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Levin v. Commerce Energy, Inc., 130 S. Ct. 2323 (2010)

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Case Summaries

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Levin v. Commerce Energy, Inc., 130 S. Ct. 2323 (2010)

Heather Briggs*

I. Introduction

Levin v. Commerce Energy[1] considers whether state authorities may discriminatorily tax the sale and distribution of natural gas to Ohio

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1. *See* Levin v. Commerce Energy, Inc., 230 S. Ct. 2323, 2325 (2010) (holding that "under the comity doctrine, a taxpayer's complaint of allegedly discriminatory state taxation, even when framed as a request to increase a competitor's tax burden, must proceed originally in state court.").

consumers.[2] Plaintiffs-respondents Commerce Energy, Interstate Gas Supply and Gregory Slone sued Richard A. Levin, Tax Commissioner of Ohio, in the U.S. District Court for the Southern District of Ohio, alleging tax discrimination against independent marketers in the natural gas industry.[3] Ultimately, this case questions whether a federal district court maintains the appropriate authority to rule on tax discrimination complaints that are "framed as a request to increase a commercial competitor's tax burden."[4]

II. Background

Ohio residents typically purchase natural gas from local distribution companies (LDCs) servicing their particular region.[5] Such customers may alternatively elect to purchase gas from independent marketers (IMs).[6] LDCs own and operate their own natural gas pipelines, providing both gas and delivery as a bundled product.[7] In contrast, IMs provide their own gas supply but rely on LDC pipelines for service.[8] Customers who opt for an IM provider thus receive gas from the IM, and delivery from the LDC.[9] Based on this discrepancy, Ohio treats LDCs and IMs differently for tax purposes, providing three tax exemptions to LDCs that IMs may not claim.[10] First, LDCs are exempt from the standard sales and use taxes that IMs must pay.[11] Instead, LDCs pay a gross receipts excise tax, which is lower than the IMs' sales and use taxes.[12] Additionally, "LDCs are not subject to the commercial activities tax imposed on IMs' taxable gross receipts."[13] Lastly, inter-LDC gas sales are also excluded from the gross receipts tax, which their IM counterparts must pay if purchasing gas from an LDC.[14]

Respondents sued Petitioner Richard A. Levin, Tax Commissioner of Ohio, in federal court, claiming discriminatory taxation of IMs in violation of the Commerce and Equal Protection Clauses.[15] Respondents sought

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2 *See id.* at 2328 (providing a summary analysis regarding the applicability of the Tax Injunction Act, comity doctrine and *Hibbs v. Winn*, 124 S. Ct. 2276 (2004)).

3. *Id.* at 2328–29.
4. *Id.* at 2328.
5. *See id.* (discussing the schematics of Ohio gas supply and distribution).
6. *Id.*
7. *Levin*, 130 S. Ct. at 2328.
8. *Id.*
9. *Id.*
10. *See id.* (detailing the relevant tax exemptions).
11. *Id.*
12. *Levin*, 130 S. Ct. at 2328.
13. *Id.*
14. *Id*.
15. *Id.* at 2328–29.

declaratory and injunctive relief, requesting that Petitioner invalidate and refuse to recognize or enforce the tax exemptions.[16] In granting the Commissioner's motion to dismiss, the District Court held that the Tax Injunction Act (TIA)[17] did not bar the lawsuit, but nevertheless refused to exercise jurisdiction as a matter of comity.[18] The Court of Appeals reversed, agreeing with the District Court's TIA analysis but disagreeing as to the comity issue.[19] In reaching its decision, the Sixth Circuit determined that a footnote in *Hibbs v. Winn*[20] effectively limited the scope of the comity doctrine in such cases.[21] Agreeing with the District Court's dismissal on comity considerations, the Supreme Court reversed the appellate ruling, stating that the "Ohio courts are better positioned to determine – unless and until the Ohio Legislature weighs in – how to comply with the mandate of equal treatment."[22]

III. Holding

In a 9-0 opinion, the Supreme Court ruled that "comity considerations . . . preclude the exercise of lower federal-court adjudicatory authority over this controversy, given that an adequate state-court forum is available to hear and decide respondents' constitutional claims."[23] Within its comity analysis, the Court conceded that the Tax Injunction Act similarly prohibits federal courts from ruling on "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."[24] However, without specifically ruling as to TIA applicability, the Court determined that the

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16. *Id.* at 2329.
17. Tax Injunction Act, 28 U.S.C. § 1341 (2010).
18. *See* Levin v. Commerce Energy, Inc., 130 S. Ct. 2323, 2329 (2010) (explaining the lack of exercise of jurisdiction by the court). "The TIA did not block the suit, the District Court initially held, because Respondents . . . were 'third-parties challenging the constitutionality of [another's] tax benefit,' and their requested relief 'would not disrupt the flow of tax revenue' to the State." (quoting Appendix to Petition for Writ of Certiorari at 24a, *Levin*, 130 S. Ct. 2323 (No. 09-233).
19. *See id.* ("While agreeing that the TIA did not bar respondents' suit, the Sixth Circuit rejected the District Court's comity ruling.").
20. *See* Hibbs v. Winn, 124 S. Ct. 2276, 2284–92 (2004) (determining that neither the TIA nor the comity doctrine prohibited federal adjudication of an *Establishment Clause* challenge to a state tax credit that provided public funds to parochial schools).
21. *See Levin*, 130 S. Ct. at 2329 ("A footnote in *Hibbs*, the Court of Appeals believed, foreclosed the District Court's 'expansive reading' of this Court's comity precedents.").
22. *Id.* at 2335.
23. *Id.* at 2330.
24. Tax Injunction Act, 28 U.S.C. § 1341 (2010).

comity doctrine controls in this case.[25] Furthermore, the Court distinguished *Hibbs v. Winn* in holding that comity doctrine considerations prevail in circumstances such as those brought forth in *Levin*, where plaintiff-respondents seek to improve their position within the tax scheme.[26]

IV. Future Implications

Unless and until state courts rule on this matter, the disparity between LDC and IM tax treatment may have negative ramifications for the natural gas industry. Through this ruling, the Supreme Court has taken a decidedly hands-off approach with regard to taxation of the natural gas industry. Avoiding judicial legislation, the Court instead urges state government to take control. However, until such state action occurs, disproportionate tax treatment may negatively affect how both the cost and supply of natural gas are passed down to consumers. In Ohio, for example, tax differentials between natural gas providers may lead to a more monopolistic industry as IMs endure disparate operating costs. Such added costs forced upon IMs will likely be passed down to consumers. Those added costs could effectively trigger an avalanche effect, as consumers instead opt for the better financial alternative – LDC natural gas supply.

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25. *See Levin*, 130 S. Ct. at 2332–33 ("[W]e hold that comity precludes the exercise of original federal-court jurisdiction in cases of the kind presented here.").

26. *See id.* at 2336 (providing three factors that form the basis as to why the comity doctrine controls).

NRG Power Marketing v. Maine Public Utilities Commission, 130 S. Ct. 693 (2010).

Anthony Flynn Jr.*

I. Introduction

This case requires an understanding of the Mobile-Sierra Doctrine. The Federal Power Act (FPA) authorizes the Federal Energy Regulatory Commission (FERC) to oversee the regulation of inter-state power grids, to approve contracts for the sale of power, and to ensure that all such contracts contain rates that are "just and reasonable."[1] In 1956, the Supreme Court released twin decisions which held that FERC must presume that contract rates freely negotiated between reasonable parties meet the just and reasonable standard in the FPA.[2] These twin-holdings came to be known as the Mobile-Sierra Doctrine. In 1968, the Court expanded on the Mobile-Sierra Doctrine, explaining that "the [FPA] is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity."[3]

In 2008, the Court expanded the Mobile-Sierra Doctrine again. In *Morgan Stanley v. Public Utility District No. 1*, the Court held that the Mobile-Sierra presumption of just and reasonable terms in a freely negotiated contract disputed before FERC applies a purposefully high bar to challengers who are either purchasers of wholesale electricity or sellers.[4] The Court noted the reasoning for such a high-bar to challenging contracts as the substantial need to "foster[] stability in the electricity market, to the long run benefit of consumers."[5]

Condensing the Court's jurisprudence on the Mobile-Sierra Doctrine, it can be said that the doctrine prohibits FERC from invalidating a

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1. Federal Power Act, 16 U.S.C. §§ 791(a)–824(a) (1990).

2. *See* Fed. Power Comm. v. Sierra Pacific Power Co., 350 U.S. 348, 355 (1956) (providing some understanding of what the just and reasonable standard suggests). "[W]hile it may be that [FERC] may not normally impose upon a public utility a rate which would produce less than a fair return . . . In such circumstances the sole concern of [FERC] would seem to be whether the rate is so low as to adversely affect the public interest . . . ." *See also* United Gas Pipe Line Co. v. Mobile Gas Service Corp. et al., 350 U.S. 332 (1956).

3. Permian Basin Area Rate Cases, 390 U.S. 747, 822 (1968).

4. *See* Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1, 554 U.S. 527, 128 S. Ct. 233, 2747 (2008) ("We hold only that FERC may abrogate a valid contract only if it harms the public interest").

5. NRG Power Marketing v. Maine Pub. Util. Comm., 130 S. Ct. 693, 700 (2010).

contract unless the terms of the contract are wholly against public interest.[6] FERC must presume a freely negotiated contract is just and reasonable.[7]

II. Background

"For many years, New England's supply of electricity capacity was barely sufficient to meet the region's demands."[8] In 2006, the New England Independent System Operator, which runs the region's power grid, entered into an agreement with a group of electrical generators.[9] This agreement established a market mechanism that would set prices by auction at later dates, but would in-theory provide enough electricity for New England consumers.[10] The agreement, which was reached after negotiations of 115 parties,[11] stipulated that any challenges to the prices of the energy supply will be adjudicated under the Mobile-Sierra "public interest" standard.[12] After the agreement was approved by FERC, six of the eight objecting parties challenged FERC's approval in federal court.[13] These parties claimed that the Mobile-Sierra Doctrine should not apply to challenges from non-contracting parties.[14] They claimed non-contracting parties should be held to a lower challenging standard with no presumption of just and reasonable terms.[15] On this issue, the D.C. Circuit Court of Appeals found for the objectors.[16]

The Supreme Court granted certiorari to determine whether the Mobile-Sierra standard should apply when a contract rate is "challenged by an entity that was not a party to the contract."[17]

III. Holding

The Court held that the Mobile-Sierra presumption applies to all parties.[18] Writing for the Court, Justice Ginsberg notes that "if FERC itself

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6. *See Fed. Power Comm.*, 350 U.S. at 354–44 (" . . . [T]he sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest . . . ").
7. *See Morgan Stanley Capital Group*, 128 S. Ct. at 2737. (finding that FERC must presume a contract for wholesale energy that has been freely negotiated meets the statutory just and reasonable requirement).
8. *NRG Power Marketing*, 130 S. Ct. at 694.
9. *Id.* at 697.
10. *Id.* at 697–98.
11. *See id.* at 697 (noting that eight of these 115 parties opposed the agreement).
12. *Id.*
13. *Id.*
14. *See NRG Power Marketing*, 130 S. Ct. at 697.
15. *Id*.
16. *Id.*
17. *Id.* at 698.

must presume just and reasonable a contract rate resulting from fair, arms-length negotiations, how can it be maintained that noncontracting parties nevertheless may escape that presumption?"[19]

Justice Ginsburg characterized the Circuit Court's analysis of the Mobile-Sierra doctrine as incorrect. [20] The D.C. Circuit claimed the "public interest" standard was at odds with the "just and reasonable" standard."[21] However, the Court found that the two standards work in tandem. [22] FERC should use the public interest standard as a frame by which to evaluate "what it means for a rate to satisfy the just-and-reasonable standard."[23]

The Court found that to allow noncontracting parties to circumvent the Mobile-Sierra doctrine would undermine the doctrine's stated goal of promoting stability of energy supply.[24] The Court stated in dicta that third-party interests are well-served by the Mobile-Sierra doctrine, as any contract rate that "seriously harms the consuming public" may be disallowed by FERC.[25]

The Mobile-Sierra doctrine serves as a guidepost for FERC to evaluate whether energy contracts rise to the standards of good public policy. In this decision, the Court reiterated the benchmarks by which FERC can judge these contracts. First, the contracts are negotiated by sophisticated parties. [26] Secondly, the interest in providing those parties with predictable and consistent review of their contracts outweighs the interest in third-party challenges.[27] Therefore, the Court finds, having a high-bar like the "just and reasonable" presumption apply to third-party challenges as well as challenges from parties who were part of the negotiation serves the public interest in a stable energy supply by ensuring contracts are not capriciously invalidated by FERC.[28]

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18. *See Id.* at 701 (holding that the "Mobile-Sierra presumption does not depend on the identity of the complainant who seeks FERC investigation.").
19. *Id.* at 700.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* (quoting *Morgan Stanley*, 554 U.S. at 621).
24. *See NRG Power Marketing*, 130 S. Ct. at 701 ("A presumption applicable to contracting parties only . . . could scarcely provide the stability *Mobile-Sierra* aimed to secure.").
25. *Id.* at 700 (quoting *Morgan Stanley*, 554 U.S. at 621).
26. *See id.* at 699 (noting that the contracts that are reviewed by FERC are "freely negotiated" between "sophisticated parties").
27. *See id.* at 701 ("A presumption applicable to contracting parties only . . . could scarcely provide the stability *Mobile-Sierra* aimed to secure.").
28. *See id.* (noting the "essential role of contracts" in providing "stability [for] the electricity market, for the longrun *(sic)* benefit of consumers").

The Court reversed the Circuit Court's opinion with regard to the District court's application of the Mobile-Sierra doctrine and remanded the case for further proceedings.[29]

IV. Dissent

Justice Stevens issued a lone dissent in this case. Justice Stevens expressed concern about the favorability shown towards energy producers and companies and the lack of concern for individual consumers.[30] He found little comfort in the Court's dicta stating third-party interests are already well-served in the Mobile-Sierra doctrine. Justice Stevens views the doctrine as setting too high a bar for a challenge to a contract rate, as FERC may only invalidate a contract if the public interest is "*seriously* harmed."[31]

Justice Stevens characterized the true purpose of the Mobile-Sierra doctrine as preventing an energy seller from unilaterally repudiating a contract due to market fluctuation. [32] According to Justice Stevens, only if the market fluctuation would drive an energy seller out of business would the seller meet the bar of Mobile-Sierra—impairing the public interest by stopping energy production—and thus, be allowed by FERC to alter the contract.[33] Justice Stevens found that the Mobile-Sierra doctrine was altered by the Court's decision in *Morgan Stanley v. Public Utility District No. 1* to create a presumption of a "just and reasonable contract."

Justice Stevens believes the public interest is "the interest of consumers in paying 'the lowest possible reasonable rate consistent with the maintenance of adequate service,'" an interest which is greater than the interest in contract stability[34] Justice Stevens found the Court's extension of the Mobile-Sierra doctrine to challenges from noncontracting parties to be adverse to the interest of the consumers. As the general public, a third-party to the contract negotiations, will end up paying the rates to purchase

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29. *See id*. at 701 ("[T]he judgment of the Court of Appeals . . . is reversed to the extent that it rejects to the application of the *Mobile-Sierra* doctrine to noncontracting parties.").

30. *Id*. at 701-02 (Stevens, J., dissenting) ("The Court held the [FERC] could not set aside such a contract as unjust and unreasonable, even though it saddled consumers with a duty to pay prices that would be considered unjust and unreasonable under normal market conditions . . . ").

31. *Id*. at 702 (Stevens, J., dissenting) (citing *Permian Basin Area Rate Cases*, 390 U.S. at 822 ("[U]nder the *Mobile-Sierra* presumption, setting aside a contract rate requires a finding of 'unequivocal public necessity.")).

32. *Id*. at 701 (Stevens, J., dissenting).

33. *Id.*

34. *Id.* at 702 ("[U]nder the *Mobile-Sierra* presumption, setting aside a contract rate requires a finding of 'unequivocal public necessity . . . .') (citing Morgan Stanley, 128 S. Ct. 2733 (slip. op. at 22) (Stevens, J., dissenting (quoting Permian Basin, 390 U.S. at 793)).

energy from the utility, their interests are not represented a contract negotiated by a wholesaler and a distributor.[35] As Justice Stevens doubts that the ordinary consumer's interests are representing in the contract negotiations, he believes their challenges should be held to a lower standard before FERC.[36]

V. Future Implications

This decision does not break new ground in contracts, administrative or energy regulatory law. In the past year, FERC has cited the decision twice in opinions upholding contract agreements,[37] which may validate Justice Stevens's concern that the standard sets the bar too high for FERC to protect consumers.[38] FERC cited NRG in an opinion requiring a public utility to provide information on the tariffs it has levied against energy suppliers.[39] By exercising its oversight authority to review tariffs aimed at reigning in energy suppliers, and using the NRC decision to do so, FERC may be benefiting "big energy" by hindering the public utilities' pricing power.

Professor Robin Craig cited the *NRG Power* case as evidence of the leeway courts will give to Congress regulating the energy industry under the instate commerce clause.[40] Professor Craig found that decisions such as NRG Power show the courts given broad interpretations to statutes such as the FPA.[41] She notes that Congress now has authority over "the

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35. *Id.* at 703.

36. *See id*. (explaining that there should be a lower standard). "[By] requiring that FERC find some greater degree of harm to the public than would be required under the ordinary just-and-reasonable standard . . . the *Mobile-Sierra* doctrine leaves little room for respondents—at least one of which did not negotiate the rate but must nonetheless purchase electricity at [this] price . . . —to assert their private interest in making a rate challenge."

37. *See* Kentucky Municipal Power Agency v. E.ON U.S., 132 F.E.R.C. P63,007, 66,064 (F.E.R.C. 2010) ("The settlement . . . can be found by the Commission to be fair and reasonable and in the public interest.") 66,067 (using the NRG Power Marketing decision to set the standard of review). *See also* High Island Offshore Sys., 131 F.E.R.C. P63,007, P63,025 (F.E.R.C. 2010) (setting the standard of review using the NRG Power Marketing decision to set the standard for review and approving the Settlement Agreement).

38. *Supra* note 25.

39. *See* Midwest Indep. Transmission Sys. v. Midwest Indep. Transmission Sys., 131 F.E.R.C. P61,163, 61,720 (F.E.R.C. 2010) (ordering Midwest ISO to revise their tariff plan) 61,725, n.37 (using the NRG Power Marketing decision to set the standard for review).

40. *See* Robin Kundis Craig, Multistate Decision Making for Renewable Energy and Transmission: Spotlight on Colorado, New Mexico, Utah, and Wyoming. 81 U. COLO. L. REV. 771 n.36.

41. *See id*. at 780 ("Moreover, [the Court] suggests that Congress's authority over energy, including renewable energy, remains very broad.").

transmission of electricity, rates, rate-making, and even the sources of fuel used to produce electricity."[42]

Though the effects of *NRG Power* are still being determined, it is clear that the impact of this case is vast, in so far as it creates a very high bar to overturn negotiated agreements vis a vis energy pricing. Justice Stevens' dissent notes that the *Mobile-Sierra* presumption gives industry great leeway in setting prices, and not allowing third-parties to challenge without overcoming the presumption provides no check for high prices in the energy market.[43] While Justice Stevens is undeniably correct that consumers have an interest in the lowest prices possible, there is an equally strong interest in having reliable energy supply. If third-parties are able to challenge contracts at a lower burden, then the negotiating parties will not be able to rely on the terms of their negotiations. Contracts negotiated at arms-length between competing parties will ensure prices do not rise to an unreasonable level, and any collusion between the competing utility and distributor would invalidate the contract as against public-interest. The *Mobile-Sierra* doctrine protects freedom of contract and allows for a constant supply of energy at a predictable contract price.

42. *Id.*
43. *NRG Power Marketing*, 130 S. Ct. at 703 (Stevens J., dissenting)

South Carolina v. North Carolina, 130 S. Ct. 854 (2010).

T. Peter Choi*

I. Introduction

South Carolina v. North Carolina[1] came as an appeal to a Court-appointed Special Master's unilateral 2009 decision to permit three nongovernmental entities to intervene in the two states' ongoing dispute over riparian rights.[2] It concerned the applicability of the Supreme Court's longstanding holding in *New Jersey v. New York*,[3] which stood for the proposition that "[a]n intervenor whose state is already a party should have the burden of showing some compelling interest *in his own right, apart from his interest in a class with all other citizens and creatures of the state*, which interest is not properly represented by the state."[4] The State of South Carolina ("South Carolina") contested the Special Master's conclusions on the grounds that the three non-governmental entities had not sufficiently

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1. South Carolina v. North Carolina (*South Carolina II*), 130 S. Ct. 854, 854 (2010).

2. *See South Carolina II*, 130 S. Ct. at 858–59 ("After holding a hearing, the Special Master granted the [three non-state entities the right to intervene] and, upon South Carolina's request, memorialized the reasons for her decision in a First Interim Report. South Carolina then presented exceptions, and we set the matter for argument.").

3. New Jersey v. New York, 345 U.S. 369, 373 (1953) (holding that the City of Philadelphia should not be allowed to intervene because its interests were adequately represented by the Commonwealth of Pennsylvania). In *New Jersey*, the Supreme Court considered whether the City of Philadelphia may intervene in an original action in which the Commonwealth of Pennsylvania was already a party. *See id.* at 370. The State of New Jersey had brought suit against the State of New York and the City of New York seeking an equitable diversion of the Delaware River, and the Commonwealth of Pennsylvania had been allowed to intervene *pro interesse suo*. *See id.* at 370–71. When the trial court's entered a decree enjoining the defendants from diverting from the Delaware River more than 440,000,000 gallons or water daily, the City of New York moved for a modification to the decree; in response, the City of Philadelphia made a motion to intervene. *See id.* at 371–72. However, the Supreme Court denied the City of Philadelphia's motion upon determining that its interests could not be distinguished from the Commonwealth of Pennsylvania's. See *id.* at 372–73. Observing that "[a]n intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state," the Court determined that the City of Philadelphia had not met its burden and denied its motion. *Id.* at 373.

4. *Id.* at 373 (emphasis added).

demonstrated that their interests were distinct from that of the State of North Carolina ("North Carolina").

II. Background

South Carolina initially had filed suit against North Carolina in 2007 by invoking the Supreme Court's original jurisdiction to gain equitable apportionment of the Catawba River.[5] Their dispute was thought to have been on course for an eventual resolution when the Court appointed in January of 2009 a "Special Master"[6] who would have "the authority to fix the time and conditions for the filing of additional pleadings,"[7] among several other specifically enumerated privileges.[8] However, when the Special Master granted three nongovernmental entities—namely, the Catawba River Water Supply Project ("CRWSP"), Duke Energy Carolinas, LLC ("Duke Energy"), and the city of Charlotte, North Carolina ("Charlotte")—to intervene in the action as separate parties upon determining that they all appeared to have satisfied the requirements set forth in *New Jersey*,[9] South Carolina took exceptions to her findings and appealed,[10] thereby prompting the Court to take this case up for a second time for the purposes of clarifying its holding in *New Jersey*.

Thus, at issue before the Court in this case was whether South Carolina's exceptions to the Special Master's findings had been justified, or to put it another way, whether CRWSP, Duke Energy,

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5. *See South Carolina II*, 130 S. Ct. at 858 ("The State of South Carolina brought this original action against the State of North Carolina, seeking an equitable apportionment of the Catawba River.") *See also id.* at 859 (noting that South Carolina sought "a decree that equitably apportions the Catawba River . . . , enjoins North Carolina from authorizing [excessive] transfers of water . . . , and declares North Carolina's permitting statute invalid to the extent it is used to authorize [excessive] transfers of water . . . .")

6. South Carolina v. North Carolina (*South Carolina I*), 128 S. Ct. 1117, 1117 (2008).

7. *Id.*

8. *See id.* (stating that the Special Master shall have several powers). These powers include the power "to direct subsequent proceedings, to summon witnesses, to issue subpoenas, and to take such evidence as may be introduced and such as she may deem it necessary to call for. The Special Master is directed to submit Reports as she may deem appropriate."

9. *See South Carolina II*, 130 S. Ct. at 861 ("[T]he Special Master found that each proposed intervenor had a sufficiently compelling interest to justify intervention. ").

10. *See id.* at 858–59 ("After holding a hearing, the Special Master granted the motions and, upon South Carolina's request, memorialized the reasons for her decision in a First Interim Report. South Carolina then presented exceptions, and we set the matter for argument.").

and Charlotte should have been allowed to intervene as separate parties to the action under *New Jersey*.[11] Justice Alito, writing for the 5–4 majority,[12] rejected[13] the broader rule that the Special Master had used to allow all three parties to intervene in the action,[14] noting that "a compelling reason for allowing citizens to participate in one original action is not necessarily a compelling reason for allowing citizens to intervene in all original actions"[15] Instead, he considered each of the three nongovernmental entities' interests separately to determine whether each had satisfied *New Jersey*'s "appropriate intervention" standard.[16] Ultimately, he concluded that CRWSP and Duke Energy had satisfied *New Jersey*'s "appropriate intervention" standard,[17] but that the city of Charlotte had not.[18]

III. Holding

Specifically, Justice Alito noted in his opinion that CRWSP had "carried its burden of showing a compelling interest in the outcome of this litigation that distinguishes [it] from all other citizens of the party States."[19] Given CRWSP's "unusual" position as a product of a joint venture between the two states,[20] he stated that "neither State

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11. *See id.* at 861 ("Applying [*New Jersey*], the Special Master found that each proposed intervenor had a sufficiently compelling interest to justify intervention. The Special Master rejected South Carolina's proposal to limit intervention to the remedy phase of this litigation and recommended that this Court grant the motions to intervene.").

12. *Id.* at 858.

13. *See id.* at 862 ("We . . . decline to adopt the Special Master's proposed rule.").

14. *See id.* at 861 (describing the rule that the Special Master had "distilled," albeit incorrectly, from the Court's holding in *New Jersey*).

15. *South Carolina II*, 130 S. Ct. at 862.

16. *See id.* at 864–68 (applying the *New Jersey* standard to CRWSP, Duke Energy, and Charlotte, respectively).

17. *See id.* at 864–67 ("Applying the standard of *New Jersey v. New York*, *supra*, here, we conclude that the CRWSP has demonstrated a sufficiently compelling interest that is unlike the interests of other citizens of the States"). Justice Alito went on to note that "[w]e conclude, as well, that Duke Energy has demonstrated powerful interests that likely will shape the outcome of this litigation."

18. *See id.* at 867–68 ("We conclude, however, that Charlotte has not carried its burden of showing a sufficient interest for intervention in this action.").

19. *Id.* at 865.

20. *See id.* at 864–65 ("The CRWSP is an unusual municipal entity, established as a joint venture with the encouragement of regulatory authorities in both States and designed to serve the increasing water needs of Union County, North Carolina, and Lancaster County, South Carolina.").

can properly represent the interests of the CRWSP in this litigation."[21]

Similarly, Justice Alito granted Duke Energy the right to intervene as a separate party upon finding that it "demonstrated powerful interests that likely will shape the outcome of this litigation."[22] He determined that, "any equitable apportionment of the river will need to take into account the amount of water that Duke Energy needs to sustain its operations and provide electricity to the region,"[23] and that "Duke Energy has a unique and compelling interest in protecting the terms of its existing FERC license and the CRA that forms the basis of Duke Energy's pending renewal application."[24]

However, because Justice Alito was unable to distinguish its interests from those represented by the State of North Carolina, he stated that Charlotte should not be allowed to intervene as a separate party.[25] He noted that, "a State's sovereign interest in ensuring an equitable share of an interstate river's water is precisely the type of interest that the State, as *parens patriae*, represents on behalf of its citizens."[26]

IV. Dissent

Chief Justice Roberts, in his dissenting opinion, harshly criticized the majority, claiming that "[t]he Court's decision to permit non-sovereigns to intervene in this case *has the potential to alter in a fundamental way the nature of our original jurisdiction*, transforming it from a means of resolving high disputes between sovereigns into a forum for airing private interests."[27] In his view, the proper course of action would have been to deny not just Charlotte, but also CRWSP and Duke Energy from intervening in this original action,[28] because "the apportionment of an interstate waterway is a sovereign

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21. *South Carolina II*, 130 S. Ct. at 865.
22. *Id.* at 866.
23. *Id.*
24. *Id.*
25. *See id.* at 867–68 ("We conclude, however, that Charlotte has not carried its burden of showing a sufficient interest for intervention in this action.").
26. *Id.* at 867.
27. *South Carolina II*, 130 S. Ct. at 869 (Roberts, C.J., dissenting) (emphasis added).
28. *See id.* at 876 ("I would grant South Carolina's exceptions, and deny [all three] motions to intervene.").

dispute"[29] whereas determining "a private entity's interest in its particular share of the State's water . . . is an 'intramural dispute' to be decided by each State on its own."[30] He also noted that such nongovernmental entities' interests could have been adequately preserved simply by granting them participation as *amici curiae*.[31]

V. Future Implications

This ruling appears to signal significant implications for not just the Court, but also for nongovernmental entities that are potentially seeking to intervene in other equitable apportionment actions as well. While the Court did not necessarily expound on the existing *New Jersey* standard—*New Jersey*'s "appropriate intervention" standard is still good law—as noted by Chief Justice Roberts in his dissent, this is the first time that the Court has ever allowed private claimants to intervene in equitable apportionment actions.[32] Hence, the latent implication of this case appears to be that, so long as an interested party—regardless of whether or not it is a sovereign state or a nongovernmental entity—can demonstrate that it has compelling interests apart from those already represented by an original party to the suit, it can intervene in the action. While it is difficult to determine the frequency of such apportionment actions, it can surely be expected that CWRSP, Duke Energy, and Charlotte will not be the last to petition to the Court to intervene.

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29. *Id.* at 869.

30. *Id.* at 870 (citing *New Jersey*).

31. *See id.* at 876 ("[T]he benefits private entities might bring can be readily secured, as has typically been done, by their participation as *amici curiae*.").

32. *See id.* at 869 ("Even though equitable apportionment actions are a significant part of our original docket, this Court has never before granted intervention in such a case to an entity other than a State, the United States, or an Indian tribe."). *See also* Lyle Denniston, *The Key to Settling a Big Fight*, SCOTUSBLOG (Dec. 27, 2010, 7:40 PM), http://www.scotusblog.com/?p=111197 ("For the first time in the Court's history of refereeing such interstate disputes, the majority allowed private claimants to something owned by sovereign states to assume a key role in the lawsuit.").