth in the [*Mobile-Sierra*] cases . . . .").

111. *See, e.g.*, Atl. City Elec. Co. v. FERC, 295 F.3d 1, 14 (D.C. Cir. 2002) ("The public interest standard of the *Mobile-Sierra* doctrine is much more restrictive than the just and reasonable standard . . . .").

112. *See* Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 535 (2008) (noting the Commission's tendency to refer to two modes of review, one with the *Mobile-Sierra* "public interest standard" and the other without this presumption, i.e. the ordinary just and reasonable standard).

113. *See, e.g.*, Ne. Utils. Serv. Co., 50 FERC ¶ 61,266, *order on remand*, 66 FERC ¶ 61,332, at 62,085 (1994) ("We recognize, moreover, that the resulting *Mobile-Sierra* doctrine consistently has been construed, by the Commission as well as by the courts, as placing substantial restrictions on the Commission's authority to modify previously accepted fixed-rate contracts.").

114. Papago Tribal Auth. v. FERC, 723 F.2d 950, 954 (D.C. Cir. 1983). *But see* Ne.

D. Morgan Stanley v. Public Utility District No. 1*: Revisiting the* Mobile-Sierra *Doctrine*

In 2008, the Supreme Court issued its much-anticipated decision on the *Mobile-Sierra* doctrine in *Morgan Stanley*.[115] In the wake of the western energy crisis of 2000-2001,[116] the Court provided its most detailed explanation of the breadth and intricacies of the doctrine since the namesake cases in 1956.[117]

In the 1990s, Californians paid more for electricity than customers in neighboring states.[118] Amid pressure to reduce rates, the state began to experiment with the idea of adopting "retail competition," which, in effect, would allow end-use customers to choose their electricity supplier rather than having to receive service from the vertically-integrated incumbent utility—the theory being that competition would drive down retail prices.[119] In 1996, the California legislature passed Assembly Bill 1890, a major piece of legislation designed to facilitate the transition to retail competition.[120] Among other things, this legislation created the California Power Exchange,[121] a non-profit entity responsible for facilitating a day-ahead and day-of auction process for the sale and purchase of wholesale power, known as the "spot market."[122] The California Power Exchange was considered a public utility under the FPA and was thus subject to the Commission's regulatory jurisdiction.[123] Assembly Bill 1890 also created the California Independent System Operator, a non-profit entity responsible for operating the transmission facilities of the investor-owned utilities and administering the "real-time" power market.[124] The new law required investor-owned utilities to sell off a substantial portion of their

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Utils. Serv. Co. v. FERC, 55 F.3d 686, 690 (1st Cir. 1995) (rejecting *Papago*'s characterization of the public interest standard of review as "practically insurmountable" in all circumstances and noting that "[i]t all depends on whose ox is gored and how the public interest is affected").

115. 554 U.S. 527 (2008).

116. *Morgan Stanley*, 554 U.S. at 540–41

117. *See* McCaffrey, *supra* note 108, at 53 (outlining several of the issues related to the *Mobile-Sierra* doctrine that the Court clarified in *Morgan Stanley*).

118. BOSSELMAN, *supra* note 19, at 964.

119. *Id.* Under a competitive retail competition scheme, the incumbent utility provider continues to distribute power to retail customers and remains a regulated natural monopoly, but customers have the opportunity to choose the entity that actually produces the electricity. *See generally id.* at 906–12 (providing background on the goals states seek to achieve by implementing a system of retail competition).

120. Act of Sept. 23, 1996, 1996 Cal. Legis. Serv. 854 (A.B. 1890) (West).

121. *Id.* § 1(c).

122. *In re* Cal. Power Exch. Corp., 245 F.3d 1110, 1114 (9th Cir. 2001).

123. *Id.*

124. Cal. *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1009 (9th Cir. 2004).

generation assets, to sell the output of their remaining resources into the newly-created spot market, and to purchase most of their power from the spot market.[125]

In the summer of 2000, wholesale power prices spiked dramatically.[126] On June 28, 2000, the spot market's constrained day-ahead price peaked at $1,099 per megawatt/hour, an increase fifteen times higher than the average cost before the industry restructuring.[127] The Commission issued an order in the fall of 2000 explaining its view that three primary factors caused the spike in prices: (1) competitive market forces (i.e., increased power production costs combined with increased demand due to unusually high temperatures and a scarcity of available generation);[128] (2) an over-reliance on the spot markets;[129] and (3) the possible exercise of market power.[130]

To help address the dysfunctional wholesale markets, the Commission urged sellers to enter into long-term contracts rather than relying primarily on volatile spot markets for their energy needs.[131] After the crisis passed, some of the entities that had followed the Commission's advice filed complaints under section 206 of the FPA, asking the Commission to lower their contract rates.[132] Those requests, and the subsequent denials by the Commission, motivated this case.[133]

Morgan Stanley involved petitions for review of Commission orders denying modification of three separate sets of wholesale power contracts entered into during the California energy crisis.[134] All three sets of contracts involved rates that were very high by historical standards, which the petitioners asked the Commission to modify after prices returned closer to normal levels.[135] After a hearing, the

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125. *Id.* at 1008–09.
126. *Id.* at 1009.
127. *In re Cal.*, 245 F.3d at 1115 n.2.
128. San Diego Gas & Elec. Co. v. Cal. Power Exch., 93 FERC ¶ 61,121, at 61,354–55 (2000).
129. *Id.* ¶ 61,359.
130. *Id.* ¶ 61,376.
131. *See id.* ¶ 61,348 (eliminating the requirement that utilities satisfy all of their energy needs in the spot market and urging that spot market purchases should merely supplement a utility's portfolio rather than define it).
132. *See* Nev. Power Co. v. Enron Power Mktg., Inc., 101 FERC ¶ 63,031, at 65,270 n.2 (2002) (listing the several complainants and respondents whose disputes gave rise to the *Morgan Stanley* decision).
133. Morgan Stanley Capital Grp. Inc. v. Pub. Utils. Dist. No. 1, 554 U.S. 527, 541–42 (2008).
134. *Nev. Power Co.*, 101 FERC at 65,270, *order on partial initial decision*, 103 FERC ¶ 61,354, at 62,409–10 (2003), *order on reh'g*, 105 FERC ¶ 61,182, at 61,939 (2003).
135. *Morgan Stanley*, 554 U.S. at 541.

Administrative Law Judge's Initial Decision concluded that the *Mobile-Sierra* "public interest" standard was the applicable standard of review and denied the petitioners' complaints under that standard.[136] The Commission then issued an order on the Initial Decision, finding, among other things, that applying the three factors articulated in *Sierra*, and considering the totality of the circumstances, the complainants failed to meet the "public interest" standard for modifying the contracts.[137]

On appeal, the United States Court of Appeals for the Ninth Circuit held that, to be consistent with the original *Mobile* and *Sierra* decisions, the *Mobile-Sierra* doctrine applies only where the Commission has had an initial opportunity to review the contract without any presumption of reasonableness.[138] The Ninth Circuit also held that a different standard for overcoming the *Mobile-Sierra* doctrine's presumption of reasonableness applies when a purchaser, rather than a seller, challenges the contract.[139] The Ninth Circuit thus remanded the case to the Commission so that it could apply the proper standard for reviewing challenges to these contracts.[140]

The Supreme Court disagreed with the Ninth Circuit's reasoning on several important points but nevertheless affirmed its decision on alternative grounds.[141] The Court held that the Commission must presume that a rate set out in *any* freely-negotiated wholesale energy contract meets the just and reasonable standard of the FPA (unless the contract specifies otherwise) and that this presumption may be overcome only if the Commission concludes that the contract seriously harms the public interest.[142] Indeed, the Supreme Court held that the FPA intended to reserve the Commission's power to

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136. *Nev. Power Co.*, 101 FERC at 65,277–78.

137. *See* Order on Partial Initial Decision, 103 FERC at 62,410 ("We find that the challenged contracts are not contrary to the public interest because the Complainants have failed to demonstrate that the contracts in question caused [them] financial distress . . . cast an excessive burden on customers . . . were unduly discriminatory to the detriment of other customers . . . or that any other factors on this record demonstrate that the contracts are contrary to the public interest.").

138. See Pub. Util. Dist. No. 1 v. FERC, 471 F.3d 1053, 1075 (9th Cir. 2006), *vacated*, 547 F.3d 1081 (9th Cir. 2008) ("To justify the *Mobile-Sierra* mode of review, the regulatory scheme in which the contracts are formed must provide FERC with an opportunity for initial review of the contracted rate.").

139. *See id.* at 1087 (arguing that the Commission relied on the wrong legal standard when determining the impact of the rates on the public interest because it applied the factors from a low-rate challenge—which would be used if a seller were bringing suit—rather than the factors for a high-rate challenge—which would be used if purchasers of energy were bringing suit, as in the case here).

140. *Id.* at 1090.

141. Morgan Stanley Capital Grp. Inc. v. Pub. Utils. Dist. No. 1, 554 U.S. 527, 528 (2008).

142. *Id.* at 527.

modify contracts to "extraordinary circumstances" where the public will be "severely harmed."[143] While acknowledging that the statutory just and reasonable standard must apply to all rates, the Court concluded that the *Mobile-Sierra* doctrine requires a differing application of the just and reasonable standard for rates set by contract.[144]

Additionally, the Court held that: (1) the *Mobile-Sierra* presumption of reasonableness applies even when the Commission has not had an initial opportunity to review the contract rate;[145] and (2) the standard to reform a contract does not differ based on whether the seller, rather than the buyer, challenges the rate; in either case, "only when the mutually agreed-upon contract rate seriously harms the consuming public may the Commission declare it not to be just and reasonable."[146] Thus, the Supreme Court reversed the Ninth Circuit's holdings on these two points, but still affirmed its decision to remand the case to the Commission.[147] This decision answered some lingering questions about how the Commission should apply the *Mobile-Sierra* doctrine in circumstances differing from those in *Mobile* and *Sierra*[148] and held that the *Mobile-Sierra* public interest standard remains the default rule for all contract rates.[149]

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143. *Id.* at 551.
144. *Id.* at 535.
145. *See id.* at 545 (arguing that requiring an initial opportunity for Commission review before applying any *Mobile-Sierra* presumption would be contrary to the statute and would violate the "commonsense notion" in *Sierra* that parties to a contract can negotiate a just and reasonable rate between themselves).
146. *Id.* at 545–46, 548 ("The standard for a buyer's challenge must be the same, generally speaking, as the standard for a seller's challenge . . . .").
147. *Id.* at 555.
148. *See generally* McCaffrey, *supra* note 108, at 73–74 (discussing the lingering *Mobile-Sierra* issues that *Morgan Stanley* sought to clarify).
149. *Morgan Stanley*, 554 U.S. at 534. Prior to *Morgan Stanley*, courts viewed the doctrine as evolving to allow great freedom of contract including allowing parties to specify in a contract that a subsequent rate will replace the contract rate, or alternatively, to specify that while a subsequent rate cannot supercede a contract rate, the Commission can review the contract rate to determine whether it generates an unfair rate of return. Papago Tribal Util. Auth. v. FERC, 723 F.2d 950, 953 (D.C. Cir. 1983).) After *Morgan Stanley*, however, the *Mobile-Sierra* presumption clearly remains the "default rule." *Morgan Stanley*, 554 U.S. at 534; *see also* Standard of Review for Modifications of Jurisdictional Agreements, 73 Fed. Reg. 79420, 79421 (Dec. 29, 2008) (to be codified at 18 C.F.R. pt. 35) (withdrawing a Notice of Proposed Rulemaking which sought to clarify the standard of review for modifications to contracts that did not specify which standard to use because of *Morgan Stanley*'s holding that the *Mobile-Sierra* presumption remains the default rule).

II. THE *MORGAN STANLEY* DECISION CONTRADICTS THE CONGRESSIONAL INTENT OF THE FPA TO PROTECT CONSUMERS FROM EXCESSIVE RATES

The Supreme Court erred in *Morgan Stanley* by holding that the *Mobile-Sierra* doctrine requires the Commission to apply, as a default, a more deferential application of the statutory just and reasonable review for contract rates.[150] The FPA's just and reasonable standard does not distinguish between contract and tariff rates and does not contemplate imposing barriers to Commission review of certain Commission-jurisdictional rates.[151]

By holding that the Commission may modify a rate set forth in a *Mobile-Sierra* contract only in extraordinary circumstances,[152] the Court's decision in *Morgan Stanley* contradicts a plain reading of the FPA and Congress's clear intent to protect consumers from excessive rates.[153] The statute's mandate to protect the "public interest" requires the Commission to distinguish between the interests of the consuming public and the interests of utilities when conducting its just and reasonable review.[154] *Morgan Stanley* hinders the Commission's ability to make this distinction.[155]

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150. *See id.* at 535 (explaining that the just and reasonable standard is the only standard applicable for reviewing rates under *Mobile-Sierra*, and that the "public interest" standard simply refers to the fact that the application of the just and reasonable standard can be different when applied to contract rates).

151. 16 U.S.C. §§ 824d(a), 824d(c), 824e(a) (2006); *see Morgan Stanley*, 554 U.S. at 556 (Stevens, J., dissenting) (noting that sections 205 and 206 distinguish between the rate-setting roles of utilities and the Commission, but not between rates set by tariffs versus contracts).

152. *Morgan Stanley*, 554 U.S. at 551 (holding that the FPA "reserve[s] the Commission's contract-abrogation power for those extraordinary circumstances where the public will be severely harmed").

153. 16 U.S.C. § 824e(a) (emphasis added) ("*Whenever* the Commission . . . shall find that *any* rate, charge, or classification . . . is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate . . . and shall fix the same by order."); *id.* (stating that federal regulation of this industry is necessary to protect the public interest); Fed. Power Comm'n v. Texaco Inc., 417 U.S. 380, 399 (1974) (emphasis added) (highlighting that the statute declares unlawful *all* rates that are not just and reasonable and does not permit a "little unlawfulness").

154. *See* Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 355 (1956) (stating that the Commission has section 206 authority to modify rates for the purpose of protecting the public interest, not the private interests of utilities); *see also* Jeffrey McIntyre Gray, *Reconciling Market-Based Rates with the Just and Reasonable Standard*, 26 ENERGY L.J. 423, 427 (2005) (characterizing the FPA as a consumer-protection statute).

155. *See Morgan Stanley*, 554 U.S. at 548 (holding that the Commission should generally not make a distinction between a seller's challenge and a buyer's challenge). Because wholesale transactions often involve two parties that, in their ordinary course of business, act as both sellers and buyers of power, distinguishing between a "seller" and a "buyer" in any given transaction may involve an oversimplification. *Id.* Nevertheless, the Court appears to reject the idea that the

First, the statute does not differentiate between the various ways that regulated entities set rates, i.e., by contract or by tariff, and it states that any rate deemed unjust and unreasonable is unlawful and must be set aside.[156] In particular, the FPA provides that "*all* rates and charges . . . shall be just and reasonable"[157] and that the Commission shall determine the lawful rate "whenever" it finds an existing rate to be unjust and unreasonable.[158] The two FPA provisions governing the setting of rates for wholesale power, sections 205 and 206, do not distinguish between contract and tariff rates and do not define or explain any heightened burden the Commission must overcome depending on how a utility sets the rate.[159] The provisions refer only in general terms to "rates," "charges," and "rate schedules" and do not separate rates set by contract and those set by tariff into separate subsections of the statute.[160]

Second, the *Morgan Stanley* Court's interpretation of the *Mobile-Sierra* doctrine contradicts Congress's intent that the FPA protect the public interest,[161] which requires the Commission to distinguish between the interests of the consuming public and the interests of utilities when conducting its just and reasonable review.[162] This limiting of the Commission's ability to modify excessively high contract rates infringes on the Commission's duty to protect the public interest.[163] For example, this holding may saddle customers with excessive rates that the Commission would find unlawful under

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Commission should consider whether the interest of the contract challenge aligns with the public interest as opposed to purely private interests. *Id.*

156. *See* 16 U.S.C. §§ 824d, 824e (treating all "rates" equally under the statute).

157. *Id.* § 824d(a) (emphasis added).

158. *Id.* § 824e(a); *cf. In re* Permian Basin Area Rate Cases, 390 U.S. 747, 783–84 (1968) (construing the analogous provisions of the Natural Gas Act as permitting the Commission, without qualification or exception, to change any rate it finds to unlawfully "contravene the relevant public interest[]").

159. 16 U.S.C. §§ 824d, 824e; Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944) (explaining that the impact of a rate, not any underlying methods used to determine the rate, matters when the Commission reviews the rate's lawfulness).

160. 16 U.S.C. §§ 824d, 824e.

161. *Id.* § 824d(a) ("It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of . . . the sale of such energy . . . is necessary in the public interest . . . .").

162. *See* Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 355 (1956) (clarifying that the Commission's section 206 authority exists to protect the public interest as distinguished from private profit-making interests of utilities).

163. *See* NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n, 130 S. Ct. 693, 702 (2010) (Stevens, J., dissenting) (pointing out that, absent a demonstration that the contracts in question "seriously harm" the public interest, consumers will end up paying higher rates than would be otherwise considered reasonable).

ordinary circumstances.[164]

While the statute does not elaborate on what precisely constitutes the "public interest," the Court has historically defined it, and the broader intent of the statute, as keeping rates as low as reasonably possible consistent with the maintenance of an adequate level of service.[165] In fact, Congress intended to afford the public a "complete, permanent and effective bond of protection from excessive rates and charges,"[166] and the Commission cannot ignore even a "small dent in the consumer's pocket" when performing its just and reasonable review.[167]

Given the regulated utility model in this country, one that prefers regulation of natural monopolies over direct public ownership of utilities,[168] the Commission must balance the interests of both consumers and investors when performing its just and reasonable review.[169] To protect the public from excessive rates while also ensuring that consumers have reliable access to this essential "product," the Commission both protects against the monopolist's tendency to exploit its economic position while also ensuring, under its traditional regulatory model, that the regulated entity has the opportunity to recover its costs and a reasonable return. This reasonable return is necessary so that the utility can continue providing its essential service and so that it can invest in needed infrastructure.[170] Thus, the Commission uses its discretion to balance investor interest in maintaining financial integrity and access to

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164. *Id.* at 704 (emphasis in original) (explaining that "[i]f a third party wholesale buyer can show a rate harms the public interest (perhaps because it is too high to be just and reasonable under normal review), but cannot show it *seriously* harms the public, FERC may do nothing about it").

165. *See* Atl. Ref. Co. v. Pub. Serv. Comm'n, 360 U.S. 378, 388 (1959) (construing the purpose of the analogous Natural Gas Act); *see also* Pa. Water & Power Co. v. Fed. Power Comm'n, 343 U.S. 414, 418 (1952) (stating that one of the major purposes of the FPA is to protect consumers against excessive prices). Keeping rates as low as reasonably possible does not, however, mean that, in the world of market-based rates, all higher-than-usual rates will be unlawful. *See generally* BOSSELMAN, *supra* note 19, at 155–57 (discussing how the Commission monitors the reasonableness of market-based rates).

166. *See Atl. Ref. Co.*, 360 U.S. at 388 (describing the Congressional intent of the analogous NGA).

167. Fed. Power Comm'n v. Texaco Inc., 417 U.S. 380, 399 (1974).

168. *See* Duane, *supra* note 17, at 476–77 (introducing the concept of "utility consensus" and discussing how it shaped American regulation of energy).

169. *See* Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944) (explaining that a regulated business's return should be commensurate with returns on investments in other enterprises having corresponding risks and should allow the business to retain its credit and attract capital, but may not produce net revenue).

170. *See id.* (noting the importance of the utility's ability to make enough revenue not just to cover operating expenses but also to cover the capital costs of the business such as servicing its debt and paying dividends on stock).

capital markets with the consumer interest in not paying exploitative rates.[171]

But while the Commission considers the interests of investors when evaluating the reasonableness of rates, it must do so for the ultimate purpose of benefitting the public interest.[172] The Commission considers the investors' interests to ensure that the public will continue to have access to an affordable and reliable power supply.[173] Consequently, when the Commission seeks to determine whether a particular rate is just and reasonable—regardless of whether that rate was set by contract or by tariff—the statute requires the Commission to base its determination primarily on how the rate affects the public interest, not on how it affects the profits of a utility company.[174] The deregulatory efforts of the last few decades have not changed this statutory obligation.[175]

Despite acknowledging that high-rate challenges and low-rate challenges may often affect the public interest differently,[176] *Morgan Stanley* appears to nevertheless largely dispose of this distinction.[177] In

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171. *See* Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n, 262 U.S. 679, 690 (1923) (holding that rates that do not yield a sufficient return for a public utility to continue its service deprive the public utility of its property in violation of the Fourteenth Amendment); *see also Atl. Ref. Co.*, 360 U.S. at 388 (holding that Congress intended in the NGA to provide natural gas to consumers at the lowest possible reasonable rate and that Congress framed the Act so as to provide consumers a complete, permanent, and effective bond of protection from excessive rates and charges). Although the Court addressed the NGA in this case and not the FPA, the relevant provisions of these two statutes are substantially identical. *See* Ark. La. Gas Co. v. Hall, 453 U.S. 571, 578 n.7 (1981) (characterizing the Supreme Court's decisions as establishing a practice of citing decisions interpreting the pertinent sections of the two statutes interchangeably).

172. *Cf. Bluefield Waterworks*, 262 U.S. at 693 (holding that a public utility's return should be sufficient to raise the money necessary for the proper discharge of its public duties).

173. *Id.*; *see also In re* Permian Basin Area Rate Cases, 390 U.S. 747, 769 (1968) ("Regulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness."); *Hope Natural Gas Co.*, 320 U.S. at 603 (citing Fed. Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 590 (1942)) (noting that the statute requires balancing of consumer and investor interests but that, while the regulation should allow for a return to reflect risk, it does not guarantee net revenues for the utility).

174. *See* Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 355 (1956) (holding that the Commission's authority to change rates is based on its duty to protect the public interest as distinguished from the interests of utilities).

175. *See* 16 U.S.C. § 824 (2006) (maintaining the same "public interest" declaration of policy under the statute as when originally passed into law).

176. *See* Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 548 (2008) (agreeing with the Ninth Circuit that the factors applied in *Sierra* are not precisely applicable to the high-rate context).

177. *See id.* at 548–51 (2008) (holding that the Commission's standard of review for all contracts rates must be generally the same and that Commission modification of such rates is only permitted in extraordinary circumstances).

other words, regardless of whether a contract would ostensibly harm the public or harm the private entity that freely negotiated the agreement, the Commission must, according to *Morgan Stanley*, presume that all such rates are just and reasonable and cannot make any modifications barring extraordinary circumstances.[178] This result runs contrary to Congressional intent to ensure that the Commission's review fully considers the public interest and that consumers pay no more than the lowest reasonable rate for power.[179]

Contrary to assertions by the majority,[180] the fact that Congress chose to include contracts in the statutory scheme does not suggest that Congress intended to shield such agreements from the same regulatory review given to other rates.[181] The majority correctly points out that the FPA differs from other similar regulatory statutes that relied on purely tariff-based regulatory schemes; this distinction indicates that Congress intended for contracts to play a role in wholesale power regulation.[182] But anticipating a role for contracts does not equate to developing a separate regulatory scheme for contract rates.[183] To the contrary, the fact that section 205 specifically requires utilities to file all contracts affecting or relating to rates with the Commission,[184] and the fact that section 206 contemplates that the Commission may change *any* rate it finds unlawful,[185] suggest that Congress intended for all such rates to remain fully subject to the Commission's traditional just and reasonable review.[186]

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178. *Id.*; *see also id.* at 530 (opening the opinion by stating that the *Mobile-Sierra* doctrine requires the Commission to presume that rates set in freely negotiated contracts meet the just and reasonable standard).

179. *See* Atl. Ref. Co. v. Fed. Power Comm'n, 360 U.S. 378, 388 (1959) (describing the Congressional intent of the NGA as ensuring the "lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest."); Pa. Water & Power Co. v. Fed. Power Comm'n, 343 U.S. 414, 418 (1952) (stating that one of the major purposes of the FPA is to protect consumers against excessive prices).

180. *See Morgan Stanley*, 554 U.S. at 531–34 (suggesting that, by deviating from the Interstate Commerce Act, which called for a purely tariff-based regulatory scheme, Congress intended for the FPA to limit the Commission's authority to abrogate contracts to extraordinary circumstances).

181. *See id.* at 566 (Stevens, J., dissenting) (arguing that Congress's inclusion of contracts in section 206 of the act implies that Congress concluded that ordinary contract defenses were insufficient to protect the public interest).

182. *See id.* at 531 (comparing the FPA to the Interstate Commerce Act).

183. *See id.* at 559 (Stevens, J., dissenting) ("[T]he fact that the FPA tolerates contracts does not make it subservient to contracts.").

184. 16 U.S.C. § 824d(c) (2006).

185. *Id.* § 824e(a).

186. *See* United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 344 (1956) (suggesting that Congress would not have included contracts in the regulatory scheme but for the ability of the Commission to modify them when necessary).

Furthermore, by imposing its own interpretation of the ambiguous statute on the Commission, the *Morgan Stanley* Court overreached.[187] The FPA does not bind the Commission to any rigid formula for determining just and reasonable rates, and courts lack the authority to set aside any rate within a "zone of reasonableness."[188] By design, Congress sought to establish broad objectives and parameters for the regulation of wholesale power while leaving to the administrative agency, which possesses expertise on the topic, the discretion to carry out those objectives.[189] This method of delegating authority to agencies with specialized expertise is commonplace in our country's administrative state.[190] In addition to contradicting the statutory scheme's plain language and the Congressional intent behind it, the Court's decision in *Morgan Stanley* misinterpreted the holdings of *Mobile* and *Sierra*.

III. *MORGAN STANLEY* MISINTERPRETED THE NARROW HOLDINGS OF *MOBILE* AND *SIERRA* AND CREATED SIGNIFICANT HURDLES TO CONTRACT REFORMATION

Mobile and *Sierra*, taken together, stand for two relatively simple propositions: (1) utilities cannot unilaterally modify a contract rate simply by filing a tariff rate;[191] and (2) the Commission cannot find a contract rate unreasonable, and therefore set it aside, solely because the rate becomes unprofitable to the utility.[192] Nothing in these

187. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (holding that a gap in a statute signifies that Congress has made an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation); Morton v. Ruiz, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."); *see also In re* Permian Basin Area Rate Cases, 390 U.S. 747, 776 (1968) (observing that the breadth of an agency's authority is determined in part by the purposes for which the agency was created, and thus the Court has held that the Commission's broad responsibilities demand a generous construction of its statutory authority).

188. *See* Fed Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 585–86 (1942) (describing the upper and lower bounds of the zone in which the Commission can fix rates).

189. *See* Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 557–58 (2008) (Stevens, J., dissenting) ("Congress . . . used the general words 'just and reasonable' because it wanted to give [the Commission], not the courts, wide latitude in setting policy.").

190. *See generally* ANDREW F. POPPER ET AL., ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH 1–2 (2d ed. 2010) (explaining that, while the authority to regulate originates in Congress, agencies are the ones that actually govern).

191. *Mobile*, 350 U.S. at 337; Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 352–53 (1956).

192. *Mobile*, 350 U.S. at 344; *see Sierra*, 350 U.S. at 353–55 (holding that the Commission erred when it found a contract rate unlawful solely because the rate

decisions creates an across-the-board presumption of reasonableness for contract rates.[193] The Supreme Court has misinterpreted these largely pro-consumer[194] decisions as instead protecting the sanctity of private contracts and as a limiting force on the government's role in ensuring just and reasonable rates.[195] By further limiting the circumstances in which the Commission can modify contracts, the Court has imposed hurdles to contract modification and protection of consumers.[196]

Because the Court in *Mobile* and *Sierra* discussed the Commission's review of contract rates and not tariff rates, the fact that courts have read into these decisions the creation of a separate statutory scheme for reviewing contract rates is perhaps unsurprising.[197] But the Court in *Mobile* and *Sierra* created no such separate scheme, even with respect to "low" contract rates as compared to tariff rates, and the Court specifically recognized the Commission's primary responsibility regarding protection of the public interest as opposed to the utilities' private interests.[198] The standard of review for all rates, contract or tariff, is the same: the Commission must ensure that rates are just and reasonable, as determined by its obligation to protect the public

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produced a rate of return substantially less than average for the company).

193. *See Mobile*, 350 U.S. at 344–45 (suggesting that, when the interests of a party to a contract coincide with the interests of the public, that party can successfully petition the Commission to modify the contract); *see also* Ne. Utils. Serv. Co. v. FERC, 55 F.3d 686, 691 (1st Cir. 1995) (arguing that the extent to which the *Mobile-Sierra* presumption applies depends on the circumstances and on "whose ox is gored").

194. *See Morgan Stanley*, 554 U.S. at 562 n.2 (Stevens, J., dissenting) (suggesting that these cases should be read as underscoring the difficulty utilities have in showing that a low rate adversely affects the public interest); Pub. Utils. Comm'n v. Sellers of Long Term Contracts, 103 FERC ¶ 61,345, at 62,446 (2003) (Massey, Comm'r, dissenting) (stating that the *Mobile-Sierra* presumption generally arose when sellers attempted to raise rates and that the higher burden to modification thus had a consumer protection rationale). *But see* Gentile, *supra* note 109, at 362 (suggesting that protecting contracts was also a key concern).

195. *See Morgan Stanley*, 554 U.S. at 551 ("We think that the FPA intended to reserve the Commission's contract-abrogation power for those extraordinary circumstances where the public will be severely harmed.").

196. *See id.* at 548 (eliminating the distinction between a buyer's challenge and a seller's challenge); *id.* at 545–46 (arguing that *Sierra* provided a definition of what "just and reasonable" means in the contract context regardless of when the contract is reviewed).

197. *See Mobile*, 350 U.S. at 347 (concluding that the NGA gives no power to companies to unilaterally modify their contract rates); *Sierra*, 350 U.S. at 355 ("But, while it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain.").

198. *See Sierra*, 350 U.S. at 354–55 (noting that its holding did not preclude natural gas companies from an avenue of relief when their interests coincided with the public interest).

interest.[199] The *Mobile* Court recognized that contracts and tariffs possess some inherent differences in how they are set and how they can be changed, but the Commission's review of such rates remains the same nonetheless.[200]

A. Mobile *and* Sierra *Distinguished Between How Utilities Modify Contract and Tariff Rates, Not How the Commission Reviews Such Rates*

Contracts play an important role in setting rates for wholesale power,[201] as the Court in *Morgan Stanley* recognized.[202] But the references in *Mobile* and *Sierra* to preserving the integrity of contracts referred to limiting the *utility's* ability to unilaterally modify its contracts under section 205, not to limiting the Commission's modification authority.[203] The Court in *Mobile* and *Sierra* did not seek to create a dual-track statutory scheme for the Commission's review of rates depending on whether the company set the rate by contract or tariff.[204] The *Morgan Stanley* Court missed this subtle, but important, distinction.[205] Indeed, courts have arguably misread the holdings in *Mobile* and *Sierra* for quite some time.[206]

The *Mobile* Court simply held that when Congress chose to include contracts in the statutory scheme, Congress contemplated the use of contracts in the traditional sense.[207] A fundamental principle of

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199. *See* 16 U.S.C. § 824(a) (2006) (declaring that regulation is necessary in the "public interest"); *id.* § 824d(a) (explaining the just and reasonable standard).

200. *See Mobile*, 350 U.S. at 343 (explaining that setting rates by tariff allows the company to propose unilaterally to modify the rates it offers to customers, while contracts require mutual agreement for modification).

201. *See id.* at 344 (explaining that the industrial use of natural gas frequently requires substantial investments that the consumer would be unwilling to make without long-term commitments from the distributor, who in turn needs to make long-term arrangements with natural gas companies).

202. *See* Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 551 (2008) (reasoning that "[t]he Ninth Circuit's standard would give short shrift to the important role of contracts in the FPA").

203. *See, e.g.*, *Mobile*, 350 U.S. at 344 ("Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act.").

204. *See, e.g.*, *id.* (recognizing that denying natural gas companies the ability to unilaterally change rates does not change the Commission's powers to modify them when the public interest requires it).

205. *See Morgan Stanley*, 554 U.S. at 551 n.6 (arguing that, regardless of the dissent's reading of the statute, *Sierra* plainly distinguished between contract and tariff rates with respect to the Commission's review).

206. *See id.* (characterizing lower courts' reading of the *Mobile-Sierra* doctrine that there is a different review process for contract rates as settled for more than fifty years).

207. *See Mobile*, 350 U.S. at 343 (noting that the rate-making power of natural gas companies is no different from those they would possess in the absence of the statute, except where the Act explicitly says otherwise); *see also* Gentile, *supra* note 109, at 353 (characterizing the *Mobile* decision as holding that the NGA did not

contracts is that one party cannot alter the terms at any time unless the parties mutually agree to allow such modification.[208] Therefore, while the statute permits a utility to freely and unilaterally change its filed tariff provided the modification is just and reasonable, the Court held that Congress did not intend to allow utilities to have similar freedom to change their contracts.[209] In hindsight, this holding is not very controversial.[210]

In practice, this holding means that utilities will have to take a different procedural avenue to modify a *Mobile-Sierra* contract as compared to a tariff.[211] In the electric context, a utility can file a rate change for its tariff under section 205 and, when doing so, need only show that the new tariff is just and reasonable; it does not need to show that the existing tariff was unjust and unreasonable.[212] On the other hand, by virtue of holding that utilities cannot modify a contract unilaterally under section 205, the utility must instead present evidence or information to the Commission so that the Commission may institute a rate investigation on its own motion under section 206 to determine whether the existing contract rate is unjust and unreasonable.[213] When doing so, the movant would bear the burden of making that showing.[214] The Court's holding therefore explained the utility's means for changing contract rates, but not the Commission's standard of review.[215]

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repeal the law of contracts).

208. *See* 17 AM. JUR. 2D *Contracts* § 507 (2004) ("A valid modification of a contract must satisfy all the criteria essential for a valid original contract, including offer, acceptance, and consideration. Hence, one party to a contract may not unilaterally alter its terms.").

209. *See Mobile*, 350 U.S. at 343 (discussing how contracts and tariffs differed in the absence of the statute).

210. *See* Gentile, *supra* note 109, at 356 (observing that this first holding merely recognizes that a utility can circumscribe its own ability to file tariff rate increases by entering into contracts).

211. *See Mobile*, 350 U.S. at 344–45 (explaining that lacking the ability to unilaterally change a contracted rate does not preclude the natural gas company from petitioning the Commission to find the rate unjust and unreasonable).

212. Proposed rates and terms under section 205 go into effect automatically after the requisite period of notice given to the public unless the Commission, upon protests from third parties or on its own motion, institutes a hearing to determine the rate's lawfulness. Upon such a hearing, the utility filing the tariff bears the burden of demonstrating the new rate's reasonableness. *See* 15 U.S.C. § 717c (detailing the procedure for rates to go into effect in the NGA); 16 U.S.C. § 824d (detailing the procedure for the FPA).

213. *See* 16 U.S.C. § 824e (setting forth the procedures for changing an existing rate); *see also* Me. Pub. Utils. Comm'n v. FERC, 454 F.3d 278, 282–83 (D.C. Cir. 2006) (describing the interplay between sections 205 and 206 and the required showings under each section).

214. *See* 16 U.S.C. § 824e(b) (stating that the movant bears the burden of proof to show that the rate is unjust, unreasonable, unduly discriminatory or preferential).

215. *See* Gentile, *supra* note 109, at 356 (interpreting *Mobile* as merely recognizing

The *Sierra* Court went on to discuss the Commission's authority under section 206 to allow a utility to modify a contract.[216] The Court held that the Commission cannot set a contract rate aside as unjust and unreasonable solely to relieve a utility of its "improvident bargain."[217] This holding singled out contracts not because the Court intended to create a new standard of review for contract rates generally, but because, by virtue of its earlier holding, only contracts require a finding of unlawfulness before they can be replaced.[218] In other words, the Commission will not find itself in the position of having to respond to a section 206 petition or complaint from a utility arguing that its filed tariff is too low because the utility can increase it under section 205.[219]

In sum, the Court in *Mobile* and *Sierra* attempted to grapple with a statute that seemed to contradict itself: it incorporates contracts into the statutory scheme, while also appearing to allow utilities a statutory mechanism to unilaterally modify those contracts.[220] The Court resolved this conflict by holding that Congress did not intend to provide a statutory mechanism by which utilities could change their contracts simply because such a change would be in their private interest.[221] Therefore, the procedure the utility undertakes to change its contract and tariff rates has to account for the inherently different ways these types of rates are set.[222]

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that a natural gas company can circumscribe its own right to file rate increases by entering into contracts).

216. *See* Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 354–55 (1956) (deciding that the Commission erred when it found an existing contract rate unjust and unreasonable based solely on how the contract rate affected the utility).

217. *Id.*

218. *See* 16 U.S.C. § 824d (codifying the utility's ability to file new rate schedules). By removing the utility's ability to replace or modify a contract unilaterally under section 205, the only available avenue for modifying a contract is by petitioning the Commission under section 206. *See id.* § 824e (codifying the Commission's authority to modify existing rates).

219. *See id.* § 824d(e) (stating that when a utility files a new rate, the utility bears the burden during the hearing of demonstrating the lawfulness of the new rate); *id.* § 824e (stating that, in any hearing to determine the lawfulness of an existing rate, the complaining party or the Commission bears the burden of demonstrating the existing rate's unlawfulness).

220. *See, e.g.*, *id.* § 824d (allowing utilities to supplement their rate schedules with contracts and contemplating unilateral replacement of rate schedules without distinguishing tariffs from contracts).

221. *See* United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 344 (1956) (determining that the NGA preserves the integrity of contracts by barring natural gas companies from unilaterally modifying contracts rates).

222. *See id.* at 343–44 (acknowledging that the NGA contemplates natural gas companies changing their rates from time to time but interpreting the statute as declining to define these powers and implying that contracts in particular cannot be changed unilaterally).

B. Mobile *and* Sierra *Distinguished Between the Public Interest and the Private Interests of Utilities, Not Between Contracts and Tariffs*

Perhaps the biggest error by the *Morgan Stanley* Court and others before it is the assumption that the *Mobile* and *Sierra* decisions' references to the "public interest"[223] sought to impose a different standard of review on the Commission for contract rates—a standard of review more demanding than the statute's just and reasonable standard.[224] To the contrary, these references to the public interest merely reflected the Commission's already-existing statutory mandate.[225] The Court attempted to underscore how the Commission's duty to protect the public interest requires it to consider changes to contracts differently depending on whom the allegedly unreasonable contract harms—not depending on whether the rate was filed as a contract or a tariff.[226]

Rather than limiting the Commission's contract modification powers, the *Mobile* Court in fact suggested that the statute would not allow natural gas companies or utilities to set rates by contract in the first place absent the Commission's ability to review and ostensibly modify such rates to protect the public interest.[227] The Court also recognized that those who represent the public interest have a higher standing to seek modification of their contracts than do those who seek changes solely to protect private interests.[228] Nevertheless, the

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223. *See, e.g.*, Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 355 (1956) ("In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest . . . .").

224. *See* Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 534 (2008) (holding that, under the *Mobile-Sierra* presumption, setting aside a contract rate requires "unequivocal public necessity"); *see also* Texaco Inc. v. FERC, 148 F.3d 1091, 1097 (D.C. Cir. 1998) (arguing that the public interest standard required to modify contracts under *Mobile-Sierra* is something different from, and more exacting than, the statute's reference to the public interest).

225. *See* 15 U.S.C. § 717(a) (2006) ("[T]he business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."); 16 U.S.C. § 824a ("[T]he business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and . . . Federal regulation . . . is necessary in the public interest . . . .").

226. *See Mobile*, 350 U.S. at 344–45 (noting that natural gas companies are "understandably" not given the same standing to complain of their own contracts as those who represent the public interest, but that they could petition the Commission to make modifications if their interests align with the public interest); *Sierra*, 350 U.S. at 355 (holding that the statute requires the Commission to protect the public interest as distinguished from the private interests of utilities).

227. *See Mobile*, 350 U.S. at 339 ("[T]he Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.").

228. *See* 15 U.S.C. § 717d(a) (excluding natural gas companies from the list of

Commission can still potentially relieve natural gas companies or utilities of their contract rates: companies have the statutory right to petition the Commission to make a finding that an existing contract rate is unjust and unreasonable.[229] As the Court in *Mobile* cautioned, though, an entity will only have success when its interests coincide with the public interest.[230] In other words, a natural gas company or electric utility will only be able to modify a contract rate if the Commission determines that the rate harms the public interest, not if it only harms the company.[231]

The *Sierra* Court attempted to elaborate on this idea of how rarely a seller will be able to successfully argue that a low rate harms the public interest.[232] In *Morgan Stanley*, however, the Court erroneously interpreted *Sierra* as stating that contracts can rarely be modified in general.[233] As the *Sierra* Court explained, when a utility asks the Commission to increase a low contract rate simply because the rate proves unprofitable for the utility, the Commission's objective should be to protect the public interest.[234] But, because the public interest is rarely harmed by a low rate, in such circumstances the low rate would only harm the public interest in extraordinary circumstances, that is, if the rate "might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."[235] Put more simply, only if the contract

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those who can file a complaint but still allowing companies to petition the Commission to conduct a hearing on its own motion); *Mobile*, 350 U.S. at 344–45 ("[N]atural gas companies are understandably not given the same explicit standing to complain of their own contracts as are those who represent the public interest . . . .").

229. *See* 15 U.S.C. § 717d(a) ("Whenever the Commission, after a hearing had upon its own motion or upon complaint . . . shall find that any rate, charge, or classification . . . is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force . . . ."); *Mobile*, 350 U.S. at 344–45 (describing how its holding that tariffs could not supersede contracts did not completely preclude any opportunity for the natural gas company to get relief from an unfavorable contract).

230. *See Mobile*, 350 U.S. at 344–45 (explaining that the avenue of relief would only exist when the company's interests aligned with the public interest).

231. *Id.*

232. *See* Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 355 (1956) (explaining that a low rate could harm the public interest if it forces the utility out of business, casts upon other consumers an excessive burden, or is unduly discriminatory).

233. *See* Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 551–52 n.6 (2008) (arguing that Sierra plainly distinguished between contract and tariff rates with respect to the Commission's review).

234. *See Sierra*, 350 U.S. at 354–55 ("In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest . . . .").

235. *See id.* at 355 (defining the public interest in the low-rate context).

rate will literally force the utility out of business—thus depriving the public of power—or cause some other serious harm or discrimination to third parties, will a low rate harm the public interest.[236]

Therefore, when read together, the *Mobile* and *Sierra* decisions make no attempt to limit the Commission's ability to set aside contract rates as a general matter, as the Court contends in *Morgan Stanley*.[237] *Mobile* and *Sierra* instead: (1) eliminated a utility's ability to modify a contract rate unilaterally under section 205 of the FPA unless the contract permits it to do so; and (2) instructed the Commission to consider the public interest, not the private interests of utilities, when evaluating changes to such contract rates under section 206.[238] The Commission must consider the public interest in all cases; the Court simply sought to clarify how the public interest is affected differently depending on whether a rate is allegedly too low or too high.[239]

C. Morgan Stanley *Expands the* Mobile-Sierra *Doctrine and Creates Additional Hurdles to Contract Modification*

Courts and commentators have often used the phrase "practically insurmountable" to describe the barrier the *Mobile-Sierra* doctrine has placed on the Commission's ability to reform freely-negotiated contract rates.[240] This phrase first appeared in an opinion written by then D.C. Circuit Judge Antonin Scalia, who also authored the majority's opinion in *Morgan Stanley*.[241] The Commission and some courts have since acknowledged the error of this characterization,[242]

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236. *Id.*

237. *See Morgan Stanley*, 554 U.S. at 530 (holding that the *Mobile-Sierra* doctrine requires the Commission to presume that any freely-negotiated contract meets the just and reasonable standard).

238. *See* discussion *supra* Parts III.A–B (analyzing how *Mobile* and *Sierra* sought to distinguish the public interest from the merely private interests of a utility).

239. *See Sierra*, 350 U.S. at 355 (limiting its description of how the public interest is affected to "such circumstances," i.e., circumstances in which a seller attempts to raise a low contract rate).

240. *E.g.*, Kan. Cities v. FERC, 723 F.2d 82, 87–88 (D.C. Cir. 1983) (holding that the *Mobile-Sierra* doctrine is "virtually inoperative"); Papago Tribal Util. Auth. v. FERC, 723 F.2d 950, 954 (D.C. Cir. 1983) (noting that the "Commission itself is unaware of any case" in which a court granted relief under the *Mobile-Sierra* standard); Gentile, *supra* note 109, at 353 (explaining the struggle for private litigants that has ensued in the years since the implementation of the *Mobile-Sierra* doctrine).

241. *See Papago*, 723 F.2d at 954 ("The public-interest standard is practically insurmountable; the Commission itself is unaware of any case granting relief under it.").

242. *See, e.g.*, Ne. Utils. Serv. Co. v. FERC, 55 F.3d 686, 691 (1st Cir. 1995) [hereinafter Ne. Utils. II] (characterizing the notion of a "practically insurmountable" barrier as a "gloss" of the case law and holding instead that the strength of the barrier the Commission must overcome depends on the

and the Commission has in fact overcome the public interest standard to modify some contracts.[243] Nevertheless, *Morgan Stanley* creates further barriers to contract modification because it appears to preclude the Commission from making distinctions between high- and low-rate challenges and from considering the timing of when the Commission reviews the contract.[244]

Prior to *Morgan Stanley*, the *Mobile-Sierra* doctrine had not prohibited contract modification in such broad circumstances.[245] For example, courts expressed a greater willingness to allow the Commission to modify contracts that the Commission was reviewing for the first time as opposed to contracts already approved by the Commission.[246] *Mobile* and *Sierra*, after all, involved circumstances in which sellers attempted to modify contracts that the Commission had already accepted under its traditional just and reasonable review.[247] Courts also appeared to recognize that *Mobile* and *Sierra* involved challenges to "low" contract rates and that, at the very least, a less stringent application of the *Mobile-Sierra* doctrine should apply in circumstances outside of the low-rate context.[248]

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circumstances); *Ne. Utils. Serv. Co.*, 66 FERC ¶ 61,332, at 62,087 (1994) (stating that employing a "practically insurmountable" barrier to contract modification on the Commission's initial review of contracts would transform public regulation into little more than rubber-stamping private contracts).

243. *See, e.g.*, *Ne. Utils. II*, 55 F.3d at 693 (affirming Commission modifications to a wholesale power contract between three entities).

244. *See Morgan Stanley*, 554 U.S. at 548 (holding that the standard for a buyer's challenge must be generally the same as the standard for a seller's challenge); *id.* at 546 (characterizing *Sierra* as setting parameters for the "just and reasonable" standard for contract rates generally).

245. *See* Tewksbury, *supra* note 73, at 445–46 n.81 (synthesizing a pattern for cases in which the courts have permitted modifications to *Mobile-Sierra* contracts).

246. Some courts (and the Commission) have held that the *Mobile-Sierra* doctrine does not apply at all to the Commission's initial review of a contract, while others have opted to impose a less demanding version of the *Mobile-Sierra* standard upon initial review of a contract. *Compare* Me. Pub. Utils. Comm'n v. FERC, 454 F.3d 278, 283 (D.C. Cir. 2006) (stating that the *Mobile-Sierra* presumption only applies after the contract is accepted for filing), *and Fla. Power & Light Co.*, 67 FERC ¶ 61,141, at 61,397 (1994) (arguing that effective rate regulation would end if the Commission had to employ the *Mobile-Sierra* standard of review even upon its initial review of a contract) *with Ne. Utils. II*, 55 F.3d at 692 (accepting the Commission's explanation that a more "flexible" public interest standard was permissible because the Commission was presented with the contract for the first time).

247. *See Ne. Utils. Serv. Co.*, 66 FERC at 62,076 (characterizing the "classic" *Mobile-Sierra* situation as when a seller attempts to unilaterally increase a contract rate already on file with the Commission).

248. *See Ne. Utils. II*, 55 F.3d at 690 (holding that the public interest standard evolved in the context of a low rate challenge and cannot be interpreted as applying in all other contexts); *see also* Ariz. Corp. Comm'n v. FERC, 397 F.3d 952, 953–54 (D.C. Cir. 2005) (approving the Commission's modification to existing settlement contracts). *But see* Potomac Elec. Power Co. v. FERC, 210 F.3d 403, 407 (D.C. Cir. 2000) (extending the stringent *Mobile-Sierra* protection of contracts to high-rate challenges).

For example, in *Northeast Utilities Service Co. v. FERC*,[249] a case that did not involve a "low-rate" challenge,[250] the Commission reviewed a newly-filed contract and ordered one of the parties to make several changes to bring the contract within the bounds of the just and reasonable standard.[251] The United States Court of Appeals for the First Circuit remanded the case to the Commission, advising that the Commission had applied the wrong standard and needed to instead apply the stricter *Mobile-Sierra* "public interest" standard.[252] On remand, the Commission had little trouble providing analysis to demonstrate that the very same contract modifications were necessary in the public interest.[253] The First Circuit upheld these modifications,[254] recognizing how the different circumstances of *Mobile* and *Sierra* allowed for a more flexible application of the "public interest" standard and rejecting the notion of any sort of insurmountable barrier to contract modification in all circumstances.[255]

The *Morgan Stanley* opinion, however, appears to significantly curtail the Commission's ability to adapt its review to circumstances that differ from those in *Mobile* and *Sierra*.[256] A contract is a contract, the Court reasons, and thus the Commission must make no distinction based on which entity is seeking to change the contract, and it must make no distinction based on whether the Commission had an initial opportunity to review the contract.[257] At a minimum, the *Morgan Stanley* decision has cast doubt on the Commission's

249. *Ne. Utils. II*, 55 F.3d 686 (1st Cir. 1998).
250. *See id.* at 690 (noting that the issues in this case involved changing the return on equity formula and the cost of decommissioning a power plant, neither of which involved "low rate" challenges in the context of *Mobile* and *Sierra*).
251. *See Ne. Utils. Serv. Co.*, 50 FERC ¶ 61,266, at 61,837 (1990) (setting the filed contract for hearing on the basis that some provisions may not be just and reasonable).
252. *See* Ne. Utils. Serv. Co. v. FERC, 993 F.2d 937, 961 (1st Cir. 1993) [hereinafter Ne. Utils. I] (holding that, by modifying a contract under the public interest standard by finding that the contract was unjust and unreasonable, the Commission conflated the just and reasonable standard with the public interest standard).
253. *See Ne. Utils. Serv. Co.*, 66 FERC ¶ 61,322, at 62,088 (1994) (concluding that its original modifications were necessary to protect the interests of nonparties to the contract).
254. *See Ne. Utils. II*, 55 F.3d at 693 (affirming the Commission's finding under the reasoning that the Commission had given thoughtful consideration to the public interest in reviewing the contract it had previously modified under the traditional just and reasonable standard).
255. *See id.* at 691 (characterizing the notion of a "practically insurmountable" barrier in all circumstances as a "gloss" of the Court's holdings in *Mobile* and *Sierra*).
256. *See supra* note 244 and accompanying text (explaining that the Court forbade the Commission from distinguishing claims based on whether they argued the rate was too high or too low).
257. *Id.*

ability to modify a contract rate that harms the public unless that harm rises to "extraordinary circumstances."[258] While the doctrine has not been "practically insurmountable" in the past, instances of the Commission overcoming the barrier and successfully modifying contracts has generally come either outside the low-rate context or upon the Commission's initial review of the contract, or both.[259] If the majority opinion eliminates any notion of a more "flexible" standard in those circumstances, envisioning when contract modification will stand becomes more difficult.[260]

To remain consistent both with the statute and the cases from which the *Mobile-Sierra* doctrine derived its name, the Commission must have the ability to modify any rate, whether by contract or tariff, when necessary to protect the public interest.[261] And when seeking to protect the public interest, the Commission needs to distinguish the interests of the consuming public from that of utility companies.[262] The Commission should not need to show, however, that "unequivocal public necessity" requires a modification to a contract; this heightened requirement represents a misreading of *Mobile* and *Sierra* and contradicts the statute.[263] Rather, the Commission should simply need to show, as with any rate, that the rate is unjust and unreasonable when evaluated in light of the public interest perspective.[264] Either the buyer or the seller's interests could

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258. *See* McCaffrey, *supra* note 108, at 70, 75 (arguing that the combination of these two holdings in *Morgan Stanley* calls into question whether the Commission could even modify contracts that explicitly contradict Commission regulations or policies absent a showing of serious harm to the public interest).

259. *See Ne. Utils. II*, 55 F.3d at 692–93 (accepting Commission modification of a newly-filed, non-low rate contract); *id.* at 691–92 (explaining that how "flexible" the standard should be depends on "whose ox is gored").

260. *Id.* at 692; *see supra* note 258 (suggesting that the threshold placed on the Commission for contract modification is already quite stringent because it requires extreme harm to the public interest). Moreover, the Court recently further expanded the reach of the *Mobile-Sierra* doctrine by holding that third-party challengers, not just parties to the contract itself, must also overcome the strict presumption of reasonableness of the *Mobile-Sierra* doctrine. NRG Power Mktg., L.L.C. v. Me. Pub. Utils. Comm'n, 130 S. Ct. 693, 701 (2010).

261. *See* 16 U.S.C. § 824d (2006) (providing no distinction between contract and tariff rates when defining the Commission's duty to ensure that "all" rates are just and reasonable); United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 344 (1956) ("[C]ontracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest.").

262. *See* Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 355 (1956) ("That the purpose of the power given the Commission by § 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in § 201 of the Act that the scheme of regulation imposed 'is necessary in the public interest.'").

263. *See* 16 U.S.C. §§ 824d, 824e (defining no differing application of the just and reasonable standard for contract rates).

264. *Id.*

potentially coincide with the public interest.[265]

Even under the traditional just and reasonable review, the party seeking to alter a rate under section 206 carries the heavy burden of demonstrating that the rate violates the just and reasonable standard.[266] This heavy burden should apply to parties seeking to modify contract rates as well, but the burden should not be so heavy as to effectively preclude the Commission from performing its statutory duty to keep rates just and reasonable in the public interest.[267]

CONCLUSION

Electricity is a rather unique consumer good. We tend not to appreciate its benefits—indeed, we tend to hardly notice it at all—until we are suddenly deprived of its use. Our dependence on electricity makes rolling blackouts and prohibitively expensive rates dangerous and unacceptable. Thus, while this country has seen the development of competitive markets for electricity, these markets differ from markets for other, less essential goods. Even as policymakers embrace market-based deregulatory reforms, regulatory authorities still possess a great responsibility to keep the lights on—and to ultimately protect the interests of consumers.

The western energy crisis of 2001 called into question the ability of state and federal officials to carry out these duties. Against the backdrop of rolling blackouts, wholesale buyers of power faced unprecedented market conditions and had little choice but to enter into long-term contracts at exorbitantly high rates. Consumers, therefore, were saddled with these high rates long after the markets calmed and returned closer to historical levels. This market uncertainty highlights the fragility of deregulated electricity markets and underscores the importance of maintaining regulatory checks on this increasingly deregulated industry.

The majority in *Morgan Stanley* missed an opportunity to bring the

265. *See Mobile*, 350 U.S. at 344–45 (explaining that, while unlikely, the seller could still potentially modify a contract rate if it can demonstrate to the Commission that its interests align with the public interest); *Sierra*, 350 U.S. at 355 (giving a specific, although not exclusive, list of the types of circumstances in which the seller's interests would coincide with the public interest, including where the low rate would force the utility out of business).

266. *See* 16 U.S.C. § 824e(b) (stating that the burden of proof for any proposed modification falls on the complaining party or the Commission if the Commission initiates the proceeding).

267. *See* Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 568–69 (2008) (Stevens, J., dissenting) (characterizing the majority's holding as limiting the Commission's discretion to protect the public interest).

Mobile-Sierra doctrine back in line with the statutory scheme and the cases from which the doctrine took its name. The *Mobile* and *Sierra* cases have been interpreted as shielding *Mobile-Sierra* contracts from thorough Commission review for quite some time; certainly *Morgan Stanley* was not the first case to hold as much. But *Morgan Stanley* went beyond the cases before it. This decision further erodes the Commission's ability to protect the public interest by limiting the Commission's ability to modify excessively high rates or rates that are otherwise harmful to third parties. The *Mobile-Sierra* doctrine will likely continue to evolve, however, as the Commission and courts struggle to understand and apply what the D.C. Circuit, perhaps ironically, once referred to as a "refreshingly simple"[268] rule.

268. Richmond Power & Light v. Fed. Power Comm'n, 481 F.2d 490, 493 (D.C. Cir. 1973).