INVESTMENT SECURITY IN THE ENERGY SECTOR: COMPARATIVE ANALYSIS OF SELECTED UNITED STATES AND EUROPEAN UNION LAW

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I. INTRODUCTION

This Article analyzes investor security laws from the United States and the European Union (EU), in particular, the Mobile-Sierra doctrine in the United States1 and the equivalent EU regime.2 The overarching goal of this Article is to provide a comparative analysis of two substantive regimes in order to suggest relevant and beneficial reform. The analysis explores whether the Mobile-Sierra doctrine of the United States and related European Union laws produce similar results within the relative downstream market or demonstrably different outcomes.3 The outcomes of the doctrine and laws may be similar or different because they have learned from one another or due to their respective legislators, regulators, or academics.4 The scope for this Article must be limited to one section of energy investment—here, the statutory framework and case law surrounding the Mobile-Sierra doctrine.5

The recent surge in shale gas production in the United States has created multiple substantive reasons to review investor security in the natural gas and electricity generation markets.6 The abundance of shale gas in the United States may have shifted the paradigm of energy security in electricity production by providing up to 100 years of natural gas as a

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1 See infra Part II.A–B.
2 See infra Part III.
3 See infra Part IV.
4 See infra Part IV.
5 See infra Part II.
substantive fuel supply for electricity generation. The advancements in technology in the United States have reduced the cost of retrieving shale resources. The Mobile-Sierra doctrine should be reviewed because of the reduced costs of extracting shale resources, which has created exponentially more commercially viable opportunities for gas suppliers and, thus, the potential for volatile prices on supplier contracts.

The Mobile-Sierra doctrine is an interpretation of the Federal Power Act and the Natural Gas Act, and it has its roots in two main cases, United Gas Pipe Line Co. v. Mobile Gas Service Corp. and Federal Power Commission v. Sierra Pacific Power Co. Courts interpreted Mobile and Sierra in subsequent cases. While all of the interpretive cases are not within the scope of this Article, the relevant cases are discussed below. Relevant EU directives are also reviewed below and analyzed in comparison to the Mobile-Sierra doctrine.

Part II analyzes Mobile, Sierra, and the subsequent interpretive cases. Part III endeavors to analyze concomitant EU laws—both case law and legislative material. Part IV provides a comparative critique of Parts II and III. Finally, Part V consists of brief concluding remarks, including the suggestion that future legislation focus more on the end consumer.

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8 See id. at 442; see also Smith et al., supra note 6, at 1026.
9 See Jenner & Lamadrid, supra note 7, at 442.
14 See infra Part II.C–F.
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16 See infra Part III.
17 See infra Part IV.
18 See infra Part II.
19 See infra Part III.
20 See infra Part IV.
21 See infra Part V.
II. THE *MOBILE-SIERRA* DOCTRINE: FORMATION AND INTERPRETATION

A. Mobile

*)United Gas Pipe Line Co. v. Mobile Gas Service Corp.* was a case primarily between two private corporate parties—Mobile Gas Service and United Gas Pipe Line.* Mobile Gas, while attempting to provide assurance of a cheap supply of gas to an interested third party, contracted with United Gas for a ten-year supply agreement.* Approximately seven years later, United Gas decided unilaterally to alter the contractual price by filing a new fee schedule with the Federal Power Commission, which approved the fee change.*

The affirmation of a unilateral price change raised issues regarding the authority of the Federal Power Commission, now the Federal Energy Regulatory Commission (FERC).* To address the scope of authority of FERC, the Supreme Court of the United States analyzed the relevant document by which FERC is given authority in this instance—the Natural Gas Act (NGA).* According to the NGA, if both parties do not consent to a price change, FERC must first hold a hearing that results in a finding that the “rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential” prior to having authority to intervene in the price change.* The Court recognized that FERC merely has the “power to review rates . . . and, if they are determined to be unlawful, to remedy them.” The Court acknowledged that the NGA recognized the gas companies had the competence to make, and amend, contracts that FERC would review.* However, the Court further clarified that neither the NGA nor the Federal Power Act* specified any authority for FERC to make or amend contracts.* Therefore, traditional contractual competency and

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23 *Id.* at 335.
24 *Id.* at 335–36.
25 *Id.* at 336.
26 *Id.* at 337–38.
29 *Mobile*, 350 U.S. at 341.
30 *Id.* at 343.
32 *Mobile*, 350 U.S. at 346–47.
rights to contract were unabridged. 33 This curtailment of FERC’s assumed authority essentially quashed the idea of unilaterally amending gas supply contracts with the permission, or approval, of FERC.

B. Sierra

*Federal Power Commission v. Sierra Pacific Power Co.* 34 is the companion case to *Mobile*. *Sierra* was a dispute between the distributor, Sierra Pacific Power Company (SPPC), and the supplier, Pacific Gas and Electric Company (PGEC). 35 SPPC and PGEC contracted for a long-term, fifteen-year supply of electricity at a fixed rate. 36 However, PGEC relied upon a cheap source of power from “unused capacity at Shasta Dam.” 37 When the cheap power was no longer available, PGEC attempted unilaterally to raise the contract price by filing a rate increase “under § 205(d) of the Federal Power Act.” 38 FERC determined that 5.5% was normally a reasonable rate of return and the lack of power from the dam lowered PGEC’s return to 2.6%, making the proposed increase, which settled the return at 4.75%, clearly reasonable within FERC’s point of view. 39

The Court opined, as it had previously, that it is not within the purview of the Court to relieve corporate bodies of their “improvident bargain.” 40 Further, the Court stated that the only opportunity for FERC properly to endorse such an increase would be if the utility, due to the rate schedule, was unable to sustain its services, had to place an “excessive burden” on the remainder of consumers, or implemented a rate that was “unduly discriminatory.” 41 In the Court’s closing remarks, the Court noted that the terms of a contract cannot be considered “unjust” and “unreasonable” merely based on profitability, or lack thereof. 42

The *Sierra* Court transcribed the ruling of *Mobile* by taking the authority granted under the NGA for the gas supply sector and applying it

33 Id. at 347.
34 350 U.S. 348 (1956).
35 Id. at 351.
36 Id. at 352.
37 Id.
38 Id.
39 Id. at 353–54.
40 Id. at 355 (citing Ark. Natural Gas Co. v. Ark. R.R. Comm’n, 261 U.S. 379, 382–83 (1923)).
41 Id.
42 Id.
to the electricity transmission and distribution sector. However, the Sierra Court added that a lack of profitability is not dispositive in relation to FERC having authority to determine if a rate is unjust or unreasonable.

C. Memphis Light

*United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division* was a multiparty case involving United Gas Pipe Line, Texas Gas Transmission Corporation, Southern Natural Gas, Mississippi Valley Gas, and Memphis Light, Gas and Water Division (Memphis Gas). United Gas supplied gas to Texas Gas, Southern Gas, and Mississippi Gas. Memphis Gas purchased gas from Texas Gas and was required to pay for any increase in the cost of gas from United Gas to Texas Gas. United Gas’s contract with the distributors required the distributors to purchase the gas at the current rate schedule that was on file with FERC or any rate schedule that superseded that schedule. The lower court had ruled that United Gas could not unilaterally alter the rate schedule by simply filing an amended rate schedule under § 4(d) of the NGA.

The Court compared gas to unregulated commodities and affirmed United Gas’s right to sell its gas at rates of its choosing “unless it has undertaken by contract not to do so.” According to the Court, legislative intent, on one hand, preserves the financial stability “for the legitimate interests of natural gas companies”; meanwhile, on the other hand, it protects the public interest by shielding “consumers from excessive prices for natural gas.”

The Court further elucidated several legal points regarding the NGA. The Court found that United Gas, as a seller of gas, must adhere to the filing requirements of the NGA. FERC has the authority to review any

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43 See id. at 349–51.
44 Id. at 355.
46 Id. at 104–05.
47 Id. at 105.
48 Id. at 105 n.1.
49 Id. at 105.
51 Memphis Light, 358 U.S. at 113.
52 Id.
53 Id.; see also 15 U.S.C. § 717c(d).
new rate schedule filed under § 4(d) of the NGA. Finally, FERC has the authority, in cases regarding the sale of gas and rate changes, to suspend new rate schedules for five months, while requiring a bond to be posted to offset costs pending the finding of the “lawfulness of the rates as changed.”

Memphis Light contained many clarifying points within the opinion. Of paramount importance, the Court clarified that the gas supplier has the ability to change unilaterally rates provided that the statutorily imposed procedures in the NGA are followed. In Memphis Light, in a secondary clarification, the Court also explained the NGA filing requirements and FERC’s authority to review and suspend new rate schedules.

D. Permian Basin

For the purpose of this Article, In re Permian Basin Rate Cases is simplified and its scope is narrowed to maintain the crux of the complex case. In that case, an untenable administrative burden of reviewing rate schedules confronted FERC. FERC’s solution was to create “area maximum rates”—one for gas produced that was dedicated to interstate commerce and another for other gas endeavors. The appeals court indicated that FERC failed to meet certain criteria laid down in prior case law.

The Court indicated that the appellate court had misinterpreted previous case law when it determined the area rates were unlawful. Instead, the Court clarified that courts could not require FERC “to employ any particular regulatory formula or combination of formulae.” Further, the Court indicated that the “rate-making agencies are not bound to the service of any single regulatory formula . . . .”

54 Memphis Light, 358 U.S. at 113; see also 15 U.S.C. § 717c(e).
55 Memphis Light, 358 U.S. at 113; see also 15 U.S.C. § 717c(e).
56 Memphis Light, 358 U.S. at 112–13.
57 Id. at 113.
59 Id. at 757–58.
60 Id. at 758–60.
61 Id. at 765–66.
62 Id. at 775.
63 Id.
64 Id. at 776–77.
Allowing FERC to exercise its discretion in creating a general window of profitability, or market rates, for purposes of administrative relief\textsuperscript{65} may have had various impacts. One of these impacts is that FERC provides a maximum ceiling that distributors must pay from suppliers, which, thus, gives investors on the distribution side an additional measure of security.\textsuperscript{66} On the supply side, there is a benchmark for placing investments that, therefore, provides a measure of security for investors as they conduct a risk-benefit analysis.\textsuperscript{67}

E. Morgan Stanley

\textit{Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County}\textsuperscript{68} was a case that involved Morgan Stanley Capital Group and the Public Utility District No. 1 of Snohomish County (Snohomish).\textsuperscript{69} The respondents, which included Snohomish, were utilities that purchased power under long-term contracts, which included rates that were high by historical standards.\textsuperscript{70} After a breakdown in the downstream electricity market in California, in part by manipulation that Morgan Stanley allegedly participated in, there were external markets that were affected.\textsuperscript{71} Snohomish agreed to purchase electricity from Morgan Stanley for nine years at the market-based rate of $105 per megawatt hour, which had increased from the historical average of $24 per megawatt hour due to the issues reverberating from California.\textsuperscript{72} After the market stabilized, Snohomish desired a lower rate comparable to the prevailing lower rates on the markets.\textsuperscript{73}

The Court reiterated that there was only one standard applicable for “assessing wholesale-electricity rates,” which is “the just-and-reasonable standard.”\textsuperscript{74} To be unjust or unreasonable, the current rate must “seriously

\textsuperscript{65} \textit{Id.} at 757–58.
\textsuperscript{67} See \textit{id.}
\textsuperscript{68} 554 U.S. 527 (2008).
\textsuperscript{69} See \textit{id.} at 541.
\textsuperscript{70} \textit{Id.} at 540–41.
\textsuperscript{71} \textit{Id.} at 539–41.
\textsuperscript{72} \textit{Id.} at 541.
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Id.} at 545.
harm the public interest”—or, said another way, the need for an adjusted rate must be of “unequivocal public necessity.” A contract should not be set aside due to exceeding a marginal cost because of the “chilling effect” that could be placed on future investments into futures or long-term markets.

The Court addressed two issues regarding FERC. First, the Court required FERC to compare the long-term market effect that the short-term increased cost created on the customer, and the Court ordered FERC to determine if the long-term cost effect imposed “an excessive burden on consumers” in the end. Secondly, regarding market manipulation of one party, the Court determined that, if “causality [between the manipulation and the rate increase] has been established, the Mobile-Sierra presumption should not apply.”

F. NRG

In short, NRG Power Marketing, LLC v. Maine Public Utilities Commission involved a noncontracting party that objected to a settlement reached in the New England capacity market. In NRG, the Court established the standard of review for noncontracting parties disputing electricity rates, announcing that the standard is the same for noncontracting parties as it is for contracting parties—“just and reasonable.” This holding created a single and consistent standard or, in other words, proffered a form of equality through the just-and-reasonable standard.

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75 Id. at 548.
76 Id. at 550 (quoting In re Permian Basin Area Rate Cases, 390 U.S. 747, 822 (1968)).
77 Id. at 551 (internal quotation marks omitted).
78 Id. at 552.
79 Id. at 554–55.
80 558 U.S. 165 (2010).
81 Id. at 167–68.
82 Id. at 167, 177.
83 Id. at 168, 177.
84 Id. at 168.
III. EU APPROACHES TO INVESTMENT SECURITY
IN THE ENERGY SECTOR

A. Third Energy Package

The Third Energy Package (TEP)\(^85\) involved a broad change in rules. This latest round of refinements in the EU electricity and gas industries had pervasive, positive implications for investor security by establishing legal security and regulatory stability in the EU.\(^86\) The TEP created ground rules for, among other things, public service obligations and consumer rights protection.\(^87\) “[I]n the general economic interest, public service obligations” are permitted to be placed for, among other things, “quality and price of supplies.”\(^88\) The need for capacity generation is evident from multiple articles cited within the Third Electricity Directive and the mention of capacity issues in the Third Gas Directive of the TEP.\(^89\) Multiple areas of the TEP highlight consumer protection,\(^90\) and a key requirement of the TEP is regional integration.\(^91\) Regulatory authorities were required to fix or approve “tariffs or their methodologies”\(^92\) and to “monitor[] the level of transparency, including of wholesale prices.”\(^93\) The TEP contemplated competent monitoring authorities that would deter or

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\(^87\) Third Electricity Directive, supra note 85, art. 3, at 64; see also Third Gas Directive, supra note 85, art. 3, at 103–04.

\(^88\) Third Electricity Directive, supra note 85, art. 3(2), at 64.

\(^89\) See, e.g., id. arts. 7–8, at 66–67; see also Third Gas Directive, supra note 85, arts. 35–36, 41, at 80–81, 86.

\(^90\) See, e.g., Third Electricity Directive, supra note 85, art. 3(7), (9), at 65.

\(^91\) Id. art. 6, at 66.

\(^92\) Id. art. 37(1)(a), at 82; see also Third Gas Directive, supra note 85, art. 41(1)(a), at 123.

\(^93\) Third Electricity Directive, supra note 85, art. 37(1)(i), at 82; see also Third Gas Directive, supra note 85, art. 41(1)(i), at 123.
prevent discrimination with specific obligations to meet the TEP’s objectives.94

Previously, the TEP took additional measures to promote investor security in the EU. One of the measures was balancing supply and demand while developing the internal market.95 “[E]stablish[ing] . . . liquid wholesale markets,”96 “removing administrative barriers to investments,”97 and refraining from placing “an unreasonable burden on the market actors” in a nondiscriminatory manner98 are all components of the early energy investment protection.

The Energy Charter Treaty (ECT) is another legal tool for obtaining investor security in the energy market within, and potentially outside, the EU.100 The ECT is primarily concerned with states treating foreign investors “no less favourabl[y] than . . . its own investors.”101 For purposes of this Article, the nondiscriminatory portion of the ECT102 is the most relevant section.

B. Federutility

Federutility v. Autorità per l’energia elettrica e il gas103 was a preliminary ruling on the interpretation of Directive 2003/55.104 The TEP repealed this directive, but the issues at stake in this case are still relevant because similar, if not identical, provisions exist in the TEP.105 The issue in Federutility was whether the Italian regulatory authority, Autorità per l’energia elettrica e il gas (AEEG), lawfully enacted public service

94 See, e.g., Third Electricity Directive, supra note 85, arts. 21(1), 36, at 75, 81; see also Third Gas Directive, supra note 85, art. 41, at 123–26.
96 Id. art. 3(2)(g), at 24.
97 Id. art. 3(3)(d), at 24.
98 Id. art. 3(4), at 24.
99 Id. art. 3(1), at 24.
101 Id. art. 10(3), at 31.
102 See id. art. 10, at 30–32.
103 Case C-265/08, Federutility v. Autorità per l’energia elettrica e il gas, 2010 E.C.R. 1-3406.
104 Id. ¶ 1.
105 See supra notes 85–88 and accompanying text.
obligations or Directive 2003/55\textsuperscript{106} forced the AEEG to rely on the free market price with no state interference.\textsuperscript{107} The European Court of Justice (ECJ) pointed out that Directive 2003/55 was intended to move progressively the natural gas sector in the EU toward total liberalization.\textsuperscript{108} However, the ECJ also found that Directive 2003/55 had additional goals: ensuring high standards with regard to public service and protecting the final customer.\textsuperscript{109}

In this case, the ECJ addressed the criteria for the implementation of a public service obligation.\textsuperscript{110} The ECJ viewed Directive 2003/55 as referring to the Treaty on the Functioning of the European Union (TFEU)—particularly an incorporation of the general economic interest from Article 106 of the TFEU.\textsuperscript{111} The ECJ recognized the incorporation of the general-economic-interest provision, but found the provision limited in scope under competition law by taking national circumstances into account\textsuperscript{112} and requiring compliance with the multipronged tests relating to the principle of proportionality.\textsuperscript{113} Essentially, the requirements of the proportionality test are: (1) “intervention must be limited in duration”;\textsuperscript{114} (2) actions must be “necessary to achieve the objective” in the economic interest;\textsuperscript{115} and (3) the measure should be “assessed with regard to the scope ratione personae of the measure.”\textsuperscript{116}

The ECJ carefully parsed the fine line between the intent of Directive 2003/55 to move progressively toward a free market, or full liberalization, and the practical needs of EU states to have a functioning exception in which the intent would otherwise fail to protect the final consumer.\textsuperscript{117} The ECJ found that national legislatures were not precluded from creating

\begin{footnotesize}
\textsuperscript{107} Federutility, 2010 E.C.R. I-3406, ¶¶ 15–16.
\textsuperscript{108} Id. ¶ 18.
\textsuperscript{109} Id. ¶ 20.
\textsuperscript{110} Id. ¶¶ 20–24.
\textsuperscript{111} Id. ¶ 26.
\textsuperscript{112} Id. ¶¶ 28–30.
\textsuperscript{113} Id. ¶¶ 33–34.
\textsuperscript{114} Id. ¶ 35.
\textsuperscript{115} Id. ¶ 36.
\textsuperscript{116} Id. ¶ 39.
\textsuperscript{117} Id. ¶ 32.
\end{footnotesize}
public service obligations—so long as the enumerated criteria within this case and within Article 3(2) of Directive 2003/55 were met.118

C. Enel

*Enel Produzione SpA v. Autorità per l’energia elettrica e il gas*119 is the companion case to *Federutility*.120 *Enel* was a preliminary ruling concerning the interpretation of the electricity directive, Directive 2003/54 (Second Electricity Directive),121 while *Federutility* was about its companion gas directive.122 While the TEP had repealed the Second Electricity Directive, relevant remaining provisions of the TEP are similar, if not identical.123 In *Enel*, the referring court asked the ECJ to interpret several articles from the European Community Treaty, which the ECJ swiftly rebuked for lack of any explanation of what was to be interpreted.124 Article 24 of the Second Electricity Directive125 was also asked to be interpreted.126 The ECJ held that Article 24 was not relevant for determining whether the AEEG could promulgate rules with which the electricity suppliers had to comply.127 The ECJ found, as it similarly did in *Federutility*, that this case hinged upon public service obligations under the Second Energy Directive,128 and the court proceeded to analyze the legality of a public service obligation in the electricity context.129

The limitations on public service obligations were, as in *Federutility*, the centerpiece of the analysis in *Enel*.130 The ECJ put forth the same

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118 *Id.* ¶¶ 42, 47.
119 Case C-242/10, Enel Produzione SpA v Autorità per l’energia elettrica e il gas, 2011 E.C.R. I-13,690.
120 *See id.* ¶¶ 39, 42, 50.
121 *Id.* ¶ 1; *see also* Directive 2003/54, of the European Parliament and of the Council of 26 June 2003 Concerning Common Rules for the Internal Market in Electricity and Repealing Directive 96/92/EC, 2003 O.J. (L 176) 37 (EU) [herinafter Second Electricity Directive].
125 Second Electricity Directive, supra note 121, art. 24, at 50.
127 *Id.* ¶ 35.
128 Second Electricity Directive, supra note 121, art. 3(2), at 42.
129 *See Enel*, 2011 E.C.R. I-13,690, ¶¶ 38–89.
130 *Id.* ¶¶ 50–89.
requirements to establish a lawful public service obligation. First, the obligation must be in the general economic interest.\textsuperscript{131} Second, the obligation must be consistent with the principle of proportionality.\textsuperscript{132} The principle of proportionality remained strikingly similar to \textit{Federutility}.\textsuperscript{133} The ECJ found that the Second Electricity Directive did not preclude a state from passing national legislation to protect the end consumer in order to "ensur[e] the security of the electricity system."\textsuperscript{134}

IV. THE \textbf{MOBILE-SIerra DOCTRINE AND EU LAW: A COMPARATIVE CRITIQUE}

The parent cases of the \textit{Mobile-Sierra} doctrine created a presumption that a contract’s arm’s-length or freely negotiated rate on the wholesale energy market was a “just and reasonable”\textsuperscript{135} rate.\textsuperscript{136} This presumption is a form of investor and consumer protection that helps stabilize rates. This stability in the setting of rates appears to be commensurate with the TEP.\textsuperscript{137} However, the EU regime is geared toward allowing the consumer to determine—via the price paid (market price)—what is an appropriate or reasonable rate by focusing, under the TEP, on a right of third-party access.\textsuperscript{138}

The \textit{Mobile-Sierra} doctrine appears to be aimed toward maximizing investor security. There is a rigorous level of scrutiny for FERC to be able to intervene in the contracts.\textsuperscript{139} At times, the U.S. Supreme Court has

\textsuperscript{131} Compare id. ¶ 50, with Case C-265/08, \textit{Federutility} v. Autorità per l’energia elettrica e il gas, 2010 E.C.R. I-3406, ¶ 26.
\textsuperscript{134} \textit{Enel}, 2011 E.C.R. I-13,690, ¶ 89.
\textsuperscript{137} Third Electricity Directive, \textit{supra} note 85, art. 3, at 64–66; see also Third Gas Directive, \textit{supra} note 85, art. 3, at 103–04.
\textsuperscript{138} Third Electricity Directive, \textit{supra} note 85, art. 32, at 80; see also Third Gas Directive, \textit{supra} note 85, art. 32, at 118.
rebuked the federal body for interfering with contracts at the behest of one party or another. However, as noticeable with the California power crisis and the Northeast power problems, this system of contract fortification combined with price caps may have its limitations. On the other hand, legal certainty is a key factor in developing a long-term solution to energy infrastructure. Issues regarding price caps are available for the regulator to adjust or otherwise address and, at the moment, those issues can be viewed as a baseline cost of doing business that investors can take into account from the beginning of an endeavor.

The EU’s Third Energy Package appears to be oriented heavily toward the consumer’s protection over the concerns of the investor. The incremental or progressive realization of a fully liberalized market has created some concerns with legal certainty—chiefly “regulatory instability and unpredictability.” The multitude of changes in the regulatory regimes of the EU has created the potential for a shroud of doubt and concern in the minds of investors. The instability for investors translates to instability in long-term investments and creates a potential for infrastructure degradation or failure to provide adequate power supply to meet demand. Boute’s elucidation—to provide transitional arrangements when making unforeseeable alterations in the legal regime—could very well become the stabilizing stitch that the EU needs in its energy paradigm.

The golden fleece of the EU energy regime seems to be the strong push toward energy efficiency and renewable energy. On the face of the

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140 Id. at 74–76.
144 Third Electricity Directive, supra note 85, art. 36(d), at 81; see also Third Gas Directive, supra note 85, art. 40(d), at 122.
145 Boute, supra note 86, at 675–76.
146 Id. at 676.
147 Id. at 692.
148 See, e.g., Third Electricity Directive, supra note 85, art. 36(d)–(e), at 81; Third Gas Directive, supra note 85, art. 40(d)–(e), at 122; see also Directive 2009/28, of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives (continued)
matter, energy efficiency, renewable energy, and climate change may seem to be outside the scope of a discussion on the Mobile-Sierra doctrine. However, the arguments surrounding renewable energy, energy efficiency, and climate change are becoming more intrinsic and interrelated with a plethora of issues that may affect contracts, thereby making them appropriate for discussion in light of the Mobile-Sierra doctrine.

Memphis Light contained notions of securing financial stability in the energy sector, adhering to strict filing guidelines to the National Regulatory Authority (NRA), FERC, and the need to incentivize investment in future capacity. Adherence to an NRA that provides oversight to the energy sector is a shared factor for European Union regulation, as well as that which was pointed out in the Memphis Light case. While Memphis Light discussed the need for a security of investors for future capacity generation, the TEP, particularly the Electricity Directive, places paramount importance upon the need for capacity generation. Although, in Memphis Light, the Court mentioned that the regulator may consider many issues to determine the benefits to an agreement. Indeed, the ability to attract investments in order to sustain or expand infrastructure is imperative. Suppliers’ rights to change unilaterally the rates, so long as they are not contractually restrained from doing so and comply with the required FERC process, directly indicate an

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149 See, e.g., Third Electricity Directive, supra note 85, art. 36(d)–(e), at 81; Third Gas Directive, supra note 85, art. 40(d)–(e), at 122.
151 Third Electricity Directive, supra note 85, arts. 21(1), 36, at 75, 81; see also Third Gas Directive, supra note 85, art. 41, at 123. But cf. Memphis Light, 358 U.S. at 113.
152 Memphis Light, 358 U.S. at 113; see also Third Electricity Directive, supra note 85, arts. 7–8, at 66–67.
153 Memphis Light, 358 U.S. at 113.
154 See Michael Keegan, Bargaining for Power: Resolving Open Questions from NRG Power Marketing, LLC v. Maine Public Utilities Commission, 65 Me. L. Rev. 99, 112 (2012) (indicating that the rates, when set, should be “sufficient to attract investment”); see also Boute, supra note 86, at 675 (“A huge amount of investment is needed in the electricity sector to replace obsolete capacity and secure long-term supply-demand adequacy.”).
industry driven by a free market. The EU’s TEP is keen to recognize explicitly the importance of investments. However, as Boute pointed out, the TEP does very little to guarantee expressly stability or legal certainty.

*Permian Basin* was key for establishing that FERC could use an area-market rate to relieve an onerous administrative burden. Similarly, the EU provides a directive aimed at reducing administrative burdens. The use of an area-market rate could be an attempt to establish a regional normative and, therefore, may create another tie between the *Permian Basin* case and the European Union through one of the overarching purposes of the TEP—promotion of regional cooperation. However, in all fairness, the subsidiarity of states under a federal system in the United States will inherently find regional cooperation more easily than in the EU. The tasks of regional cooperation or seamless crossborder interconnections are far more grandiose when viewed from an international perspective.

*Morgan Stanley* clarified ambiguity surrounding the singular standard that should be used to assess wholesale electricity rates while also defining key terms within that standard. The Court pointed out that investor security was a key component of the relevant sections of the Natural Gas Act. The Court also clarified how to balance short- versus long-term consumer protection. Further, the Court reiterated the basic contract principles that underwrite the *Mobile-Sierra* doctrine. Arm’s-length negotiations are the cornerstone of *Mobile-Sierra* doctrine. A presence of market manipulation, if a causal link can be proven, will destroy the

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157 Boute, *supra* note 86, at 687.


160 *Permian Basin*, 390 U.S. at 759; see also Third Electricity Directive, *supra* note 85, art. 6, at 66.


162 *Id.* at 552–53.

163 *Id.*

164 *Id.* at 545–46.

165 *Id.* at 554.
foundation of the doctrine and make it inapplicable to the specific case.\textsuperscript{166} This case, more or less, provides more emphasis on long-term investor security, coming more in line with the Investment Directive and the purposes of the ECT.\textsuperscript{167}

\textit{NRG} stands for the notion of one standard for all litigants under the \textit{Mobile-Sierra} doctrine.\textsuperscript{168} In other words, a form of nondiscrimination became a tenant of the \textit{Mobile-Sierra} doctrine.\textsuperscript{169} The concept of nondiscrimination is a fundamental part of the EU energy and investment regime.\textsuperscript{170} However, this is not to suggest that a single case entering an aspect of nondiscrimination by means of a standard of proof is the equivalent to creating an entire regime based around a fundamental principle of nondiscrimination. On the other hand, there may be an argument that the past ten years have shown that not all entities or states in the EU agree on what is discriminatory or what is simply a public service obligation.\textsuperscript{171}

\textbf{V. Conclusion}

The \textit{Mobile-Sierra} doctrine has been interpreted in such a manner that would, if applied in the EU, fulfill many aspects of the EU legal regime revolving around rate setting on the downstream market.\textsuperscript{172} Conversely, and more appropriately, given the temporal development of the respective regimes, the EU regime embodies the successes of the \textit{Mobile-Sierra} doctrine, except that the EU regime is designed to provide a high level of consumer-centric protection.\textsuperscript{173} The legal regimes of the United States and European Union may have separate energy policies.\textsuperscript{174} However, the downstream regimes, even though very different, appear to be accomplishing very similar results in regard to the \textit{Mobile-Sierra} doctrine

\textsuperscript{166} Id.

\textsuperscript{167} See ECT, supra note 100, art. 10, at 30–31; Investment Directive, supra note 95, art. 3(1), at 24.


\textsuperscript{169} Id. at 175–76.

\textsuperscript{170} Third Electricity Directive, supra note 85, arts. 21(1), 36, at 75, 81; see also Investment Directive, supra note 95, art. 3(1), (2)(g), (3)(d), (4), at 24; Third Gas Directive, supra note 85, art. 3(2), at 103.


\textsuperscript{172} See supra text accompanying notes 136–40.

\textsuperscript{173} See supra text accompanying notes 136–40.

\textsuperscript{174} See supra Parts II–III.
and similar EU legislation. The primary difference seems to be the culture of whom the regimes protect. The United States’ regime is keen to provide investor security while nominalizing regulatory input upon a valid agreement. The European Union’s regime is keen to provide consumer protection while taking each state’s circumstances into account.

Given that the TEP is relatively new, the EU should carefully review ensuing litigation to determine if the TEP is truly the well-crafted regime that is hoped, or if it is a “paper tiger” that is incapable of implementation in less developed EU states. The TEP is armed with many of the necessary legal tools to provide a stable regime. EU states should take serious note of future changes in their legal regimes. Boute made an excellent point that, if change must be made, then a transitionary period to relieve the burden on investors should be applied. In order to preserve the confidence of investors, this period could be a temporal transitional period or a graduated alteration of terms until the final implementation.

Interestingly, the European Union’s investor or consumer security cases can be viewed as companion cases similar to Mobile and Sierra. Perhaps the EU will have a Federutility-Enel doctrine in the future. The future interpretations for that doctrine could possibly deem the doctrine to be in the interest of the end consumer, which would permit judicial establishment of a tighter form of legal certainty or investor security of some form. However, there is room to argue that the interests of either consumer or investor, even though one may appear diametrically different from the other, may not in fact be so dramatically different after all. Perhaps the balance of short- or long-term interests should be viewed when leaning toward an investor- or consumer-centric regime.

175 See supra Part IV.
176 See supra text accompanying notes 136–38.
177 See supra text accompanying notes 138–40.
178 See supra note 85; see also supra Part III.A.
179 See supra Part III.A.
180 Boute, supra note 86, at 683.
181 See supra Part III.B–C.
182 United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); see supra Part II.A.
184 See supra Part III.A–C.