MOBILE-SIERRA DOCTRINE AND ENERGY CONTRACTS*

Mobile-Sierra Doktrini ve Enerji Sözleşmeleri

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Abstract

The Mobile-Sierra doctrine outlines the circumstances under which the Federal Energy Regulatory Commission (FERC) is authorized to intervene in wholesale energy contracts. Central to this doctrine are the legal standards of 'just and reasonable' pricing, along with the 'public interest' criteria that have been shaped by judicial interpretation. These standards are pivotal for understanding how the concept of 'public interest' is applied within U.S. administrative law.

Since the initial Mobile and Sierra decisions, and subsequent rulings by the Supreme Court, the doctrine has undergone significant development. This ongoing evolution has led to extensive debate about the practical conditions, limitations, and various dimensions of the doctrine. Changes in legal standards and judicial interpretations have continuously influenced how these conditions are applied.

Given the intensive regulatory framework of energy law, examining how contracts interact with regulatory authority, and the balance between ensuring contractual stability and exercising regulatory power, as well as the impact of the public interest concept within U.S. law, can provide valuable insights. Such an analysis could be particularly beneficial for understanding similar issues in Turkish law.

Keywords: Regulation, energy contracts, public interest, regulatory power, tariffs

* There is no requirement of Ethics Committee Approval for this study.

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Özet

Düzenleyici kurum olarak FERC'in enerji hizmetlerinde toptan satış sözleşmelerinde belirlenen fiyatlara hangi şartlarda müdahale edebileceği *Mobile-Sierra* doktrininin temelini oluşturmaktadır. Tarife belirleme dışında sözleşmelere müdahale yetkisi içeren bu alanda yasa ile belirlenen 'adil ve makul' ölçütü yanında içtihatla geliştirilen kamu yararı kriteri ABD İdare hukukundaki 'kamu yararı' kavramına ilişkin tartışmalara ışık tutması bakımından önem arz etmektedir.

Doktrinin temeli olan *Mobile* ve *Sierra* kararları ile bu alanda oluşturulan içtihat Yüksek Mahkemenin sonraki kararlarıyla daha da geliştirildiğinden doktrinin uygulamadaki koşul ve sınırları ile diğer boyutları da bu çerçevede ele alınmıştır. Bu çerçevede yasa ile belirlenen koşulların uygulamasının yargı kararlarıyla nasıl geliştiği ve değiştiği bu süreç içinde değerlendirilmiştir.

Yoğun bir düzenleme çerçevesine sahip olan enerji hukuku alanında sözleşmelerin idarenin yetkileri karşısındaki konumunun, sözleşme istikrarı ile düzenleme yetkisi arasındaki ilişkinin ve kamu yararı kavramının bu alandaki etkisinin düzenleyici kurumlar alanında önemli bir birikime sahip olan ABD hukuku çerçevesinde incelenmesinin Türk hukuku açısından da faydalı olabileceği değerlendirilmektedir.

Anahtar Kelimeler: Regülasyon, enerji sözleşmeleri, kamu yararı, düzenleme yetkisi, tarife

INTRODUCTION

The *Mobile-Sierra* doctrine has a very significant role on the energy regulation. It represents a sensitive and highly important balance between the regulatory power and contractual rights and responsibilities in the energy law.

The origin of the *Mobile-Sierra* doctrine has been described as two of the "best-known public utility decisions by the Supreme Court in [the 20th] century,"[1] Because this doctrine tries to maintain a very sensitive balance between contract stability and regulatory power. Actually this point may be seen among the main issues of the regulatory state and its powers. So its subject is neither new nor, perhaps, even resolvable problem. Basically it seems as an economic and political balance point and it can be changed according to present conditions. Depending on these conditions this balance point can either go beyond this doctrine or restrict it.

[1] *Boston Edison Co. v FERC* 233 F.3d 60, 64 (1st Cir.2000); Richard P. Bress, Michael J. Gergen, and Stephanie S. Lim, 'The Business of the Court: A Deal Is Still a Deal: Morgan Stanley Capital Group v. Public Utility District No. 1' [2007-08] Cato Sup. Ct. Rev. 285, 292.

However, this doctrine especially deals with energy regulation and wholesale energy contracts and tariffs. Therefore, beyond the general overview of the doctrine, it is necessary to focus on the specific reflections of it on the energy regulation. In order to examine the *Mobile-Sierra* doctrine firstly it is necessary to understand its origin and the main cases that constitute the main structure of the doctrine. After this general context, it can be easier to analyze its evolution and different aspects of its application in the area of energy contracts.

I. Overview of The *Mobile-Sierra* Doctrine

A. Origin

The *Mobile-Sierra* doctrine is taking its name from two same-day Supreme Court decisions: United Gas Pipe Line Co. v. Mobile Gas Service Corp. and Federal Power Commission v. Sierra Pacific Power Co.[2] The doctrine mainly puts a principle that FERC presumes the justness and reasonableness of the negotiated wholesale contract rates agreed by the parties unless it seriously harms the public interest. At first it seems a burden on the freedom of contract principle, but actually according to this doctrine, National Gas Act (NGA) and Federal Power Act (FPA) impose a restriction on the FERC's authority on the private contracts. Because after these decisions, just and reasonable standard associated and interpreted with the public interest criterion.[3]

In general, the central issue in this doctrine concerns with the rate-making authority and the constraints on that power. Wholesale energy rates are generally determined in two ways. A supplier may set rates unilaterally by selling energy according to predetermined tariffs, or they may set rates bilaterally through contracts with individual buyers, where the rate is specified within the terms of the agreement.[4]

The Mobile-Sierra doctrine is applicable where the rate is determined by a contractual agreement. Under the Mobile-Sierra doctrine, FERC may terminate or modify freely negotiated private contracts that set rates only if the public interest so requires. The doctrine provides that if two or more parties reach a negotiated settlement on a disputed rate, FERC will apply a strong presumption that the negotiated rate is just and reasonable, and FERC may intervene in the contract only for the most compelling of reasons, the public interest. Therefore, the doctrine's balance between public interest and freedom of contract constitutes the main basis of the debates in this field.

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2 Brent Allen, 'Consumers versus Contracts: Morgan Stanley, Maine, and the Mobile-Sierra Doctrine' (2009) 1 San Diego J. Climate & Energy L. 315, 316.

3 ibid.

4 Ibid 318.

B. Legal Background

1. Regulation

Mobile-Sierra doctrine is mainly related with the interpretation of two FPA sections 205 and 206 which mainly defines the requirement of just and reasonable rates and Commission's power in case of inconsistency with this principle. FPA section 205 (a) titled "Just and reasonable rates" regulates that;

"*All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.*"[5]

In line with the previous section FPA 206 (a) regulates the Commission's power as follows;

"*Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.*"[6]

Based on these provisions, the Federal Power Act (FPA) grants FERC authority to ensure that all rates are fair and reasonable and provides FERC with the power pursuant to this duty to review and approve tariff rates before they go into effect and to change any rate or contract term upon a showing that it is "unjust, unreasonable, unduly discriminatory or preferential".

Taken together, this forms the basis for the just-and-reasonable review framework, which is the standard the Commission must use when evaluating challenges to filed rates under sections 205 and 206 of the FPA.

2. Mobile Case

The Mobile case is about contractual obligations between the United Gas Pipe Line Company and its distributor customer Mobile Gas Service Corporation (Mobile). In this case Mobile would buy gas from United at 10.7 cents per MCF (thousand cubic feet) and sell it to the end users with a complementary contract at 12 cents per MFC. But United wanted to increase this rate to the 14.5 cents level and filed new schedules with the Commission. But Mobile petitioned the

5 16 U.S.C. § 824d (2000).

6 16 U.S.C. § 824e (2000).

Commission to reject United's filing and claimed that United could not unilaterally change the contract rate. After Commission rejected this contention, Mobile filed a petition for review in the Court of Appeals for the Third Circuit. That Court reversed the Commission's order, directed it to reject United's new schedule and held Mobile entitled to a return of the amounts paid above the contract rate. Upon the petition for certiorari of the United and the Commission, Supreme Court hold that the "Natural Gas Act does not give natural gas companies the right to change their rate contracts by their own unilateral action."[7]

The question in this case is whether under the Natural Gas Act a regulated natural gas company may, without the consent of the distributing company, change the rate specified in the contract simply by filing a new rate schedule with the Federal Power Commission.[8]

According to the Court:

> "(T)he provision of the Natural Gas Act directly in issue here is 4(d), and this article provides that 'no change shall be made by any natural-gas company in any such (filed) rate … or contract … except after thirty days' notice to the Commission', which notice is to be given by filing new schedules showing the changes and the time they are to go into effect."[9]

The Court stated that 4 (d) is "simply a prohibition, not a grant of power". In another words "[t]he section says only that a change cannot be made without the proper notice to the Commission; it does not say under what circumstances a change can be made."[10]

Besides the Court rejects the claim that the 4(d), 4(e) and 5(a) sets alternative rate-changing 'procedures' and expresses that:

> "These sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies."[11]

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7 *United Gas Pipe Line Co. v Mobile Gas Serv. Corp.* 350 U.S. 332, 334-337 (1956).

8 ibid 334.

9 ibid 339.

10 Ibid.

11 ibid 341.

According to the Court, under the 5(a) the basic power of the Commission was "to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential'"[12]. However, the Court stressed that "[t]his is neither a rate-changing nor a rate-making' procedure. This provision only regulates the Commission's 'power to review' and "if they are determined to be unlawful, to remedy them".[13]

As the Court stated, these conditions mainly defined in the Natural Gas Act. However, the Court added another element for this determination. Contracts for sale of gas by natural gas companies are "fully subject to paramount power of Federal Power Commission to modify them when necessary in the *public interest*."[14]

It must be noted that, either the provisions or the Court's definition is about the nature and the conditions of the Commission's power to change the contract rates. However, the difference is, while the statutory conditions are about the features of rates and contracts, the judiciary "public interest" standard describes a more general criterion.

Besides, although, the statutory provisions set out an objective or independent standard for the Commission and both sides of the contract, 'public interest' can be considered a more discretionary standard for the Commission.

As a result "if the Commission, after hearing, determines the contract rate to be so low as to conflict with the public interest, it may under §5(a) authorize the natural gas company to file a schedule increasing the rate."[15]

But it must be noted that, while natural gas companies are precluded from unilaterally changing their contracts which it is in their private interests to do so, they can get an avenue of relief when their interests coincide with the public interest.[16] Therefore the issue is not whether a rate is low, but whether it is so low as to adversely affect the public interest[17].

The Court states that "[t]he Act affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other."[18] This finding points out the core trade-off of the *Mobile-Sierra*.

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12 Ibid.

13 ibid.

14 ibid 344.

15 ibid 345.

16 ibid 344.

17 Harold Glenn Drain, 'Union Pacific Fuels, Inc. v. FERC: The FERC's Ability to Abrogate Natural Gas Transportation Contracts' (1998) 33 Tulsa L.J. 931, 934.

18 *United Gas Pipe Line Co. v Mobile Gas Serv. Corp.* 350 U.S. 332, 344 (1956).

As a summary, with this decision, the Court added public interest standard to statutory 'unjust, unreasonable, unduly discriminatory, or preferential' standards. But the Court did not explain the relation between these two standards. To examine this relation we can get more clues from the Sierra Case.

3. Sierra Case

The Court decided another important case in the same day with Mobile and this decision determined another component of the doctrine. The case was between petitioner Pacific Gas and Electric Company (PG&E), a 'public utility' and respondent distributor, Sierra Pacific Power Company (Sierra). PG&E made a 15-year contract for power at a special low rate with Sierra in June 1948 and filed it with Federal Power Commission. But in 1953, PG&E, unilaterally filed with the Commission a schedule aims to increase its rate to Sierra by approximately 28% under §205(d) of the Federal Power Act.[19]

The Commission denied the Sierra's motion against the PG&E, challenging the unilaterally changing the contract. After the hearings, the Commission, reaffirmed its refusal and held the new rate not to be 'unjust, unreasonable, unduly discriminatory, or preferential.'[20]

Sierra filed a petition for review in the Court of Appeals for the District of Columbia. That Court, holding that the contract rate could be changed only upon a finding by the Commission that it was unreasonable, reversed the Commission's order, directed it to reject PG&E's new schedule and held Sierra entitled to a return of the amounts paid above the contract rate.[21]

When it came before the Supreme Court, the Court held that their interpretation on the Natural Gas Act is equally applicable to the Federal Power Act. Therefore the Court concluded that, Federal Power Act is also not authorizing unilateral contract changes and "neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra."

When we look at the difference between these two same day decisions, it can be said that: in Mobile, the Court puts public interest standard as a different criterion for contract modification apart from the statutory standards. But in Sierra the Court takes a further step and moves up the public interest standard to a higher level and expands the scope of it. Besides, it tries to set these statutory standards as the elements of the 'higher' public interest standard.

According to the Court, it is necessary to determine whether there is a an adverse effect on the public interest "as by impairing financial ability of utility

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19 *Fed. Power Comm'n v Sierra Pac. Power Co*. 350 U.S. 348, 352 (1956).

20 ibid.

21 ibid.

to continue its service, by casting upon other consumers excessive burden, or by being unduly discriminatory."[22] These three factors were named as the three prong test of the Sierra.

II. Energy Contracts and Market-Based Rate Regime

The interstate wholesale rates of natural gas and electricity are regulated through tariffs or bilateral contracts. Under the Natural Gas Act (NGA) and the Federal Power Act (FPA) regulated utilities have to file their tariffs with FERC and to comply with these terms and rates when they are providing service to customers. Besides if they want to change the existing rates they are required to submit a notification to the Commission within a prescribed time.[23] A similar procedure also exists in the contractual rate making. These contracts also must be filed with the Commission before the implementation.[24]

However, under FERC's current regulatory regime, a wholesale electricity seller may file a "market-based" tariff, which simply states that the utility will enter into freely negotiated contracts with purchasers. As a different procedure, those contracts are not filed with FERC before they go into effect.[25]

III. Application of the *Mobile-Sierra* to the Energy Contracts

Although some court decisions defined the *Mobile-Sierra* doctrine as a "refreshingly simple" principle, the application of this presumption caused a lot of disputes around the criteria and scope of it.

While examining the application of the *Mobile-Sierra*, it is necessary to begin with the applicability and then to explore the necessary conditions of application and rebuttal of the doctrine.

A. Applicability of the *Mobile-Sierra* to the Contracts

At the first step, we need to explore the several circumstances that cause some disputes about whether or to which extent the *Mobile-Sierra* doctrine or presumption can be applied.

When we look at the applicability problems of the *Mobile-Sierra*, it can be said that they generally stem from the court of appeals decisions. Although the

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22 ibid.

23 Michael A. Rosenhouse, Annotation, 'Construction and Application of Mobile-Sierra Doctrine, Under Which Federal Energy Regulatory Commission Must Presume Gas or Electricity Rate Set in Freely Negotiated Wholesale Contract Meets Statutory "Just and Reasonable" Standard' (2012) 62 A.L.R. Fed. 2d 427.

24 ibid.

25 *Morgan Stanley Capital Group Inc. v Pub. Util. Dist. No. 1 of Snohomish County, Wash.* 554 U.S. 527, 537 (2008).

Supreme Court had established the 'public interest' standard, the interpretation and implementation of it by the courts of appeals sometimes caused different applicability problems for Mobile-Sierra.

1. Low Rate-High Rate Contracts Distinction

In Mobile case the Court held that "if the Commission, after hearing, determines the contract rate to be so low as to conflict with the public interest, it may under §5(a) authorizes the natural gas company to file a schedule increasing the rate."[26]

According to the Court, under the Natural Gas Act, the Congress aims to protect the consumers from excessive prices and at the same time considers the legitimate interests of natural gas companies. [27]

Memphis decision also implied that *Mobile-Sierra* should apply both to seller-side and buyer-side complaints. Because the Court saw the function of the doctrine as respecting contracts and it was not exclusively about constraining regulated sellers for the benefit of consumers.[28]

Court of Appeals also applied *Mobile-Sierra* equally to buyers and sellers before *Morgan Stanley* decision.[29] However, in *Morgan Stanley* case, the Ninth Circuit held that it is necessary to use a different standard for overcoming the *Mobile–Sierra* presumption[30] when a purchaser challenges a contract: whether the contract exceeds a "zone of reasonableness."[31] The Court also held that the three factors identified in Sierra are neither exclusive nor "precisely applicable to the high-rate challenge of a purchaser."[32] Because those three factors are not the 'exclusive components' of the public interest.[33]

But the Court rejected a different standard for the high-rate contracts and stated that 'zone of reasonableness' test cannot provide an adequate level of protection to contracts, therefore, "the standard for a buyer's rate-increase

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26 *United Gas Pipe Line Co. v Mobile Gas Serv. Corp.* 350 U.S. 332, 345 (1956).

27 *United Gas Pipe Line Co. v Memphis Light, Gas and Water Division* 358 U.S. 103, 113 (1958).

28 David G. Tewksbury, Stephanie S. Lim, Grace Su, 'New Chapters In The Mobile-Sierra Story: Application Of The Doctrine After NRG Power Marketing, LLC V. Maine Public Utilities Commission' (2011) 32 Energy L.J. 433, 439.

29 Ibid. (citing *Potomac Elec. Power Co. v F.E.R.C.* 210 F.3d 403 (D.C. Cir. 2000); Boston Edison Co. v. F.E.R.C., 856 F.2d 361 (1st Cir. 1988).

30 The Supreme Court also referred to the Mobile-Sierra doctrine as the "Mobile-Sierra presumption" in *Morgan Stanley Capital Group Inc. v Public Utility District No. 1 of Snohomish County* 554 U.S. 527, 534 (2008).

31 *Morgan Stanley Capital Group Inc. v Pub. Util. Dist. No. 1 of Snohomish County, Wash.* 554 U.S. 527, 544 (2008).

32 ibid 566.

33 ibid 549.

challenge must be the same, generally, as the standard for a seller's challenge: The contract rate must seriously harm the public interest."

2. Fixed Rate and Going Rate Distinction

In *Memphis*, the Court separates the 'fixed rate' from the 'going rate'. According to the Supreme Court, the Court of Appeals erred when it decided that the utility cannot change unilaterally also a going rate contract. In the Court's interpretation, this type of contract gives the seller an authority to file unilateral changes for rate increases[34]. Therefore when the public utility filed for a new rate increase, it was not "unilaterally changing its contractual obligations", but "simply exercised its rights reserved by contract."

But the difference between the going rate and fixed rate has not been always clear.[35] The most considerable determination for that is the D.C. Circuit's holding in the Texaco Inc. v. FERC. According to the court "[a]bsent contractual language 'susceptible to the construction that the rate may be altered while the contract[] subsist[s],' the *Mobile-Sierra* doctrine applies."[36]

According to this interpretation, it is necessary to look at the language of the contract. If the parties had not reserved a right to modify the contract the parties could not change the contract. If the parties did not give themselves that ability, the Commission was also prevented from modifying the contract. But this situation did not bind the Commission if there were necessary conditions for the application of the *Mobile-Sierra*.[37]

There can be also middle options between the *Mobile–Sierra* and *Memphis*. In Papago the D.C. Circuit held that although the parties do not give themselves a right to file new rates, they can permit Commission "to set aside the contract rate if it results in an unfair rate of return, not just if it violates the public interest".[38]

3. Contractual Determination

Although *Memphis* has an importance for the fixed rate-going rate distinction for application of *Mobile-Sierra*, the application of this decision is not limited to this issue. In *Memphis* the Court concluded that "[u]nder provisions of Natural Gas Act, natural gas supplier has right, in first instance, to change rates at will,

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34 William A. Mogel, 'The Federal Power Commission's Authority to Set Area Rates By Rulemaking' (1973) 5 Seton Hall L. Rev. 31 1973-1974, 41.

35 David G. Tewksbury & Stephanie S. Lim, 'Applying the Mobile-Sierra Doctrine to Market-Based Rate Contracts' (2005) 26 Energy L.J. 437, 445.

36 *Texaco Inc. v FERC* 148 F.3d 1091, 1096 (D.C. Cir. 1998) (citing *Appalachian Power Co. v FPC* 529 F.2d 342, 348 (D.C. Cir. 1976).

37 Carmen L. Gentile, 'The Mobile-Sierra Rule: Its Illustrious Past and Uncertain Future' (2000) 21 Energy L.J. 353, 383.

38 *Papago Tribal Util. Auth. v F.E.R.C.*, 723 F.2d 950, 953 (D.C. Cir. 1983).

unless it has undertaken by contract not to do so." This condition was named as "Memphis clause" and accepted as a limitation of the *Mobile-Sierra* doctrine.

Accordingly, since the Supreme Court's decision in *Memphis*, the courts have generally stated that the *Mobile-Sierra* doctrine applies unless the contract explicitly provides otherwise in a "Memphis clause."[39]

The Memphis clause can have several results for the modification of the contract. It can give the parties' a right to modify the contractual rate unilaterally, preserve the FERC's rights or restrict the FERC's modification rights to *Mobile-Sierra*.[40]

4. Is It Required Previously to File with the FERC?

Because of the contracts at issue in Mobile and Sierra cases were previously filed with and reviewed by FERC, the subsequent cases revealed a controversy about the applicability of *Mobile-Sierra* for the contract that are not previously filed with FERC. According to DC Circuit and First Circuit the previous filing with the Commission is not a necessary condition for the application of *Mobile-Sierra*. But the First Circuit implied that if the contract was not submitted to the FERC previously, the public interest standard can be applied less strictly.[41]

Morgan Stanley decision also argued this issue and the Supreme Court clarified this dispute by citing Sierra and stated that "Sierra thus provided a definition of what it means for a rate to satisfy the just-and-reasonable standard in the contract context—a definition that applies regardless of when the contract is reviewed."[42] The Court also concluded that the Sierra decision could not be read as an initial Commission opportunity for review was necessary for the application of the *Mobile-Sierra*.[43] The Court held that according to Sierra a rate set out in a contract must be presumed to be just and reasonable, absent serious harm to the public interest, regardless of *when* the contract is challenged, and thus, the presumption applied to challenged market-based rate contracts" [44]

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39 *Texaco Inc. v FERC*, 148 F.3d 1091, 1096 (D.C. Cir. 1998); See also Boston Edison Co. v. FERC, 233 F.3d 60, 67 (1st Cir. 2000); *La. Power & Light Co. v FERC*, 587 F.2d 671, 675 (5th Cir. 1979).

40 *Papago Tribal Util. Auth. v F.E.R.C.*, 723 F.2d 950, 953 (D.C. Cir. 1983).

41 David G. Tewksbury, Stephanie S. Lim, 'Applying the Mobile-Sierra Doctrine to Market-Based Rate Contracts' (2005) 26 Energy L.J. 437, 446 & n.87; See also Northeast Utilities. Serv. Co. v. FERC, 993 F.2d 937, 961 (1st Cir. 1993), *Sam Raybum Dam Elec. Coop. v FPC*, 515 F.2d 998, 1008 (D.C. Cir, 1975).

42 *Morgan Stanley Capital Group Inc. v Pub. Util. Dist. No. 1 of Snohomish County, Wash.* 554 U.S. 527, 546 (2008).

43 ibid.

44 ibid 528.

5. Third Party Claim

In Maine (2008) DC Circuit referred to the Mobile and stated that Supreme Court has emphasized that the "the relations between the parties may be established by contract, subject only to public interest review". In a previous case DC Circuit also held that *deferential public interest* standard only applies to "*freely negotiated private contracts* that set firm rates or establish a specific methodology for setting the rates for service."[45]

Because according to the DC Circuit, *Mobile-Sierra* doctrine sets a highly-deferential public interest standard of review to preserve the terms of the bargain as between the contracting parties. But if a rate challenge is brought by a non-contracting third party, the *Mobile-Sierra* doctrine simply does not apply; the proper standard of review remains the "just and reasonable" standard in section 206 of the Federal Power Act." In accordance with these decisions and holdings, DC Circuit rejected FERC's decision and concluded that, as a challenge brought by a non-contracting third party, Maine case is "clearly outside the scope of the *Mobile-Sierra* doctrine".[46]

After the court of appeals' decision, NRG Power Marketing, LLC, and other energy companies that have settled with the FERC petitioned the Supreme Court for review. According to petitioners, the public-interest standard applies whether the FERC's investigation is initiated in response to a contracting party's or a noncontracting party's complaint, or by the FERC acting sua sponte. Petitioners argued that the public interest standard is specifically constructed to protect the interests of members of the public who are not part of the contract[47].

When this case went before the Supreme Court, the Court reversed DC Circuit's decision. In this case the United States Supreme Court held that "the Mobile–Sierra presumption does not depend on the identity of the complainant who seeks FERC investigation. The presumption is not limited to challenges to contract rates brought by contracting parties. It applies, as well, to challenges initiated by third parties."[48]

B. Necessary Criteria for the Application of *Mobile-Sierra* to the Energy Contracts

Above mentioned situations can be seen as the disputes about the *Mobile-Sierra*'s applicability under some specific conditions. These situations have

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45 *Atl. City Elec. Co. v. FERC* 295 F.3d 1, 14 (D.C.Cir.2002). (emphasis added)

46 *Maine Pub. Utilities Comm'n v F.E.R.C.* 520 F.3d 464, 477 (D.C. Cir. 2008).

47 Grenig, Jay E, 'Does the Mobile-Sierra Doctrine Apply When a Contract Is Challenged By a Noncontracting Third Party?' (2009) 37 Preview of United States Supreme Court Cases; Chicago 112, 114.

48 *NRG Power Mktg., LLC v Maine Pub. Utilities Comm'n* 130 S. Ct. 693, 701, 62 A.L.R. Fed. 2d 427 (2010).

different features than the Mobile and Sierra cases. But if the case it suitable to apply *Mobile-Sierra* under the applicability conditions, it is necessary to decide whether the application requirements are satisfied in the case.

Under the *Mobile-Sierra*, if the contractual rate is just and reasonable it can be modified only if it does not satisfy the public interest standard. Therefore, the basic and most important reason to modify a contract under the *Mobile-Sierra* is the public interest standard. But at the same time the contract rate must be just and reasonable.

However, the relation between these two terms has a long story in the court's decisions. As the main conditions for the application of the *Mobile-Sierra*, it is necessary to examine the basic views about this relation in a more detailed way.

Besides for the application of *Mobile-Sierra*, the contract should be made based on arm's length negotiation.

1. The Just and Reasonable & Public Interest Standards

There are different interpretations about the relation between just and reasonable standard and public interest standard. While in some decisions these standards can be seen as the same, some other decisions separate one from another. For example, as we mentioned above, in the third party challenges, just and reasonable standard was used instead of public interest standard. The assumption behind this distinction was more deferential weight of public interest standard. According to this opinion, the public interest standard has a higher burden of proof than the just and reasonable standard. Therefore, the intervention of the FERC was restrained more than just and reasonable standard.

However, for instance, in *Morgan Stanley* the Court stated that "the term 'public interest standard' refers to the differing application of that just-and-reasonable standard to contract rates."[49] Besides it suggested that these two applications of the "just and reasonable standard" can be separated as "the "ordinary" "just and reasonable standard" and the "public interest standard."[50]

Following *Papago*, the court divided all contracts into three categories: those permitting unilateral rate changes by the utility under §205, those permitting changes under §206 subject to the *Mobile-Sierra* public interest standard, and those permitting changes under section 206 subject to the just and reasonable standard.[51]

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49 *Morgan Stanley Capital Grp. Inc. v Public Util. Dist. No. 1 of Snohomish Cnty* 554 U.S. 527, 535 (2008).

50 ibid.

51 Carmen L. Gentile, 'The Mobile-Sierra Rule: Its Illustrious Past and Uncertain Future' (2000) 21 Energy L.J. 353, 360-61.

a. *The Just-and-Reasonable Standard*

"Just and reasonable" standard unlike the public interest is a statutory standard. FPA §206 and NGA§5(a) establishes this standard as a presumption and if this presumption is not met, the contract can be subject to the FERC's modification.

In *Maine* decision (2008) Supreme Court held that "[w]hen two or more parties reach a negotiated settlement over a disputed electricity rate, the Federal Energy Regulatory Commission (FERC) applies a strong presumption that the settled rate is just and reasonable and may only set aside the contract for the most compelling reasons."[52]

In some cases the courts prefer this standard to the public interest standard. In *Papago*, the D.C. Circuit found 'public interest standard' as "almost insurmountable". In *Kansas Cities* D.C. Circuit repeated this ruling and stated that;

To assume that a contractual provision pertaining to rate adjustment refers to that standard is to assume that it was intended to be virtually inoperative; whereas to interpret it as referring to just-and-reasonable changes is to give it a content that is both substantial and fair to both sides. Thus, courts and the Commission have almost universally construed contractual references to future rate changes to authorize §206 proceedings with a just-and-reasonable standard of proof.[53]

In *Morgan Stanley*, the Supreme Court also stated that "[t]he statutory requirement that rates be "just and reasonable" is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions."[54]

As the Court stated, 'just and reasonable' standard gives a great deference to the Commission's decisions. This approach also shows that the Court tries to limit the 'public interest' standard and wants to remove 'almost insurmountable' obstacles in front of the FERC's discretionary power.

At the same time, it tries to clarify the neglected 'just and reasonable' standard. According to the Court "FERC must choose a method that entails an appropriate 'balancing of the investor and the consumer interests'."[55]

b. *The Scope of the Public Interest Standard*

In *Mobile*, the Court held that "the contracts for sale of gas by natural gas companies are fully subject to paramount power of Federal Power Commission to modify them when necessary in the public interest."[56]

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52 *Maine Pub. Util. Comm'n v FERC* 520 F.3d 464, 477 (D.C.Cir.2008).

53 *Kansas Cities v F.E.R.C.* 723 F.2d 82, 88 (D.C. Cir. 1983).

54 *Morgan Stanley Capital Grp. Inc. v Public Util. Dist. No. 1 of Snohomish Cnty.* 554 U.S. 527, 532 (2008).

55 ibid.

56 *United Gas Pipe Line Co. v Mobile Gas Serv. Corp.* 350 U.S. 332, 344 (1956).

In *Mobile* the Court also held that "[t]he basic power of the Commission is that given it by § 5(a) is to set aside and modify any rate or contract which it determines, after hearing, to be unjust, unreasonable, unduly discriminatory or preferential"[57]

According to these holdings the public interest standard was regarded as the same with the statutory 'unjust, unreasonable, unduly discriminatory or preferential' criteria.

As we pointed out above, in *Sierra*, the Court detailed the 'public interest' standard through a three-prong test. Under this test there can be an adverse effect on the public interest "as by impairing financial ability of utility to continue its service, by casting upon other consumers excessive burden, or by being unduly discriminatory."[58] Besides it put the statutory 'unduly discriminatory' standard under the public interest standard and therefore defined the public interest standard as a more important criterion.

However, in *Morgan Stanley* the Court stated that the Sierra's three prong test is not applicable to all circumstances. Those three factors are "in any event not the exclusive components of the public interest."[59]

Another important point is that, merely the interest of public utility is not enough to prove a public interest. In *Sierra*, the Court critics the Commission's approach and states that "In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest-as where it might impair the financial ability of the public utility to continue its service"

But the Court stated that that the purpose of the power given the Commission by §206(a) is the protection of the public interest and it is necessary to distinguish this form the "private interests of the utilities". In other words, the public utility's interest is considered different from the public interest. And the Court concluded that "a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility"[60]

Even though, in *Sierra*, the Court was using the public interest standard as a broader standard than the just and reasonable standard, nevertheless, this holding shows that just and reasonable standard has a very close meaning to the public interest standard. Because in this holding the Court implied that 'interest of the public utility' was not a 'public interest'. But it used the notion of 'just

57 ibid 341.

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

59 *Morgan Stanley Capital Grp. Inc. v Public Util. Dist. No. 1 of Snohomish Cnty.* 554 U.S. 527, 549 (2008).

60 *Federal Power Commission v Sierra Pacific Power Co*. 350 U.S. 348, 355 (1956).

and reasonable' instead of 'public interest'. This choice shows us that the Court could use these two standards as substitutes for each other.

However, under *Mobile-Sierra* doctrine, the weight of the causation between the public interest and FERC's power to modify can be worded differently. For example D.C. Circuit held in *Texaco* that "Federal Energy Regulatory Commission (FERC) may abrogate or modify the contract only if the public interest so requires.[61] But in *Union Pacific* case the same court held that "Federal Energy Regulatory Commission (FERC) may exercise rate-making authority to abrogate existing contracts, under Natural Gas Act, only where public interest imperatively demands such action."[62]

Although, it can be claimed that there is a slight difference between these decisions, the language of the second decision seems a stricter interpretation of the FERC's power to modify.

The eligibility of the findings for the satisfaction of the public interest standard have also considered in some decisions. While some decisions let the FERC to modify the agreements based on the generic findings[63], some other decisions require FERC rely on particularized findings.[64]

c. *The Relation between These Standards*

Is the public interest standard same with the just and reasonable standard or one of them is the interpretation of another?

As we pointed out above, in *Mobile*, the just and reasonable standard and public interest standard are seen almost as the same with each other. But, the Supreme Court consciously puts this standard beside the statutory standard. In addition, it extends the scope of public interest standard and uses this standard when determining the modification power of the FERC instead of statutory 'just and reasonable' standard.

By this way, the public interest standard became a different and a further standard 'above' and 'apart from' the statutory standards. Because even though a contractual rate is just and reasonable if there is a likely adverse effect in terms of public interest standard, the Commission can modify this contract on the basis of its regulatory power.

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61 *Texaco Inc. & Texaco Gas Mktg. Inc. v Fed. Energy Regulatory Comm'n* 148 F.3d 1091, 1095 (D.C. Cir. 1998).

62 *Union Pac. Fuels, Inc. v F.E.R.C.* 129 F.3d 157, 157 (D.C. Cir. 1997).

63 *Arizona Corp. Comm'n v F.E.R.C.* 397 F.3d 952, 955, 62 A.L.R. Fed. 2d 427 (D.C. Cir. 2005).

64 Michael A. Rosenhouse, Annotation, 'Construction and Application of Mobile-Sierra Doctrine, Under Which Federal Energy Regulatory Commission Must Presume Gas or Electricity Rate Set in Freely Negotiated Wholesale Contract Meets Statutory "Just and Reasonable" Standard' (2012) 62 A.L.R. Fed. 2d 427.

A similar approach can be seen in the Supreme Court's interpretation of the Natural Gas Act and Federal Power Act. Natural Gas Act and Federal Power Act in almost the same language establishes that all rates and charges of any public utility subject to the jurisdiction of FERC should be just and reasonable and any such *rate* or charge that is not just and reasonable is unlawful.[65] These provisions require FERC to determine whether the rates are just and reasonable, not whether they are unlawful.

But in *Sierra* the Supreme Court held that "[t]he Commission has undoubted power under §206(a) to prescribe a change in contract rates whenever it determines such *rates* to be *unlawful*."[66]

The difference between these two approaches is: while the statutory provision establishes the 'unlawfulness' as a result of the just and reasonable standard, the Supreme Court changes it to a condition for the modification of the contract. This interpretation gives a broader authority to FERC to modify the contract clauses. Because the term 'unlawful' have a broader extent than the just and reasonable standard.

Referring to the *Mobile-Sierra* as a presumption causes the just and reasonable standard to become less effective. Because, this interpretation makes this standard only a presumption for the contracts not a criterion to modify them. Therefore, it can be said that the public interest standard has gradually become the sole standard for contract modifications, while it was not a statutory standard.

As a general observation, we can say that the courts of appeals see these standards more different from each other than the Supreme Court. In some cases "public interest" standard is considered "much more restrictive" than the FPA's just and reasonable standard.[67] Above mentioned *Maine* case can be shown as an example of this approach. In Papago, the D.C. Circuit has defined the public interest standard as 'practically insurmountable'. And it stated that "specific acknowledgment of the possibility of future rate change is virtually meaningless unless it envisions a just-and-reasonable standard."[68]

There are also some decisions that try to put a strict separation between these standards. For instance in *Northeast* the court stated that "[t]he distinction between the 'just and reasonable standard' and 'public interest' standards loses its meaning entirely if the Commission may modify a contract under the public

65 15 U.S.C. § 717c(a); 16 U.S.C. § 824d(a) (emphasis added).

66 *Federal Power Commission v Sierra Pacific Power Co.* 350 U.S. 348, 353 (1956).

67 *Maine Pub. Utilities Comm'n v F.E.R.C.* 520 F.3d 464, 476 (D.C. Cir. 2008), *Union Pacific Fuels, Inc. v FERC*, 129 F.3d 157, 161 (D.C.Cir.1997), *San Diego Gas & Elec. Co. v. FERC* 904 F.2d 727, 730 (D.C.Cir.1990).

68 *Papago Tribal Util. Auth. v F.E.R.C.* 723 F.2d 950, 954 (D.C. Cir. 1983).

interest standard where it finds the contract 'may be unjust [or] unreasonable."[69]

In *Papago*, the D.C. Circuit clearly separated the public interest standard from the just and reasonable standard and held that the parties may eliminate "the Commission's power to impose changes under § 206, except the indefeasible right of the Commission under § 206 to replace rates that are contrary to the public interest."[70]

According to this decision while the parties can eliminate even the statutory standards, the public interest standard is protected and cannot be eliminated. Because it establishes an 'indefeasible right' for the Commission.

However as a newer decision, in *Morgan Stanley* noted that the "public interest standard" is not an exception to the statutory 'just and reasonable' standard. It refers to only a "differing application of that just-and-reasonable standard to contract rates."[71]

The important point of this decision is that it puts the just and reasonable standard to a higher level. While the Court in *Sierra* tries to extend the scope of the public interest standard, this decision gives a priority to the statutory just and reasonable standard.

As a general evaluation, we can say that, while the court of appeals tends to see these two standards as different standards, the Supreme Court does not want to see them as two separate standards. As we can see in *Morgan Stanley*, the Supreme Court has almost the same consideration with *Mobile* and *Sierra* decisions after 50 years later.

2. Arm's Length Negotiation

Arm's lengths negotiation is the basic assumption of the *Mobile-Sierra* presumption. Because, *Mobile-Sierra* actually defends the contract stability against the excessive regulatory intervention. But if the contract was not established based on arm's length principle, we cannot mention about a fair use of freedom of contract.

In *Morgan Stanley* the Court stated that "the premise on which the Mobile–Sierra presumption rests: that the contract rates are the product of fair, arms-length negotiations."[72] The Court also stated that "[u]nder the Mobile–Sierra doctrine, the Federal Energy Regulatory Commission (FERC or Commission) must presume that the rate set out in a *freely negotiated* wholesale-energy contract

69 *Northeast Utilities. Serv. Co. v FERC* 993 F.2d 937, 962 (1st Cir. 1993).

70 *Papago Tribal Util. Auth. v FERC* 723 F.2d 950, 953 (D.C. Cir. 1983).

71 *Morgan Stanley Capital Grp. Inc. v Public Util. Dist. No. 1 of Snohomish Cnty* 554 U.S. 527, 535 (2008).

72 ibid.

meets the "just and reasonable"[73]

The Supreme Court also reaches important conclusions about the evaluation of this principle in this decision. As a result of the previous holdings the Court held that "FERC has ample authority to set aside a contract where there is unfair dealing at the contract formation stage—for instance, if it finds traditional grounds for the abrogation of the contract such as fraud or duress." If there is not a fair dealing in the contract formation stage, we cannot claim that it deserves to be protected and to be sustained against the governmental regulation. On the contrary it can be a necessity to intervene these kinds of contracts for the sake of public interest.

C. Some Situations That Impede the Application of *Mobile-Sierra*

Mobile-Sierra presumption is based on some prerequisites. Most importantly, it is presumed that private parties have negotiated an agreement that they view as just and reasonable over the time period covered. These prerequisites can be related to contract negotiations procedure, service requirements or price determination. If there were some problems about these issues or they emerged after the contract has been made, it can cause the rebuttal of the presumption that the negotiated contract rates were "just and reasonable" under the *Mobile-Sierra* doctrine. These kinds of improprieties can undermine the basis for *Mobile-Sierra* just as does a Memphis clause.[74] Here some circumstances will be examined.

1. Changing Conditions of a Contracting Party

In some cases, the decrease of the quality of service can be seen as an adverse effect to the public interest. In *Arizona Corp.* case, FERC determined that capacity curtailments existed on a natural gas company's main line were severe enough to render firm service unreliable and converted the full requirements contracts of natural gas shippers to contract demand arrangements, therefore such shippers were obligated to pay for the additions to capacity necessitated by the growth in their demand. The DC Circuit justified the FERC's decision pursuant to the *Mobile-Sierra* public-interest standard.[75]

According to the D.C. Circuit, the Commission "exercised its *Mobile-Sierra* authority to prevent "the imposition of an excessive burden" on third parties."[76]

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73 ibid 530.

74 Scott H. Strauss and Jeffrey A. Schwarz, 'The Mobile-Sierra Doctrine: A Return to Its Statutory Roots' (2007) 145 No. 5 Pub. Util. Fort. 60.

75 *Arizona Corp. Com'n v F.E.R.C.* 397 F.3d 952, 953 62 A.L.R. Fed. 2d 427 (D.C. Cir. 2005).

76 ibid 954. (citing *Northeast Utils. Serv. Co. v FERC* 55 F.3d 686, 691 (1st Cir.1995)).

2. FERC Intervention to the Market

Another dispute under this issue is whether the effects of the orders of the FERC are enough to overrule the *Mobile-Sierra* presumption. In Tenneco Oil case[77], FERC set down national minimum price of $0.18/mcf for natural gas and abrogated all contracts below this limit. Although there was no finding that service would be impaired and adversely affected the public interest in the absence of such price-setting, the court rejected this argument and concluded that this decision satisfied the "public interest" standard of *Mobile-Sierra*.

However, in some cases the courts do not see this kind of conflicts between the pre-existing agreements and FERC's general arrangements as enough for public interest standard. For instance, in Atlantic City case, FERC issued two orders that requires the owners of transmission assets entering into an agreement for an Independent System Operator ("ISO") to give up their right to file changes in tariff rates, terms, and conditions under section 205 of the Federal Power Act and to modify their ISO agreements to forbid any owner from withdrawing without prior FERC approval pursuant to section 203 of the Act. The court held that "FERC's requirement of generic reformation of pre-existing wholesale power contracts, without making a particularized finding that the public interest requires modification of a particular agreement, is a violation of the *Mobile-Sierra* doctrine."[78]

In this case, the court has narrowly construed the FERC's authority to modify the pre-existing contracts. Indeed, its approach can be understood from the first sentence of its legal analysis. According to the court "[a]s a federal agency, FERC is a "creature of statute," having "no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." … Thus, if there is no statute conferring authority, FERC has none"

3. Anticompetitive or Dysfunctional Market Conditions

In some cases, the FERC have modified the contracts on the grounds that they had anticompetitive effects on the energy market.

In *Texaco* case FERC established an order that modifies a pipeline company's service agreements with natural gas shippers by requiring the company to set its rates according to a straight fixed-variable (SFV) method. The court noted that the aim of the FERC's order was to foster competition among natural gas producers by ensuring that commodity prices reflected the difference in extraction costs at the wellhead. Therefore, the court concluded that FERC satisfied the public-interest requirement of *Mobile-Sierra*.

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77 *Tenneco Oil Co. v Federal Energy Regulatory Commission* 571 F.2d 834, 62 A.L.R. Fed. 2d 427 (5th Cir. 1978).

78 *Atl. City Elec. Co. v F.E.R.C.* 295 F.3d 1, 62 A.L.R. Fed. 2d 427 (D.C. Cir. 2002).

In this case it can be observed that the court construed the FERC's power to regulate a little bit broadly. According to the court "public interest necessary to override a private contract is significantly more particularized and requires analysis of the manner in which the contract harms the public interest *and* of the extent to which abrogation or reformation mitigates the contract's deleterious effect."[79] The court's interpretation of the *Mobile-Sierra* seems to extend the public interest standard to the different criteria.

In *Morgan Stanley* the Court concluded that, "if it is clear that one party to a wholesale energy contract for future energy supplies engaged in extensive unlawful market manipulation as to alter the playing field for contract negotiations" the contract cannot be presumed as just and reasonable under the *Mobile-Sierra*.[80]

In addition, if there is "dysfunctional" – not imperfect, or even chaotic- market conditions caused by illegal action of one of the parties, FERC should not also apply the Mobile–Sierra presumption.[81]

4. Price Discrimination

Price discrimination also overrules the *Mobile-Sierra* presumption. In *Potomac Elec. Power* case, the court stated that "rate disparity attributable to the operation of the *Mobile-Sierra* doctrine is not, on that basis alone, unduly discriminatory." Besides, the court stated that "the fact that a contract has become uneconomic to one of the parties does not necessarily render the contract contrary to the public interest."[82] According to the court it is necessary to present enough evidence "regarding how the contract rates are unduly discriminatory."[83]

D. The Importance of Mobile-Sierra

As we pointed out in the introduction, these two cases and the following decisions are examples of a regulation and contract conflict in energy law. However, they also have a special place in terms of the concept of public interest. Considering the limited usage of the public interest criterion in US law, *Mobile-Sierra* is one of the most prominent examples of public interest analysis by the US courts. When both dimensions are taken into account together, it can be said that the most important aspect of *Mobile-Sierra* is the incorporation of the concept of public interest by judicial decision as an additional independent

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79 *Texaco Inc. and Texaco Gas Marketing Inc. v Federal Energy Regulatory Com'n* 148 F.3d 1091, 1097 62 A.L.R. Fed. 2d 427 (D.C. Cir. 1998) (emphasis added).

80 *Morgan Stanley Capital Grp. Inc. v Public Util. Dist. No. 1 of Snohomish Cnty, Wash.* 554 U.S. 527, 554 (2008).

81 ibid 547-548.

82 *Potomac Elec. Power Co. v F.E.R.C.* 210 F.3d 403, 407 (D.C. Cir. 2000)

83 ibid.

criterion for regulatory agencies to intervene in contracts, apart from the criteria in the legislation.

After these cases, it is seen that the discussions on how to apply the public interest principle in US law have led to different views and evaluations regarding the contract stability, the effect of regulatory powers and how to evaluate the public interest criterion.

At the outset, it should be noted that after these decisions of the Supreme Court, the discussions on how to establish a relationship between the conditions in the legislation and the public interest criterion continued with subsequent cases, and various conditions were set for the application of this standard, as explained above.

In applying *Mobile-Sierra*'s public interest standard, some approaches expand FERC's authority to intervene by applying the standard broadly, while others take a restrictive approach by interpreting the standard more narrowly. It shows that the public interest can also be an assessment tool that limits the conditions in the legislation and should not necessarily be considered as an expansive criterion.

However, it is clear that there has been a significant body of experience in bringing together legislative requirements and public interest assessment. Therefore, this doctrine is also important in terms of how the concept of public interest is technically interpreted. The main feature of this doctrine is that the public interest assessment is carried out within the framework of the standards in the legislation and by taking into account some additional criteria that have been developed.

Although tariff setting is a regulatory power, its effect on current contracts is a highly controversial issue. Because even the two sides of the wholesale energy contracts are private companies, the mere public utility nature of the energy services gives the regulatory authority the power to control the price for the benefit of end users.

While the debate between regulatory power and existing contracts is also present in US law, the use of the concept of public interest as a criterion in the balance between contract and regulation in this field makes the debate on this concept more important. Therefore, it would be useful to touch upon the approaches to the concept of public interest in this balance.

In this respect, the discussions on how the public interest criterion should be evaluated are also important in terms of reflecting the different perspectives between the regulators and the judiciary in US law on the interpretation of this principle. In this framework, it is argued that an assessment focused on the price level alone is not sufficient, that the long-term regulatory effect of the protection of competition on prices should also be taken into account, and that the long-term effects of anti-competitive interventions should be taken

into account as well as short-term results. Therefore, the Commission has been reluctant to implement *Mobile-Sierra* public interest standard because of its broad meaning. In *Philadelphia Electric Co.*, the Commission rejected the claim that the *Sierra* case definitively established the only three factors relevant to the public interest that could justify modifying rates under Section 206. Instead, the Commission stated that the public interest is "a fluid concept, dynamic in nature, and necessarily discernible only within a particular context once a full appreciation of all relevant facts is achieved." According to the Commission, the factors identified in *Sierra* were merely illustrative. The Commission also disagreed with the administrative law judge's conclusion that a rate failing to recover sufficient revenue to cover costs is automatically contrary to the public interest[84].

In another case on public interest assessment, Western Utilities in California were forced to enter into long-term contracts in 2001 when spot prices rose, but then applied to FERC to reduce the prices. FERC rejected this application using the *Mobile-Sierra* public interest standard, claiming that although the dysfunction in the California spot market affected the prices in the forward market, merely this fact cannot be a sufficient reason to abrogate all the forward contracts. The 9th Circuit reversed the FERC's decision. The 9th Circuit's decision was based on the grounds that FERC should have evaluated the circumstances under which the contracts were entered into and assessed whether the prices were reasonable before applying the *Mobile-Sierra* public interest standard. Secondly, even if the public interest standard was used, the public interest assessment should include an analysis of market prices. However, the Supreme Court subsequently upheld FERC's decision. According to the majority opinion, the FERC is authorized to revise contracts only when they cause serious harm to consumers[85].

The experience of the *Mobile-Sierra* standard in terms of public interest assessment is also important for other areas of regulation in US law. In this respect, it is possible to say that *Mobile-Sierra* is a referenced theory in terms of the public interest standard for the intervention of regulatory authorities in contracts. For example, in the telecommunications sector, *Mobile-Sierra* could be used to enable the Federal Communications Commission (FCC), as a regulatory authority, to intervene in the terms of contracts between internet service providers and their edge service providers that disadvantage other edge service providers in competition. Although the contract is between internet service providers and their edge service providers, the advantages granted to

[84] David C. Hjelmfelt, 'Fixed Rate Contracts Under The Federal Power and Natural Gas Acts' (1979-1980) 57 Denv. L.J. 559, 569.

[85] Giuseppe Bellantuono, 'Contract Law, Regulation and Competition in Energy Markets' (2009) 10 Competition & Reg. Network Indus. 159, 183.

these edge service providers over others may lead to monopolization and price increases in the market, which may be contrary to the public interest[86].

CONCLUSION

In *Mobile*, the Supreme Court stated that "[t]he [Natural Gas] Act affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other."[87] This finding points out the core trade-off of the *Mobile-Sierra*.

Because *Mobile-Sierra* presumes that the rate set out in a freely negotiated wholesale-energy contract is considered as 'just and reasonable'. This presumption "may be overcome only if FERC concludes that the contract seriously harms the public interest."[88] While the first part of this presumption favors the contract stability, the second part supports the regulatory power of the FERC.

However the naming of the *Mobile-Sierra* as a presumption shows that it mandates respect for private contracts by shielding them from regulatory interference except when necessary in the public interest.[89] Actually the *Mobile-Sierra* doctrine created a sphere of quasi-deregulation years before the Commission adopted the concept of market-based rate-making.[90] As the Supreme Court pointed out in *Morgan Stanley*, "[o]ver the past 50 years, decisions of this Court and the Courts of Appeals have refined the Mobile–Sierra presumption to allow greater freedom of contract."[91]

Indeed, the *Mobile-Sierra* public interest test has created a significant barrier to the Commission's intervention to bilateral contracts. However, the Commission also has amended or abrogated a lot of contract under the public interest standard as part of the implementation of broad-based policy initiatives. And the courts have permitted these modifications. In other words, these initiatives viewed as satisfying the *Mobile-Sierra* public interest standard.[92] Because, as the D.C. Circuit

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86 McKenzie Schnell, 'The Mobile-Sierra Doctrine: An Unlikely Friend for Opponents of ZeroRating' (2018) 70 Federal Communications Law Journal 329, 332.

87 *United Gas Pipe Line Co. v Mobile Gas Serv. Corp.* 350 U.S. 332, 344 (1956).

88 *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Wash.* 554 U.S. 527, 530 (2008).

89 David G. Tewksbury, Stephanie S. Lim, Grace Su, 'New Chapters In The Mobile-Sierra Story: Application Of The Doctrine After NRG Power Marketing, LLC V. Maine Public Utilities Commission' (2011) 32 Energy L.J. 433.

90 Carmen L. Gentile, 'The Mobile-Sierra Rule: Its Illustrious Past and Uncertain Future' (2000) 21 Energy L.J. 353.

91 *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Wash.* (2008) 554 U.S. 527, 534.

92 Carmen L. Gentile, 'The Mobile-Sierra Rule: Its Illustrious Past and Uncertain Future' (2000) 21 Energy L.J. 353, 365.

held in *Maine* "Federal Energy Regulatory Commission's (FERC) interpretation of the scope of its jurisdiction [was] entitled to *Chevron* deference."[93]

Furthermore in some cases FERC is given a more authority even beyond the *Mobile-Sierra*. For instance, in Union Pacific Fuels, Inc. v. FERC, the D.C. Circuit strengthened FERC's discretion in regulating rates in the natural gas industry and weakened the *Mobile-Sierra* doctrine. Because according to the court FERC can intervene without showing that public interest demands that it do so. Policy changes also can have a legal basis for the Commission's discretion to alter the existing contractual terms.[94] However this change also causes some criticisms about the FERC's increased regulatory discretion while it attempts to deregulate the natural gas industry.[95]

Although the *Mobile-Sierra* actually tries to limit the FERC's regulatory power on the contracts in favor of contract stability, the interpretation of this doctrine can change the weight of the FERC's discretion on the contracts. As we noted above, the Supreme Court also tries to limit the 'almost insurmountable' public interest standard and favors statutory just and reasonable standard. Accordingly, as a general observation, we can say that the FERC is given more discretionary power in recent years. In other words, the interpretation of the *Mobile-Sierra* can also be regarded as a benchmark for the scope of the regulatory power of the FERC.

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93 *Maine Pub. Util. Comm'n v FERC*, 520 F.3d 464, 479 (D.C.Cir.2008) (emphasis added)

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