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U.S. Supreme Court Holds Public Interest Standard Applies When a Contract Rate Is Challenged by a Third Party

On January 13, 2010, the United States Supreme Court issued its decision in *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 558 U.S. ____ (2010). The case addresses whether the public interest standard, as established under the Mobile-Sierra doctrine, applies when a contract rate is challenged by an entity that was not a party to the contract. The Supreme Court concluded that the Mobile-Sierra doctrine does apply to challenges from third parties, and reversed the decision of the D.C. Circuit Court of Appeals.

The issue arose in connection with the development of the electric capacity market in New England. A lengthy and highly contested case led to an eventual settlement, under which the parties agreed to conduct annual auctions to set the market price, which would take effect three years later. In the meantime, the parties to the settlement agreed to employ a transitional pricing structure. Further, the settlement contained a provision requiring that any challenges to the transition payments and the subsequent auction-clearing prices were to be subject *to* Mobile-Sierra's "public interest" standard, regardless of whether the challenge is brought by a settling party, a non-settling party, or by the Federal Energy Regulatory Commission (FERC). All but eight of the 115 parties joined in the settlement.

The Supreme Court first announced the Mobile-Sierra doctrine in 1956 in *United States Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). In those cases, the Supreme Court established that, notwithstanding the just and reasonable standard established by the Federal Power Act, parties to a bilateral contract cannot seek to change its terms unless the public interest so requires. In its January 13 decision, the Court explained that the goal of the doctrine, as reaffirmed in *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. ____ (2008), is to provide stability in the marketplace. To avoid undermining that goal, when the parties to a contract agree that the Mobile-Sierra doctrine applies, FERC and any non-contracting parties must also live by the public interest standard.

The critical question that the Court failed to address is what it means to have a "contract" versus a "tariff" – the Mobile-Sierra doctrine does not apply to tariffs. Specifically, the Court declined to rule upon whether the rates at issue in *NRG Power Marketing* qualify as contract rates and, if not, whether FERC had the discretion to treat them analogously. The Court based its decision on the fact that these questions were not addressed by the D.C. Circuit below.

Justice Stevens, the lone dissenting Justice, took the position that the Mobile-Sierra doctrine is evolving in scope to a point where it is no longer appropriate under the Federal Power Act (FPA). Under the FPA, customers have the right to challenge rates under a "just and reasonable" standard. While the contracting parties are properly held to a higher standard that they negotiated for themselves, in Justice Stevens's view, the Court improperly extends that higher standard to parties that did not agree to it.

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The Supreme Court's decision significantly impairs the ability of interested entities to exercise their rights under the FPA to challenge contractual terms that may be unjust and unreasonable by subjecting those entities to a more onerous standard. Many contested cases at FERC are resolved via settlement. Whether a settlement applies to a contract or a tariff, the Supreme Court's decision suggests that the Mobile-Sierra doctrine applies if the settling parties so state in the settlement. Consequently, parties with an interest in a matter before FERC should give more consideration to intervening and participating or risk the ability to protect their interests on those issues in the future.

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