

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - x

3 NRG POWER MARKETING, :

4 LLC, ET AL., :

5 Petitioners :

6 v. : No. 08-674

7 MAINE PUBLIC UTILITIES :

8 COMMISSION, ET AL. :

9 - - - - - x

10 Washington, D.C.

11 Tuesday, November 3, 2009

12

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

16 APPEARANCES:

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

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

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

25

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	JEFFREY A. LAMKEN, ESQ.	
4	On behalf of the Petitioners	3
5	ERIC D. MILLER, ESQ.	
6	On behalf of respondent FERC, supporting	
7	the Petitioners	16
8	GEN. RICHARD BLUMENTHAL, ESQ.	
9	On behalf of the Respondents	29
10	REBUTTAL ARGUMENT OF	
11	JEFFREY A. LAMKEN, ESQ.	
12	On behalf of the Petitioners	52
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(10:02 a.m.)

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

Mr. Lamken.

ORAL ARGUMENT OF JEFFREY A. LAMKEN

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

16 MR. LAMKEN: That's exactly right.

17 JUSTICE GINSBURG: Yes. I think --

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

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

22 MR. LAMKEN: Right.

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

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

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

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

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

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

20 Unless --

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

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

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

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

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

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

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

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

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

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

1 administrative review for challenges raised by  
2 nonparties?

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

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

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

1 agreements cannot be abrogated unless the public  
2 interest would be severely harmed. And --

3 JUSTICE KENNEDY: Then I --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 (Laughter.)

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

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

25 JUSTICE SCALIA: He took the words right out

1 of your mouth.

2 (Laughter.)

3 MR. LAMKEN: Thank you, Justice Breyer.

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

6 MR. LAMKEN: Yes.

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

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

19 MR. LAMKEN: Right. I --

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

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

24 JUSTICE BREYER: Sorry?

25 MR. LAMKEN: That would be our back-up

1 position. Our position is once you have --

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

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

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

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

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

19 MR. LAMKEN: Well --

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

24 MR. LAMKEN: Well, the answer is that this  
25 Court regularly, regularly, addresses the question

1 presented and the issue answered below without delving  
2 into underlying assumptions.

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

5 MR. LAMKEN: That's right.

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

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

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

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

24 JUSTICE STEVENS: Could you give me an  
25 example of a -- of a challenge to a rate that's set

1 under this whole program that would succeed under the  
2 just and reasonable standard and fail under the public  
3 interest standard, or vice versa?

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

7 JUSTICE STEVENS: Yes.

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

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

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

22 JUSTICE SCALIA: Yes or no?

23 MR. LAMKEN: Yes.

24 JUSTICE SCALIA: Okay.

25 MR. LAMKEN: If I may reserve the remainder

1 of the time for rebuttal.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Miller.

4 ORAL ARGUMENT OF ERIC D. MILLER

5 ON BEHALF OF RESPONDENT FERC,

6 IN SUPPORT OF THE PETITIONERS

7 MR. MILLER: Mr. Chief Justice, and may it

8 please the Court:

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

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

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

24 JUSTICE KENNEDY: In -- in calling the rate  
25 that was agreed upon a presumption of a reasonable rate?

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

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

8           MR. MILLER: No. We quarrel --

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

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

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

23          MR. MILLER: The --

24          JUSTICE SCALIA: I mean, what's the use of  
25 having Mobile-Sierra if -- if they're going to reexamine

1 the thing under the usual standard anyway?

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

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

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

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

25 CHIEF JUSTICE ROBERTS: But that's a change.

1 Before you didn't think there were other issues that  
2 affected the determination or might. You said we should  
3 grant -- reverse the determination insofar as it granted  
4 the petitions for review.

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

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

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

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

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

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

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

19           MR. MILLER: In the contract setting?

20           JUSTICE SOTOMAYOR: Yes.

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

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

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

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

11 MR. MILLER: Well, you have --

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

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

23 JUSTICE STEVENS: May I --

24 JUSTICE SOTOMAYOR: So it goes back to my  
25 original question with your adversary, which is: Is

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

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

12 JUSTICE SOTOMAYOR: I agree.

13 MR. MILLER: Okay.

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

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

25 JUSTICE SOTOMAYOR: And that's what the

1 Third Circuit -- I'm sorry, that's what the court below  
2 didn't --

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

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

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

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

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

23 MR. MILLER: No, that is --

24 JUSTICE SCALIA: The D.C. Circuit said that  
25 the entire -- there is no application of Mobile-Sierra

1 at all.

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

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

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

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

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

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

22 MR. MILLER: No --

23 CHIEF JUSTICE ROBERTS: -- whether it's a  
24 contract or whether you have authority to make an  
25 exception to the Mobile-Sierra doctrine?

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

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

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

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

24           MR. MILLER: I'm not --

25           CHIEF JUSTICE ROBERTS: You don't get to

1 reserve time.

2 MR. MILLER: Right. Right.

3 (Laughter.)

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

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

16 JUSTICE BREYER: The transition rates?

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

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

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

1 depend on the clearing prices of the auctions, which  
2 are the -- I mean, what the --

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

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

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

1 little sense to say that it ceases to be bound by that  
2 as long as anybody in the world other than the  
3 contracting party comes in and files the complaint to  
4 initiate the FERC investigation.

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

13 MR. MILLER: Well, the --

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

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

20 JUSTICE SCALIA: We can --

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

24 JUSTICE SCALIA: I'm not sure that's any  
25 stranger than saying the Commission has one standard

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

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

6 JUSTICE SCALIA: Yes.

7 (Laughter.)

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

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

12 MR. MILLER: Thank you.

13 CHIEF JUSTICE ROBERTS: General Blumenthal.

14 ORAL ARGUMENT OF GEN. RICHARD BLUMENTHAL

15 ON BEHALF OF THE RESPONDENTS

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

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

1 the contract, but they will be binding on NSTAR, which  
2 sells 25 percent of the power in the New England market;  
3 they will be binding on the other five Respondents,  
4 including Maine and Massachusetts as well as  
5 Connecticut.

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

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

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

1 is likewise bound by Mobile-Sierra. Isn't that right?

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

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

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

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

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

25 What we have here is an auction system that

1 sets rules of general applicability.

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

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

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

23 MR. BLUMENTHAL: There is. There is in  
24 section 4.C in effect a modified Memphis clause which  
25 says that the parties can come together and agree to a

1 different standard, Justice Ginsburg.

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

8           JUSTICE BREYER: Why?

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

11          JUSTICE BREYER: Why are you powerless?

12          MR. BLUMENTHAL: I'm sorry.

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

23               And if they agree with your reasons, they'll  
24 say: Fine, go ahead. And if they don't, they don't.  
25 Why aren't you exactly as powerful or powerless as

1 anybody else?

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

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

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

18 (Laughter.)

19 JUSTICE BREYER: It's electricity.

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

22 (Laughter.)

23 MR. BLUMENTHAL: We're here because we  
24 believe that the section 4.C establishes a standard that  
25 is contrary to the statute, the just and reasonable

1 standard.

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

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

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

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

1 even though you don't use cost-of-service ratemaking.

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

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

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

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

22 It was a very simple proposition on which we  
23 granted cert, whether Mobile-Sierra's public interest  
24 standard applies when a contract rate is challenged by  
25 an entity that was not a party to the contract. That's

1 the question. And what's your answer to that?

2 MR. BLUMENTHAL: Our answer is --

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

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

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

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

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

24 JUSTICE KENNEDY: But the rationale is the  
25 commonsense notion that it's a presumptively reasonable

1 rate, and if that's true, how is that altered by the  
2 identity of the party that attacks it?

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

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

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

23 JUSTICE KENNEDY: Yes. That's different  
24 than Mobile-Sierra, although Mobile-Sierra did invoke  
25 market forces of another kind -- of another kind.

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

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

9           MR. BLUMENTHAL: Well --

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

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

25          MR. BLUMENTHAL: Because addressing that

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

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

11 (Laughter.)

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

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

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

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

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

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

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

25 What about that?

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

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

5 MR. BLUMENTHAL: There may be --

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

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

13 CHIEF JUSTICE ROBERTS: Oh, I know --

14 MR. BLUMENTHAL: -- by tariff rates.

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

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

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

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

6                   JUSTICE SCALIA:  Has anybody before --

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

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

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

19                   MR. BLUMENTHAL:  Mobile- --

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

24                   I mean, that was the whole purpose of  
25   Mobile-Sierra.  People had to be able to predict whether

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

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

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

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

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

23 Assuming, for the sake of argument, that the  
24 transition fees are contract rates, are you disputing  
25 the circuit court's analysis that the Mobile-Sierra

1 doctrine applies to those contract rates and binds third  
2 parties who are challenging that particular rate between  
3 those two parties?

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

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

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

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

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

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

20 MR. BLUMENTHAL: If --

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

1 not fair and reasonable?

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

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

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

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

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

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

22 MR. BLUMENTHAL: Our position, Justice  
23 Sotomayor -- and it's a hypothetical here because,  
24 again -- and I apologize for belaboring the point, but  
25 what we have here are rates of general applicability.

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

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

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

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

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

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

25 MR. BLUMENTHAL: Well, FERC is -- is bound

1 by the same law that applies to third parties, which is  
2 --

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

5 MR. BLUMENTHAL: Mobile-Sierra applies --

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

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

12 JUSTICE SCALIA: Okay.

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

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

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

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

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

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

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

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

1 capricious, abuse of discretion?

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

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

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

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

19 So -- so where are we?

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

25 JUSTICE GINSBURG: That's a third standard

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

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

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

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

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

25 MR. BLUMENTHAL: And -- yes, Justice

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

9 JUSTICE GINSBURG: It didn't say that.

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

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Lamken, you have 3 minutes.

18 REBUTTAL ARGUMENT OF JEFFREY A. LAMKEN

19 ON BEHALF OF THE PETITIONERS

20 MR. LAMKEN: Thank you, Your Honor.

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

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

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

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

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

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

1     whatsoever, if it's flanked by noncontracting parties to  
2     the --

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

5                     (Laughter.)

6                     MR. LAMKEN: Thank you, Your Honor.

7                     CHIEF JUSTICE ROBERTS: Thank you, counsel.

8                     The case is submitted.

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

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

<b>A</b>				
<b>able</b> 7:12 43:25 44:3	7:2 15:14 21:21	<b>analysis</b> 23:4 27:19 44:25	45:1 48:1,5,14	15:4 31:9 34:15 41:11
<b>above-entitled</b> 1:13 54:10	<b>advisory</b> 13:20 14:4,10	<b>announce</b> 11:3 13:18	<b>apply</b> 3:15 5:11 10:16 14:23	<b>asks</b> 6:5
<b>abrogate</b> 7:7 8:9 9:10,11 32:7,9 51:20	<b>advocating</b> 51:12	<b>announcing</b> 11:4	23:8,10 24:16 28:17,23 33:3 36:18 43:3,4 43:12,15 44:14 48:4,6,25 50:8 52:6	<b>assaults</b> 53:24
<b>abrogated</b> 6:6 6:13 9:1 32:11	<b>affect</b> 15:14 21:21 46:17 49:21	<b>answer</b> 3:17 5:15 8:3 13:24 19:12 22:21 25:2,6,19 37:1 37:2 41:8,11 41:17 42:23 50:2 53:22	<b>applying</b> 29:24	<b>Assistant</b> 1:19
<b>absolute</b> 45:19	<b>agencies</b> 34:11	<b>answerable</b> 47:5	<b>appreciates</b> 22:17	<b>assume</b> 13:18
<b>absolutely</b> 31:13 42:2	<b>agency</b> 5:25 12:9 51:11	<b>answered</b> 10:6 14:1 45:16	<b>approach</b> 22:7	<b>assumed</b> 10:5 13:16,17 28:14
<b>abuse</b> 12:16 50:1	<b>ago</b> 19:18	<b>answers</b> 10:6 15:16	<b>appropriate</b> 19:10	<b>assumes</b> 7:13
<b>accept</b> 14:16,23	<b>agree</b> 3:17 5:3,7 10:23 12:5 13:5 20:12 22:12 25:16 26:13 29:4,20 32:25 33:23 38:21 45:6 52:4	<b>anybody</b> 7:13 27:10,15 28:2 31:7 34:1 43:6	<b>appropriately</b> 23:19	<b>Assuming</b> 44:23
<b>accepted</b> 42:17	<b>agreed</b> 5:10,13 16:25 22:24 23:17 29:25 31:16 33:9 37:21 39:17 53:8	<b>anyway</b> 18:1	<b>approve</b> 11:9 18:7	<b>assumption</b> 25:18,22 26:4 26:5
<b>accepting</b> 47:9	<b>agreement</b> 4:3 18:3,8 22:5 23:10 28:8 32:4,13 36:11 44:21 47:18	<b>APA</b> 50:10	<b>approved</b> 18:10 32:13 37:10	<b>assumptions</b> 12:5 14:2
<b>accommodating</b> 50:22	<b>agreements</b> 4:5 8:24 9:1 53:3	<b>apologize</b> 44:12 46:24	<b>aptly</b> 39:4	<b>attaches</b> 32:7
<b>accorded</b> 35:15	<b>agrees</b> 9:19	<b>appeals</b> 6:7 16:9 16:15,17,20 18:16,21 19:11 19:13,16 22:10 24:10,12 25:19 26:5 27:19 31:5,17 39:5	<b>arbitrary</b> 49:25	<b>attack</b> 12:15 25:11 26:10 28:8,11 32:6 51:19
<b>acting</b> 27:21	<b>ahead</b> 33:24	<b>appear</b> 44:20	<b>area</b> 7:23	<b>attacks</b> 38:2,14
<b>action</b> 3:21	<b>AL</b> 1:4,8	<b>APPEARAN...</b> 1:16	<b>areas</b> 8:4	<b>Attorney</b> 1:23 14:14
<b>actual</b> 53:3,7	<b>alien</b> 14:15,18	<b>appendix</b> 24:4	<b>argue</b> 41:24 42:20 47:20	<b>auction</b> 4:4 17:14 24:7 27:8,11,15 29:23 31:25 33:6 38:18 40:5 46:9,10
<b>add</b> 51:2	<b>ALITO</b> 7:23	<b>applicability</b> 29:24 32:1 44:16 46:25	<b>argued</b> 31:16,16 31:17 41:20	<b>authority</b> 10:24 11:3 24:15,24 32:9 42:8
<b>addition</b> 27:14	<b>allow</b> 16:16 19:11 20:2	<b>application</b> 15:21 23:25	<b>arguing</b> 5:5 21:14	<b>aware</b> 8:23 34:3 49:22
<b>address</b> 9:25 10:4 14:17,18 14:19,21 24:21 53:19	<b>alters</b> 38:1	<b>applied</b> 6:16 10:19 34:9 47:6	<b>argument</b> 1:14 2:2,10 3:3,7 8:20 16:4 21:7 29:14 40:22,25 44:23 52:18,22	<b>auctions</b> 27:1
<b>addressed</b> 16:15 24:17 40:2 53:19	<b>amount</b> 7:4 44:22	<b>applies</b> 5:23 7:14,17 27:20 35:6,10 36:24	<b>argued</b> 31:16,16 31:17 41:20	<b>authority</b> 10:24 11:3 24:15,24 32:9 42:8
<b>addresses</b> 13:25	<b>amounts</b> 49:5		<b>arguing</b> 5:5 21:14	<b>awake</b> 8:23 34:3 49:22
<b>addressing</b> 16:17 39:25	<b>analogous</b> 18:6		<b>arguments</b> 41:15 47:17	<b>a.m</b> 1:15 3:2 54:9
<b>adhere</b> 53:17			<b>arm's-length</b> 37:12 44:3	
<b>administering</b> 6:1			<b>arm-length</b> 30:21	
<b>administrative</b> 8:1 53:1			<b>articulated</b> 31:22 34:4 45:14	
<b>adopt</b> 35:15 36:5			<b>aside</b> 21:18	
<b>adversary</b> 21:25			<b>asking</b> 13:18	
<b>adversary's</b> 47:16				
<b>adversely</b> 6:25				

**B**

**B** 22:18,22  
23:11  
**back** 10:9 11:19  
19:6 21:24  
41:22 47:2  
**back-up** 12:23  
12:25 13:3  
**bad** 21:17

<p><b>bargain</b> 21:17 31:24 <b>barrier</b> 51:5 <b>based</b> 10:8 13:9 17:16 31:14 <b>basic</b> 49:24 <b>basis</b> 16:13 24:10 36:15,17 42:7 51:12 <b>bedrock</b> 3:11 <b>behalf</b> 1:17,21 1:24 2:4,6,9,12 3:8 16:5 29:15 52:19 <b>belaboring</b> 46:24 <b>believe</b> 11:2,4 34:24 <b>beneficiary</b> 8:12 <b>beyond</b> 39:24 <b>bilateral</b> 9:11,12 9:17 10:11 32:4 <b>bind</b> 5:21 45:5 <b>binding</b> 10:25 18:9 30:1,3 32:8 <b>binds</b> 22:5 31:6 31:21 45:1 <b>bit</b> 6:18 <b>Blumenthal</b> 1:23 2:8 29:13 29:14,16 30:8 31:2,13 32:12 32:23 33:9,12 34:2,16,20,23 35:14 36:2,10 37:2,5,19 38:3 38:17 39:1,9 39:25 40:16 41:4 42:1,5,10 42:14,22 43:7 43:19 44:11 45:4,13,20 46:2,6,22 47:4 47:13,25 48:5 48:8,13,21</p>	<p>49:15 50:2,20 51:3,8,25 52:10 <b>bothered</b> 53:6 <b>bothering</b> 53:5 <b>bound</b> 3:22 4:3 5:2,3,6 6:2,21 7:21 13:21 21:13 27:24 28:1,15 30:13 30:15,22 31:1 40:23 41:1 42:12 47:25 48:9,10,18,21 <b>Brandeis</b> 35:21 <b>Breyer</b> 11:5,8 11:23 12:3,4,7 12:20,23,24 13:2 25:5,21 26:4,16,19 27:3 33:8,11 33:13 34:2,8 34:19 35:2,17 40:1 41:8 42:1 42:16 44:13 49:22 50:4,6 <b>Bridgeport</b> 47:6 <b>brief</b> 7:3 18:16 <b>briefs</b> 18:13 <b>brings</b> 48:19 <b>broad</b> 53:1 <b>broad-based</b> 53:20 <b>brought</b> 10:17 <b>burden</b> 45:15 <b>business</b> 12:16 12:16,18 21:20 <b>businesses</b> 17:3 19:20 <b>buyer</b> 5:10 7:7 20:11 30:21 <b>buying</b> 22:6</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>C</b> 2:1 3:1 22:19 22:22,22,23,24 23:13</p>	<p><b>call</b> 14:3 <b>called</b> 36:5 <b>calling</b> 16:21,24 <b>calls</b> 35:18 <b>can't</b> 47:22 <b>capacity</b> 17:14 35:7,10 <b>capricious</b> 50:1 <b>case</b> 3:4,11 9:5 10:7 11:5,8 12:7,9 14:7 16:14 17:13 24:13 25:6,18 25:18 31:10 36:3,16 38:17 41:2,20 42:9 54:8,9 <b>cases</b> 11:9 47:7 <b>category</b> 7:20 <b>ceases</b> 3:15 28:1 <b>central</b> 29:19,22 <b>cert</b> 10:1 36:23 <b>certain</b> 35:25 <b>certainly</b> 4:10 5:23 7:14 8:22 9:19 22:16 30:19 31:10 <b>certainty</b> 6:9,10 <b>certiorari</b> 31:17 40:17 <b>cetera</b> 41:16,23 <b>challenge</b> 4:7 5:9,12 7:12,13 8:10,14 10:16 12:13 14:25 20:6 27:11,15 45:11 47:23 48:14,17 49:18 50:7,9 <b>challenged</b> 3:16 16:11 19:24,25 23:5 36:24 <b>challenger</b> 3:20 4:15,18 <b>challengers</b> 4:9 <b>challenges</b> 3:25 8:1 29:1 36:18</p>	<p>50:23 <b>challenging</b> 13:10 45:2,5 <b>change</b> 18:12,25 30:9 <b>changed</b> 18:18 <b>characterizati...</b> 17:10 <b>characterized</b> 23:19 <b>charge</b> 23:13 <b>charged</b> 5:25 <b>Chenery</b> 51:10 <b>Chief</b> 3:3,9 6:18 7:9 10:13,23 16:2,7 18:11 18:25 24:20,23 25:25 29:10,13 29:16,17 40:20 41:5 42:3,6,10 42:13,15,23 44:13 51:6 52:16 54:7 <b>choice</b> 34:16 <b>circuit</b> 4:13 5:1 21:12 23:1,22 23:24 24:3,17 31:12 39:17,18 39:23 44:8,25 51:24 52:5 53:5,6,12,14 <b>Circuit's</b> 31:14 31:19 39:13 51:15 52:1 <b>circumstance</b> 11:11,12 21:19 47:10 50:8 <b>circumstances</b> 12:10 20:25 33:15 35:25 41:15,23 45:10 45:18,23 <b>claim</b> 8:23 53:14 <b>claiming</b> 30:16 <b>clarify</b> 50:21 51:3 <b>clause</b> 8:5 26:14</p>	<p>27:17 32:22,24 <b>clear</b> 24:3 27:20 53:13 <b>clearing</b> 27:1 <b>clearly</b> 10:11 49:16 <b>clients</b> 36:14 <b>come</b> 4:6 5:12 20:11,17,21 21:1,4 27:10 27:15 32:25 37:12 45:23 46:15,21 47:19 <b>comes</b> 5:9 6:5 8:9 28:3 <b>coming</b> 34:14 41:10 <b>Commission</b> 1:8 3:5 5:17,24 7:18 17:13 18:5,6,10 20:16 22:17 25:13 26:11,24 27:4,6,7,9,12 27:21 28:11,15 28:21,22,25 29:2 33:14,14 35:11,14,23 36:4,13,20 37:10 38:8 40:2 <b>commissions</b> 41:15 <b>Commission's</b> 25:14 <b>common</b> 25:17 <b>commonsense</b> 37:25 38:13,15 <b>companies</b> 6:10 <b>complain</b> 7:11 <b>complaint</b> 27:23 28:3 32:10 48:24 <b>complete</b> 42:23 <b>comply</b> 17:22 <b>conceive</b> 15:5 <b>concern</b> 4:5 53:9</p>
---	--	--	--	--

<p><b>concerned</b> 22:20  <b>concerns</b> 3:11  <b>concludes</b> 12:10  <b>conform</b> 39:13  <b>confuse</b> 46:9  <b>Congress</b> 6:1  <b>Conn</b> 1:24  <b>Connecticut</b>  30:5  <b>consent</b> 18:6  37:23 38:7  <b>consenting</b> 5:10  <b>consequences</b>  39:11  <b>consequential</b>  39:16  <b>consider</b> 19:14  <b>considerations</b>  18:15  <b>considered</b>  51:11  <b>consumer</b> 48:23  <b>context</b> 23:7  25:13  <b>contract</b> 3:15  4:4 5:7,18 6:5  6:10,17,20,21  6:22 7:16,24  8:7,9,10,14,15  9:6,8,11,12,21  10:25 11:10  12:8 13:8,14  13:21 16:11  17:4 18:4 20:2  20:10,14,19  21:18 22:23  23:5,6 24:8,14  24:24 25:11  26:6,7,9 27:25  29:20 30:1,10  30:12,14,17,24  33:10,17 35:24  36:24,25 37:13  38:19,21 39:14  40:23 41:7  42:24,25 43:5  44:3,19,24</p>	<p>45:1,5,7 46:10  47:11,18 48:9  49:6,19 50:8  53:11,11,12,15  53:18  <b>contracted</b> 11:7  <b>contracting</b> 5:2  6:16 15:12  21:2,17 22:3  28:3 30:13,20  31:6,21 37:17  37:20 47:20  51:17,22 53:24  <b>contractors</b>  29:25  <b>contracts</b> 4:7  6:12,14 7:2  9:17 10:10,11  10:12,18 11:9  25:8 37:7,8  39:13 52:7  <b>contractual</b> 6:9  <b>contrary</b> 34:25  45:12,24 47:12  49:13  <b>contravenes</b>  35:16 37:14  <b>convene</b> 8:20  <b>convince</b> 34:12  <b>correct</b> 3:25  8:16 12:21  13:4,6 16:20  16:20 31:13,20  31:20 40:10,13  <b>cost-of-service</b>  36:1  <b>counsel</b> 16:2  52:16 54:7  <b>counterargum...</b>  51:18  <b>country</b> 14:15  14:16,19,22  <b>course</b> 9:4 17:12  <b>court</b> 1:1,14  3:10 6:7 8:23  9:20,22,24  10:3,5,7,20</p>	<p>11:2,4,17 13:7  13:13,16,25  14:17,20 16:8  16:9,15,16,17  16:20,22 17:1  17:12 18:12,14  18:16,21 19:10  19:13,15,18  20:24 21:15,19  22:10 23:1,3,4  23:6 24:10,12  24:19 25:1,17  25:19 26:5  27:19,19 28:17  28:17,23 29:18  31:4,17 33:2  34:3 37:4,11  39:4,5 40:6,9  41:5 47:10  50:21 51:13  52:11,14 53:18  53:19  <b>court's</b> 5:1  11:14 44:25  <b>covered</b> 26:13  <b>create</b> 10:10  <b>created</b> 17:14,19  26:23  <b>Customs</b> 14:13  <b>C's</b> 23:16</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D</b> 1:19 2:5 3:1  16:4  <b>days</b> 27:14  <b>deal</b> 36:13 37:12  <b>dealing</b> 35:16  36:2 40:4 41:6  47:2  <b>dealt</b> 31:11  <b>decide</b> 19:11  25:18 26:9  39:20 40:8  <b>decided</b> 3:13  31:5,8 36:16  36:16 39:23  42:6 51:24</p>	<p><b>deciding</b> 22:19  <b>decision</b> 10:8  24:11 39:16  51:12,15 52:2  <b>declines</b> 10:4  <b>decree</b> 18:6  <b>defending</b> 51:14  51:21 52:1  <b>define</b> 21:4  <b>degree</b> 15:12  <b>deliver</b> 21:22  <b>delving</b> 14:1  <b>demand</b> 28:16  <b>demanding</b> 6:2  <b>denied</b> 19:6  <b>depart</b> 42:8  <b>Department</b>  1:20  <b>departs</b> 12:17  <b>depend</b> 27:1,22  <b>depends</b> 26:20  26:20,23 41:14  41:22 49:18  <b>deport</b> 14:15  <b>described</b> 16:23  17:12 20:24  24:5  <b>details</b> 36:19  <b>determination</b>  8:19 14:22  19:2,3 21:13  37:10 38:15  <b>determine</b> 43:18  <b>determined</b>  17:17 27:8  <b>deviate</b> 35:23  <b>devises</b> 35:11  <b>dictate</b> 7:25  <b>didn't</b> 32:20  <b>difference</b> 4:13  22:1 32:3 34:3  <b>different</b> 3:20  3:23,24 4:9,10  9:17 22:5,7  28:17,23 29:2  33:1 38:14,23  45:24 46:11</p>	<p>47:14 49:11  51:12 52:3  <b>difficult</b> 52:13  <b>difficulties</b>  52:11  <b>dilemma</b> 41:6  <b>direct</b> 7:10  53:24  <b>directly</b> 7:11,15  7:20 46:2,5  53:7  <b>dirty</b> 40:9  <b>disagreeing</b>  30:12  <b>disagrees</b> 9:6  <b>discretion</b> 12:17  34:7 35:15  36:5,20 40:24  40:25 43:2,2  50:1  <b>discrimination</b>  25:7  <b>discussing</b> 50:23  <b>disposition</b>  19:10  <b>disputed</b> 18:5  <b>disputing</b> 30:11  44:24  <b>distinction</b>  22:10,15  <b>doctrine</b> 3:13  5:17 6:16  10:16 24:25  36:17 43:11,21  45:1,9 46:11  51:10  <b>dollars</b> 6:11  <b>downstream</b>  30:24 43:12  <b>draws</b> 22:10  <b>due</b> 31:3 39:2  <b>D.C</b> 1:10,17,21  4:13,25 21:12  23:22,24 24:3  24:17 31:12,14  31:19 39:13,16  39:18,23 44:8</p>
---	--	---	---	--

51:15,24 52:1 52:5 53:5,5,12 53:14	<b>error</b> 13:7 16:12 <b>escape</b> 31:23 38:7,8 <b>ESQ</b> 1:17,19,23 2:3,5,8,11 <b>essence</b> 5:4 <b>established</b> 17:19 <b>establishes</b> 34:24 <b>et</b> 1:4,8 41:16,23 <b>exactly</b> 4:16 24:18 33:25 <b>examination</b> 17:17 <b>example</b> 7:3 12:14 14:8,13 14:25 35:24 45:19 <b>exception</b> 19:17 24:25 32:15,17 32:18 53:21 <b>excessive</b> 36:20 <b>exempt</b> 10:24 <b>exemption</b> 7:20 10:10,14 13:9 <b>exempts</b> 49:23 <b>exorbitant</b> 30:25 <b>expert</b> 7:18 <b>expertise</b> 6:2,4 <b>extent</b> 18:22 22:20 25:3 <b>extraordinarily</b> 45:15 <b>extraordinary</b> 20:24 21:19 <b>extreme</b> 47:9	<b>factual</b> 40:3 52:3 <b>fail</b> 15:2,5 <b>fair</b> 20:12,17 45:11 46:1,15 47:11,13,21 <b>far</b> 8:13 41:12 51:9 <b>feature</b> 19:22 23:14 <b>Federal</b> 3:12,12 5:17,24 7:17 <b>feel</b> 39:1 <b>fees</b> 44:20,22,24 <b>FERC</b> 1:21 2:6 3:17 8:19 9:6 9:10,10,19 10:8,17,24 16:5 24:13,15 25:8 27:23 28:4 31:16 32:7,8,9,13 39:12,17 40:23 40:24 42:7,20 43:1 46:20 47:22,22,23,25 48:4,10,17,17 48:17,18,20,21 49:24 51:20,20 <b>FERC's</b> 27:22 47:23 48:24 49:21 <b>field</b> 35:9 <b>filed</b> 27:23 <b>files</b> 28:3 <b>finality</b> 47:18 <b>find</b> 13:13 35:24 <b>finding</b> 11:10 <b>fine</b> 33:24 34:13 <b>first</b> 3:4 16:18 19:14 22:9 25:12 39:21 <b>fits</b> 43:7 <b>fitting</b> 39:6 <b>five</b> 30:3 50:18 <b>fixes</b> 23:12 <b>flanked</b> 54:1	<b>flexibility</b> 36:13 <b>flow</b> 46:7 <b>follow</b> 24:20 32:21 <b>forces</b> 38:25 <b>foreclosed</b> 21:8 <b>foreign</b> 14:15 <b>forties</b> 35:22 <b>fortiori</b> 12:8 <b>forward</b> 17:14 <b>found</b> 35:5 <b>foundation</b> 6:8 <b>free</b> 37:22 <b>freely</b> 38:6 <b>further</b> 18:15 29:8	<b>giving</b> 14:10 42:7 <b>go</b> 12:15 33:13 33:24 34:21 39:24 40:24,25 44:17 48:17 <b>goes</b> 21:24 51:18 <b>going</b> 11:14 14:17,19,21 17:25 21:20 22:20 28:6 35:2 41:10 44:7,8,21 46:16,17,17 47:1 <b>good</b> 14:12 36:13 37:17 <b>government</b> 8:17 29:20,22 32:18 34:6 36:3 38:20,21 39:3 52:4 <b>government's</b> 40:16 <b>grant</b> 10:1 19:3 <b>granted</b> 18:17 19:3,7 36:23 <b>greater</b> 8:10 <b>greatest</b> 6:2 <b>ground</b> 12:16 44:1 50:7 <b>guess</b> 50:7
<hr/> <b>E</b> <hr/> <b>E</b> 2:1 3:1,1 <b>easier</b> 40:12 <b>economic</b> 12:10 <b>effect</b> 7:25 10:25 23:9 32:24 34:7 52:12 <b>effective</b> 18:7,9 27:17 <b>effectively</b> 10:18 48:8 <b>either</b> 24:21 <b>electricity</b> 34:19 35:7,10 <b>eligible</b> 23:15 <b>emerges</b> 9:8 <b>emphasized</b> 27:10 <b>employment</b> 25:7 <b>encumbered</b> 28:9 <b>energy</b> 3:12 5:17 5:24 7:17 47:6 53:23 <b>Enforcement</b> 14:14 <b>England</b> 30:2 <b>enter</b> 4:5 7:3 8:7 44:2 <b>entered</b> 4:2 7:8 7:16 8:11 <b>entering</b> 6:14 <b>entertain</b> 32:10 <b>entire</b> 23:25 <b>entirely</b> 27:13 <b>entity</b> 6:3 36:25 53:10 <b>equivalent</b> 53:23 <b>ERIC</b> 1:19 2:5 16:4 <b>erred</b> 11:4 16:9	<hr/> <b>F</b> <hr/> <b>fact</b> 6:7,13 12:23 21:16 31:15 41:4 50:10 52:22,24 <b>factors</b> 49:20 <b>facts</b> 31:15 39:6 47:2	<hr/> <b>G</b> <hr/> <b>G</b> 3:1 <b>gas</b> 34:15 35:6,9 44:1 <b>GEN</b> 1:23 2:8 29:14 <b>general</b> 1:20,23 8:8 14:15 20:18 29:13,24 32:1 44:16 46:25 <b>generally</b> 48:14 <b>generating</b> 26:6 <b>generators</b> 26:7 <b>getting</b> 22:19 50:14,16 <b>giants</b> 37:11 <b>Ginsburg</b> 4:14 4:17,20,23 9:4 9:16 24:12 31:4,14 32:2 32:20 33:1 39:7,10 40:1 41:9 50:25 51:14 52:1,9 <b>give</b> 7:3 14:24 34:12 <b>given</b> 36:20,20 45:18 46:13 <b>gives</b> 36:13	<hr/> <b>H</b> <hr/> <b>happen</b> 20:9 <b>happened</b> 39:12 <b>happy</b> 4:5 34:21 <b>harm</b> 49:2 <b>harmed</b> 9:2 38:11 49:10 <b>Hartford</b> 1:24 <b>hear</b> 3:3 <b>hearing</b> 41:24 <b>heart</b> 24:13 <b>heavy</b> 39:11 <b>held</b> 17:2 37:19 41:15	



<p><b>legal</b> 38:16  <b>light</b> 40:18  <b>lightly</b> 6:13  <b>likewise</b> 31:1  <b>Line</b> 53:23  <b>listen</b> 34:11  <b>little</b> 28:1  <b>LLC</b> 1:4  <b>long</b> 28:2 35:19  35:20 50:6  <b>longer</b> 21:22  48:18  <b>look</b> 15:11  <b>looked</b> 17:13,14  27:7  <b>looking</b> 35:5  <b>looks</b> 49:1  <b>looming</b> 31:10  <b>lot</b> 40:12,24,25  41:1,14  <b>lower</b> 4:7 6:5  8:7 9:22,24  11:14,17 40:9  47:9  <b>lurking</b> 9:5</p> <hr/> <p style="text-align: center;"><b>M</b></p> <p><b>Maginot</b> 53:23  <b>main</b> 20:15,15  <b>Maine</b> 1:7 3:4  20:16 30:4  <b>mainstream</b>  41:21  <b>making</b> 14:16  <b>man</b> 35:8  <b>mandate</b> 6:4  <b>manner</b> 31:12  <b>market</b> 30:2  38:25  <b>Marketing</b> 1:3  3:4  <b>Massachusetts</b>  30:4  <b>matter</b> 1:13 3:19  8:15 38:15  39:21 47:15  48:11 54:10</p>	<p><b>matters</b> 10:4  39:19  <b>mean</b> 7:11 10:14  11:13,15 17:24  19:9 25:5,9  27:2 30:11  35:3,4 43:24  46:5,6 48:7  51:15  <b>meaning</b> 24:8  <b>mechanism</b>  17:13,19 26:23  27:8 35:19  38:19 40:5  <b>meets</b> 5:18  <b>member</b> 20:7  <b>members</b> 20:4  22:3  <b>Memphis</b> 8:5  32:16,21,24  <b>mention</b> 30:12  <b>mentioned</b>  51:10  <b>mere</b> 21:16  <b>merely</b> 10:4  13:15  <b>met</b> 53:1  <b>Midas</b> 35:8  <b>Milford</b> 47:7  <b>Miller</b> 1:19 2:5  16:3,4,7,22  17:1,8,11,23  18:2,20 19:7  20:19,21 21:7  21:11,15 22:8  22:13,16 23:3  23:16,23 24:2  24:9,18,22  25:1,16,24  26:2,12,17,22  27:6 28:13,18  28:21 29:4,8  29:11,12  <b>millions</b> 6:11  <b>minimum</b> 45:19  <b>minutes</b> 25:23  52:17</p>	<p><b>mixed</b> 11:15,18  <b>Mobile</b> 9:18  28:15 43:19,22  <b>Mobile-Sierra</b>  3:12 5:4,14,16  6:15 10:16  13:22 16:10  17:2,25 18:4  19:17,19 20:2  22:23 23:7,10  23:14,15,25  24:8,25 25:9  25:10 26:7,8  27:20,24,25  28:9,12 30:19  31:1,6,21 33:4  36:17 37:6,22  38:9,24,24  39:15 41:21  42:8,11 43:7,9  43:25 44:25  46:11 48:4,5,8  48:18 51:17,23  52:6 53:21,22  <b>Mobile-Sierra's</b>  3:14,18 6:8  36:23  <b>mode</b> 23:3  <b>modification</b>  20:3  <b>modified</b> 32:24  <b>modifier</b> 52:10  52:12  <b>modify</b> 50:21  <b>moment</b> 19:17  <b>Morgan</b> 5:14  16:22 17:2  19:18 27:20  31:22 33:3,4  36:6 40:18  45:14 48:10  49:16  <b>motion</b> 48:24  <b>mount</b> 28:10  50:7  <b>mouth</b> 12:1  <b>movies</b> 7:5</p>	<hr/> <p style="text-align: center;"><b>N</b></p> <p><b>N</b> 2:1,1 3:1  <b>natural</b> 34:15  35:6,9 44:1  <b>nature</b> 49:19  <b>necessarily</b> 51:4  <b>necessary</b> 20:3  <b>need</b> 6:9 53:18  53:19  <b>negotiate</b> 17:3  <b>negotiated</b>  19:20 32:4  38:6 49:6  <b>negotiation</b>  37:23  <b>never</b> 24:13 33:9  35:3 47:18  <b>New</b> 30:2  <b>noncontracting</b>  3:16 5:6,8 6:15  10:10,14,17,24  16:12 42:11  48:13,16 49:17  49:18 52:7  54:1  <b>nonparties</b> 4:6  8:2 23:6  <b>nonparty</b> 6:23  6:25 8:13 13:9  <b>normal</b> 20:14  <b>notion</b> 37:25  38:13 53:9  <b>November</b> 1:11  <b>NRG</b> 1:3 3:4 4:2  <b>NSTAR</b> 30:1  46:14  <b>nub</b> 53:4  <b>number</b> 39:12</p> <hr/> <p style="text-align: center;"><b>O</b></p> <p><b>O</b> 2:1 3:1  <b>objecting</b> 22:2,4  <b>objectors</b> 22:1  <b>odd</b> 5:25  <b>oh</b> 14:10 42:13  <b>okay</b> 12:18  15:24 22:13</p>	<p>45:9 48:3,12  50:4,11  <b>once</b> 12:12 13:1  28:10 39:22  44:2  <b>ones</b> 32:19 33:5  37:21 39:20  <b>opening</b> 18:11  <b>opinion</b> 13:20  14:10 24:4  37:3 52:6  <b>opinions</b> 14:4  34:4 43:10  <b>opportunity</b>  19:14  <b>opposed</b> 45:12  <b>opposition</b>  31:17  <b>option</b> 30:9,10  30:14  <b>oral</b> 1:13 2:2 3:7  16:4 29:14  <b>order</b> 28:22  <b>ordinary</b> 12:8  15:10 26:25  34:5 43:4  <b>original</b> 21:25  <b>outcome</b> 50:24  <b>outsider</b> 5:12  6:3 7:6  <b>outsiders</b> 22:3  <b>overturned</b> 6:6</p> <hr/> <p style="text-align: center;"><b>P</b></p> <p><b>P</b> 3:1  <b>package</b> 26:21  <b>page</b> 2:2 24:3  44:18  <b>part</b> 12:12 17:2  26:21 49:15  53:4  <b>particular</b> 3:23  12:10,11 45:2  <b>particularly</b>  24:3  <b>parties</b> 3:21  5:22 6:16,20</p>
--	--	--	---	---

6:21,24 7:10 7:15,16,21,24 8:6,11,18 10:11,14,24 15:12 18:9 20:4,7,15,16 20:21 21:2,6 21:17 22:3 26:18 28:16 29:25 30:11,20 31:6,21,23 32:25 36:18 37:17,20 39:14 42:11 43:13 44:20 45:2,3,6 45:6,22,22 46:21 47:19,20 48:1,7,9 49:7 49:17 51:18,22 52:7,23,25 53:25 54:1	<b>personally</b> 22:6 <b>petition</b> 18:24 24:4 <b>Petitioners</b> 1:5 1:18,22 2:4,7 2:12 3:8 16:6 25:17 39:3,17 52:19 <b>petitions</b> 18:17 19:4,5 <b>pick</b> 39:8 <b>picture</b> 9:17 <b>place</b> 12:12 <b>please</b> 3:10 16:8 29:17 50:21 <b>point</b> 6:9 15:13 15:15 27:10,18 34:8,21 35:5 35:20 44:14 46:24 <b>pointed</b> 39:22 <b>popcorn</b> 7:5 <b>position</b> 3:20,24 4:9,11 12:23 13:1,1,7 18:18 28:6,7,15,19 40:17,21 46:19 46:22 51:21 <b>possibility</b> 8:5 <b>power</b> 1:3 3:4 17:4 19:23 21:22 27:22 30:2,22 35:23 47:7 <b>powerful</b> 33:25 <b>powerless</b> 32:19 33:5,11,25 <b>practically</b> 36:6 <b>practice</b> 40:15 <b>precisely</b> 10:21 11:2 14:12 <b>predict</b> 43:25 <b>present</b> 31:15 <b>presented</b> 3:13 14:1 18:23,23 20:6 31:11 41:2,5,7,12	42:9 51:7,9 52:2 <b>preserve</b> 6:19 <b>preserved</b> 53:14 <b>presumably</b> 20:11 32:9 <b>presume</b> 5:18 17:15 49:20 <b>presumed</b> 10:5 17:5 19:21 38:9 <b>presumption</b> 3:18 16:21,25 19:19 37:22 <b>presumptively</b> 37:13,25 38:5 38:13,16 49:7 <b>prevails</b> 52:4 <b>price</b> 20:9,10,12 20:14 21:2 22:6 46:10 47:11 <b>prices</b> 27:1 <b>primary</b> 13:7,7 <b>principle</b> 3:11 <b>prior</b> 14:22 <b>proceeding</b> 18:5 48:20 <b>process</b> 8:20,21 8:24 29:24 52:23,25 <b>produce</b> 27:9 35:8 43:22,23 52:8 <b>program</b> 15:1 <b>progressed</b> 40:21 <b>projects</b> 6:12 <b>proof</b> 45:15 <b>proper</b> 8:17 <b>properly</b> 19:12 25:4 53:13 <b>proposition</b> 36:22 42:18 <b>propriety</b> 8:19 <b>protect</b> 20:3 <b>protection</b> 48:23	53:25 <b>protects</b> 53:24 <b>prove</b> 45:25 <b>provide</b> 5:15 6:10 <b>provided</b> 5:19 <b>provides</b> 16:12 53:25 <b>provision</b> 27:13 <b>public</b> 1:7 3:5 3:14 5:15 9:1 12:14 15:2,13 15:14,15 16:10 17:22 20:1,4,7 20:16,17,22,25 21:4,21 22:4 23:7 24:16 25:11 26:14 27:17,24 32:6 32:17 33:16 34:5,10 36:23 37:14 38:10 43:3,13 45:12 45:13,24 47:12 47:14 48:23 49:1,2,3,9 50:22 51:1 <b>purchase</b> 53:8 <b>purchaser</b> 53:3 <b>purchasers</b> 53:7 <b>purpose</b> 20:1 43:24 44:5 <b>pushing</b> 41:2 <b>put</b> 21:20 33:18 51:20	38:4 39:22,23 40:1,2,3 41:7 41:12,12,18 42:8,20 43:18 44:13 45:17 46:9 49:17 50:2 51:7,8 52:2 <b>questions</b> 8:18 25:19 29:9 40:8 <b>quite</b> 9:16 24:3 25:17 29:5 39:4 <b>quote</b> 35:5
<hr/> <b>R</b> <hr/>				
<b>R</b> 3:1 <b>raise</b> 47:19 <b>raised</b> 8:1 25:20 48:11 53:16 <b>rate</b> 3:15,23 5:12,18 6:6,24 6:25 7:1,7,17 9:6,7,9,10,11 11:10,11,12 13:8,14 14:25 15:5,17 16:24 16:25 19:22,23 21:22 22:19,22 22:23,24 23:11 23:12,16,17,20 24:14 31:7 32:4,5,7,8 36:24 37:14 38:1,15 39:14 44:19 45:2,11 45:21 48:14 49:6,7 51:19 51:21,23 53:8 53:10,11 <b>ratemaking</b> 36:1 <b>rates</b> 8:25 9:20 9:21 10:25 13:21 16:11 17:15,17,18				

<p>19:19 23:5                  24:7,8 26:13                  26:16,17 29:20                  29:21,23,24                  30:17,18,25                  31:18 33:6                  35:24 37:9                  38:18 40:5,23                  41:6,7 42:14                  42:24,25 43:1                  43:3,5,12,13                  44:15,24 45:1                  46:7,25 49:14                  52:8 53:11,11                  53:12,15,15,18  <b>rate's</b> 45:25                  47:21  <b>rate-setting</b>                  12:11  <b>rationale</b> 37:24                  39:5  <b>reach</b> 9:22 24:19                  40:13  <b>really</b> 9:5 40:4                  47:17  <b>reason</b> 19:15,22                  21:18 27:22                  37:6 39:4  <b>reasonable</b> 5:18                  11:12 12:11                  15:2,10,10,20                  16:25 17:5,16                  17:20,21 19:21                  19:23 25:12,15                  26:25 27:9,12                  32:6,14,16                  33:5 34:6,25                  35:18,25 37:9                  37:13,25 38:5                  38:10 43:5                  45:11 46:1,15                  47:5,11,13,21                  48:22,25 49:4                  49:8,9,12,14                  51:1  <b>reasonableness</b>                  26:19</p>	<p><b>reasonably</b>                  35:13  <b>reasoning</b> 5:1                  22:9 31:14,20  <b>reasons</b> 33:21                  33:23  <b>rebuttal</b> 2:10                  16:1 52:18  <b>recognize</b> 41:4  <b>recognized</b>                  19:18  <b>reconciled</b> 6:8                  13:11  <b>reconsideration</b>                  40:18  <b>recurring</b> 10:8  <b>reexamine</b>                  17:25  <b>referring</b> 8:6  <b>regime</b> 50:8  <b>regularly</b> 7:2                  10:4 13:25,25  <b>regulations</b>                  49:25  <b>regulator</b> 7:18  <b>Regulatory</b> 5:17                  5:24 7:18  <b>reiterated</b> 31:23  <b>relates</b> 4:20  <b>rely</b> 44:3  <b>remainder</b>                  15:25  <b>remains</b> 28:15  <b>remand</b> 14:9,21                  16:16 18:15                  19:10 40:17  <b>remedy</b> 34:10                  34:12,12  <b>removable</b>                  14:20  <b>represent</b> 4:1,2                  4:2  <b>reproduce</b> 35:9                  35:11  <b>require</b> 45:15  <b>requirement</b>                  5:19 49:24</p>	<p><b>requirements</b>                  53:2  <b>requires</b> 49:14  <b>reserve</b> 15:25                  21:19 26:1  <b>reserving</b> 25:23  <b>resolution</b> 18:4  <b>resolved</b> 16:16  <b>respect</b> 3:25                  8:25 31:3 39:2                  43:11  <b>respondent</b> 1:21                  2:6 16:5  <b>respondents</b>                  1:24 2:9 16:20                  29:15,23 30:3                  33:7 46:14                  52:22  <b>response</b> 44:12  <b>responses</b> 22:8  <b>restricted</b> 7:10  <b>rests</b> 17:2 19:19  <b>result</b> 24:7                  40:14  <b>results</b> 4:4 27:9                  27:16  <b>reversal</b> 40:18  <b>reverse</b> 18:21                  19:3 33:3  <b>reversed</b> 18:17  <b>reversing</b> 16:13  <b>review</b> 8:1 18:18                  19:4,5 26:14                  27:12,17 28:22                  33:6,19  <b>reviewed</b> 26:24  <b>revised</b> 39:12  <b>rewritten</b> 10:9  <b>RICHARD</b> 1:23                  2:8 29:14  <b>right</b> 4:16,22 5:5                  8:12,14 11:13                  11:25 12:19                  13:15 14:5,8                  14:12 19:8,8,8                  23:16,21 24:2                  24:18 26:2,2</p>	<p>26:11 31:1                  33:19 36:12                  42:2 49:14                  50:18 51:7,16  <b>rights</b> 8:10  <b>risk</b> 6:13  <b>ROBERTS</b> 3:3                  6:18 7:9 10:13                  10:23 16:2                  18:11,25 24:20                  24:23 25:25                  29:10,13 40:20                  42:3,6,13,15                  51:6 52:16                  54:7  <b>rule</b> 5:25 8:8,25                  11:3,4 12:13                  14:23 32:16  <b>ruled</b> 25:2 42:4  <b>rules</b> 27:11 32:1                  49:24  <b>ruling</b> 6:7 31:19                  52:1</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>S</b> 2:1 3:1  <b>sake</b> 44:23  <b>sale</b> 17:4  <b>satisfy</b> 20:22  <b>saying</b> 6:25 23:9                  28:25 30:16                  42:19 44:21                  47:17 49:5                  51:15  <b>says</b> 30:19,19,24                  32:14,18,25                  38:9,20 48:9                  48:22,24 49:16  <b>Scalia</b> 9:22 10:1                  11:25 13:13                  14:3,6,9 15:22                  15:24 17:21,24                  23:9,21,24                  28:5,14,20,24                  29:6 30:15                  31:2,22 32:3                  36:8,12 37:3,6</p>	<p>37:8 39:21                  40:7,12 41:9                  43:6,8,20                  47:22 48:3,6                  48:12,16 49:3                  54:3  <b>scenario</b> 23:17  <b>Scores</b> 9:15  <b>scratch</b> 40:15  <b>Second</b> 20:1  <b>section</b> 32:12,24                  34:24 36:9,10  <b>seeking</b> 38:7  <b>self-supply</b> 30:7                  30:11  <b>seller</b> 5:10 7:8                  30:21  <b>sells</b> 30:2  <b>send</b> 11:18 19:6                  41:22  <b>sense</b> 7:19 20:5                  22:23 28:1                  33:2 44:10                  52:2  <b>serious</b> 49:2  <b>seriously</b> 38:11  <b>set</b> 14:25 17:17                  21:18 22:22                  23:18 32:8                  40:5 45:21  <b>sets</b> 23:11 32:1  <b>setting</b> 20:19  <b>settled</b> 8:25 35:3                  35:4  <b>settlement</b> 4:3                  8:20 9:13                  11:11 17:18,20                  18:2,3,4,8 22:5                  26:14,24 27:14                  32:13,22 52:23                  52:25  <b>settling</b> 26:18  <b>severe</b> 20:25  <b>severely</b> 9:2  <b>shape</b> 31:12  <b>shelter</b> 51:19  <b>sheltered</b> 39:15</p>
--	--	--	---	---

<p>51:23  <b>shoes</b> 47:20  <b>shouldn't</b> 39:7  <b>show</b> 20:23 21:2  49:8,9 53:2  <b>showing</b> 45:15  <b>shows</b> 52:25  <b>side</b> 4:21,23  41:3 51:9  <b>side's</b> 28:6  <b>Sierra</b> 9:18 21:8  21:16 28:16  43:23  <b>Sierra-Mobile</b>  51:16  <b>sign</b> 6:21  <b>signed</b> 6:17  <b>significant</b>  42:20  <b>simple</b> 5:1 11:21  31:5 36:17,22  46:13,21  <b>simply</b> 10:15  13:10 17:15  36:17 39:6  51:3 52:25  <b>sitting</b> 10:20  <b>situation</b> 20:9  20:14 22:21  31:3 33:16,16  34:9 40:3  44:15 46:21  48:20 50:13  52:3  <b>situations</b> 20:10  41:14  <b>Solicitor</b> 1:19  <b>Somalia</b> 14:18  <b>somebody</b> 19:25  27:23 29:1  30:23 33:21  <b>sophisticated</b>  19:20 30:21  49:7  <b>sorry</b> 10:13  12:24 23:1  33:3,12</p>	<p><b>sort</b> 18:6 21:7  47:23 53:1  <b>Sotomayor</b> 3:19  4:8,12,24 5:21  13:12,17,20  20:8,20 21:1,9  21:12,24 22:12  22:14,25 30:6  30:9 44:17  45:4,8,16,21  46:4,8,23 47:1  47:8,16 50:14  <b>spared</b> 52:11  <b>special</b> 33:14,16  <b>sponte</b> 27:21  <b>stability</b> 6:19  43:22  <b>stand</b> 47:20  <b>standard</b> 3:15  4:7 5:11,16,16  6:3,5 7:6,25  8:8 10:19,21  15:2,3,10,11  15:13,14,18,20  16:10 17:12,22  18:1 23:8  24:16 25:12  26:25 27:24  28:17,22,23,25  29:2 32:7,14  32:17 33:1,6  33:17,19 34:5  34:6,24 35:1  35:15,17 36:5  36:24 38:4  43:3,5 45:14  45:24 47:6,14  47:14 48:22,25  49:1,4,4,12,16  50:22,25  <b>standards</b> 43:18  <b>standing</b> 53:2  <b>standpoint</b> 42:2  <b>stands</b> 9:9  <b>Stanley</b> 5:14  16:22 17:2  19:18 27:20</p>	<p>31:22 33:3,4  36:7 40:19  45:14 48:10  49:16  <b>State</b> 36:14  <b>stated</b> 18:24  <b>statement</b> 13:6  18:12,13 49:23  <b>States</b> 1:1,14  <b>statute</b> 6:1 12:17  34:25 35:16,17  48:23 49:13,13  49:18  <b>statutory</b> 6:4  <b>STEVENS</b>  14:24 15:7,16  21:23 24:6  <b>stick</b> 31:7  <b>stop</b> 44:18  <b>straightforward</b>  11:22  <b>strange</b> 28:19  29:3,5 48:20  <b>stranger</b> 28:25  <b>strictly</b> 42:25  <b>strong</b> 40:22  <b>sua</b> 27:21  <b>subject</b> 6:4  23:20 32:5  34:13 46:10  <b>submitted</b> 54:8  54:10  <b>substantive</b> 7:25  <b>subsumed</b> 53:9  <b>succeed</b> 15:1,5  <b>suddenly</b> 28:11  48:19  <b>sufficient</b> 16:13  <b>sufficiently</b> 7:21  7:21  <b>suggested</b> 32:3  43:8,16,17,20  <b>suggesting</b> 18:3  52:5  <b>supplier</b> 21:20  <b>support</b> 16:6  37:3,5</p>	<p><b>supporting</b> 1:21  2:6  <b>supposed</b> 11:13  13:22 25:15  26:8 33:10  <b>Supreme</b> 1:1,14  <b>sure</b> 14:16 15:16  28:24  <b>surmount</b> 52:13  <b>sympathy</b> 50:16  <b>system</b> 12:11,12  12:13 31:25  35:12 50:8</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>T</b> 2:1,1  <b>table</b> 51:10  <b>tables</b> 10:20  <b>take</b> 8:18 9:7  25:21 44:1  <b>taken</b> 38:5  <b>takes</b> 52:2  <b>talking</b> 9:7,12  23:4 38:18  39:2  <b>talks</b> 41:7  <b>tariff</b> 20:9 23:20  29:21 30:9  31:18 33:18  40:5 41:6  42:14 43:1,3  52:8  <b>tariffs</b> 44:16  <b>tell</b> 8:13 10:20  34:20 39:7,16  <b>tens</b> 47:7  <b>term</b> 5:3  <b>terms</b> 5:6,9 18:8  22:2 40:3  51:20  <b>test</b> 20:2,5,23  <b>Thank</b> 3:9 12:3  16:2 29:10,12  29:16 50:4  52:15,16,20  54:6,7  <b>that's</b> 24:18</p>	<p><b>theater</b> 7:4  <b>theatergoers</b> 7:4  <b>There's</b> 45:21  <b>thing</b> 11:15,18  13:18 18:1  25:8 41:17  43:9,10  <b>things</b> 7:5 15:9  41:14,24  <b>think</b> 4:17 8:3  11:9 15:8  18:20,22 19:1  21:7 22:8,16  24:21 25:1,16  28:19 29:2,4  32:21 33:15,19  33:20,20,22  40:22 41:11  50:13,17,18  53:4  <b>thinking</b> 35:6  <b>thinks</b> 24:13  26:5  <b>third</b> 3:22 5:22  6:20 16:12  20:3,7,15,21  23:1 25:10  26:10 28:7,10  28:16 36:18  45:1,10,22,23  46:20 47:19,24  48:1,19 50:25  51:6  <b>third-party</b> 8:12  19:16 53:20  <b>thirties</b> 35:21  <b>thorny</b> 52:13  <b>thought</b> 23:6  25:13 27:4,7  32:2,3 35:19  35:21 37:9  <b>tier</b> 51:2  <b>time</b> 16:1 26:1  41:23 50:15,15  50:17  <b>today</b> 3:4 43:16  <b>tomorrow</b> 43:17</p>
--	--	---	---	--

<p><b>tough</b> 40:21  <b>transition</b> 17:15  26:16,17 44:20  44:21,24  <b>treatment</b> 23:15  <b>tries</b> 8:9  <b>true</b> 27:3 38:1  <b>truth</b> 29:19,22  <b>try</b> 21:3  <b>trying</b> 4:25  31:23 35:12  46:8  <b>Tuesday</b> 1:11  <b>turn</b> 52:22  <b>two</b> 5:9,12 6:16  6:20,21,24 7:7  9:8 22:2,8,11  23:12 30:20  37:11,17,20  45:3,5,22 48:7  48:9 51:17  <b>type</b> 7:10  <b>types</b> 5:22</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>unbridled</b> 36:4  <b>unchained</b>  48:19  <b>unclear</b> 44:12  <b>underlying</b> 14:2  <b>understand</b> 4:24  <b>understood</b>  28:18  <b>unencumbered</b>  27:13 28:11  <b>unfair</b> 21:3  22:18  <b>unfairness</b> 21:5  21:16  <b>unilaterally</b>  23:18  <b>United</b> 1:1,14  <b>unites</b> 29:22  <b>universes</b> 39:3  <b>unlawful</b> 8:21  <b>unreasonable</b>  30:18</p>	<p><b>upheld</b> 37:15,16  37:20  <b>use</b> 17:24 23:3  36:1 38:8  41:18  <b>usual</b> 18:1 40:15  <b>Utilities</b> 1:7 3:5  20:16</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>v</b> 1:6 3:4 14:13  <b>validity</b> 8:14  26:20,22,23  <b>variously</b> 20:24  <b>versa</b> 15:3  <b>vice</b> 15:3  <b>victory</b> 42:7  <b>view</b> 12:21 19:9  19:15 23:19  24:6,9 25:15  31:19 39:21  42:10 52:3  53:17  <b>violate</b> 15:18,20  43:13  <b>violates</b> 12:14  <b>violation</b> 50:10  <b>virtually</b> 36:4  <b>vis-à-vis</b> 20:12</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wading</b> 40:14  <b>wait</b> 25:22  <b>want</b> 14:4 25:22  27:4 33:18  44:6 47:1  50:10,14,15,16  51:2  <b>wants</b> 42:20  <b>Washington</b>  1:10,17,20  <b>wasn't</b> 31:11  42:9  <b>way</b> 17:11 31:12  40:13,21 41:2  46:18 49:8  <b>weaker</b> 41:1</p>	<p><b>wealth</b> 35:8  <b>We'll</b> 3:3  <b>we're</b> 7:1 9:11  14:10,17,19,21  26:8 34:16,23  35:16,20 36:2  38:18 40:4,13  41:2 44:7,8,18  44:21 52:1  <b>we've</b> 41:24  50:23  <b>what's</b> 9:5  <b>whatsoever</b> 54:1  <b>wholesale</b> 17:3  19:20  <b>wholly</b> 39:6 53:9  <b>willing</b> 5:10 7:7  7:7  <b>win</b> 35:13  <b>wit</b> 35:8  <b>word</b> 17:7 46:4  <b>words</b> 11:25  42:25  <b>work</b> 40:9 44:6  <b>world</b> 28:2  32:14  <b>worrying</b> 6:12  <b>wouldn't</b> 18:8  <b>wrong</b> 11:14,14  11:18 19:16  22:18 39:18  <b>wrote</b> 10:18</p> <hr/> <p style="text-align: center;"><b>X</b></p> <hr/> <p><b>x</b> 1:2,9 44:22  50:9</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>Y</b> 50:9</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <hr/> <p><b>Z</b> 50:9</p> <hr/> <p style="text-align: center;"><b>0</b></p> <hr/> <p><b>08-674</b> 1:6 3:4</p> <hr/> <p style="text-align: center;"><b>1</b></p> <hr/> <p><b>10:02</b> 1:15 3:2</p>	<p><b>11:00</b> 54:9  <b>16</b> 2:7  <b>1930s</b> 35:19</p> <hr/> <p style="text-align: center;"><b>2</b></p> <hr/> <p><b>20a</b> 24:4  <b>2009</b> 1:11  <b>25</b> 30:2  <b>29</b> 2:9</p> <hr/> <p style="text-align: center;"><b>3</b></p> <hr/> <p><b>3</b> 1:11 2:4 52:17</p> <hr/> <p style="text-align: center;"><b>4</b></p> <hr/> <p><b>4.C</b> 32:12,24  34:24 36:9,10  36:19  <b>45</b> 27:14  <b>45-day</b> 27:16</p> <hr/> <p style="text-align: center;"><b>5</b></p> <hr/> <p><b>5</b> 25:22  <b>50</b> 10:9  <b>52</b> 2:12</p>
--	---	---	---