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Supreme Court Reaffirms the *Mobile-Sierra* Doctrine

On January 13, 2010, the Supreme Court of the United States issued its decision in *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, No. 08-674. The decision reaffirms the *Mobile-Sierra* doctrine, limiting the authority of the Federal Energy Regulatory Commission (FERC) to modify rates for regulated services when the rates are set by contract. In particular, the decision clarifies that FERC does not have greater authority to modify private contracts merely because the contract rate is being challenged by a non-contracting party. The Court's decision reverses a 2008 decision by the United States Court of Appeals for the District of Columbia Circuit, which expanded FERC's authority by carving out a new non-contracting party exception to the *Mobile-Sierra* doctrine.

King and Spalding represented a group of parties before the Supreme Court who filed an *amici curiae* brief in support of petitioners.

A. The *Mobile-Sierra* Doctrine

Under substantively identical provisions of the Federal Power Act and the Natural Gas Act, FERC is charged with ensuring that rates for regulated services are "just and reasonable."¹ Under the *Mobile-Sierra* doctrine, which takes its name from the Supreme Court's landmark 1956 decisions in *United Gas Pipe Line Company v. Mobile Gas Service Corporation*² and *FPC v. Sierra Pacific Power Company*,³ the Commission has no authority to modify rates fixed by contract except when modifications are "necessary in the public interest." The rationale behind the doctrine is that, while FERC cannot ordinarily impose a rate on utilities that produces less than a fair return, when utilities contract for such a rate, FERC's "sole concern" is "whether the rate is so low as to adversely affect the public interest."

While *Mobile* and *Sierra* involved challenges by regulated sellers alleging that rates were too low, the Supreme Court's 2008 decision in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*⁴ confirms that the *Mobile-Sierra*

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doctrine also applies when buyers challenge contract rates as too high. In *Morgan Stanley*, the Court rejected claims that, in preventing FERC from modifying rates unless the public interest so requires, the *Mobile-Sierra* doctrine conflicts with the statutory requirement that rates be just and reasonable. *Morgan Stanley* recognized that “there is only one statutory standard for assessing wholesale rates, whether set by contract or tariff—the just and reasonable standard”—and that *Mobile-Sierra* “provide[s] a definition of what it means for a rate to satisfy the just and reasonable standard in the contract context.”

B. The D.C. Circuit’s Decision

In *Maine Public Utility Commission v. FERC*,⁵ the D.C. Circuit largely affirmed FERC’s orders approving a contested settlement relating to ISO New England Inc.’s Forward Capacity Market. It reversed, however, with respect to a single settlement provision describing FERC’s authority to modify agreements contemplated under the settlement. For the most part, the relevant provision functions as a “*Memphis* clause,”⁶ specifying that, with respect to most of the settlement’s provisions, the *Mobile-Sierra* doctrine will not apply to restrict the Commission’s authority. But the settlement also noted two exceptions to this rule. These exceptions relate to capacity payments made to suppliers during a three and one-half year transition period, and to final prices established by forward capacity auctions (prices are “final” unless the Commission orders otherwise within a 75-day period following the filing of objections). In these two limited circumstances, the settlement recognized that the *Mobile-Sierra* doctrine would apply to all rate challenges, including challenges brought by third parties, and preclude FERC from making changes unless necessary in the public interest.

The D.C. Circuit concluded that, in purporting to apply *Mobile-Sierra* in these limited circumstances, “the settling parties were attempting to thrust the ‘public interest’ standard of review upon non-settling third parties who have vociferously objected to the terms of the settlement agreement.” According to the D.C. Circuit, *Mobile-Sierra*’s “deferential public interest standard only applies to ‘freely negotiated private contracts.’” In the D.C. Circuit’s view, “when 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.”

The D.C. Circuit denied requests for rehearing, rejecting arguments that it should reconsider its decision in light of the Supreme Court’s intervening decision in *Morgan Stanley*. NRG Power Marketing, LLC and various of its affiliates filed a petition for *certiorari*, which the Supreme Court granted on April 27, 2009.

C. The Supreme Court’s Decision

In an opinion authored by Justice Ginsburg and joined by all but one of the other Justices, the Supreme Court held that the *Mobile-Sierra* doctrine does not depend on the identity of the complainant. That is, the doctrine is not limited to challenges to contract rates brought by contracting parties, but includes challenges initiated by third-parties as well. The Court explained:



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In unmistakably plain language, *Morgan Stanley* restated *Mobile-Sierra's* instruction to the Commission: FERC “must presume that the rate set out in a freely negotiated wholesale-energy contract meets the ‘just and reasonable’ requirement imposed by law. The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest.”

The Court thus concluded that, “if FERC itself must presume just and reasonable a contract rate resulting from fair, arms-length negotiations,” non-contracting parties should not be permitted to escape the presumption.

The Court also pointedly noted that promoting stability in the energy industry is the *Mobile-Sierra* doctrine’s “animating purpose,” and that “*Morgan Stanley's* reasoning strongly suggested” that the D.C. Circuit has “misperceive[d] the aim, and diminishe[d] the force, of the *Mobile-Sierra* doctrine.” The Court further found that, contrary to concerns raised by certain parties, “the *Mobile-Sierra* doctrine does not overlook third-party interests,” but is rather framed to protect the public from a contract rate that “seriously harms the consuming public.”

Although the Supreme Court reversed the D.C. Circuit inasmuch as the lower court had refused to apply *Mobile-Sierra* to non-contracting parties, it did not address whether the doctrine properly applies to the parties’ settlement. Instead, as the Court noted, whether the precise rates at issue under the settlement “qualify as ‘contract rates,’ and, if not, whether FERC has discretion to treat them analogously are questions raised before, but not ruled upon by, the Court of Appeals.” Accordingly, the Court held that those issues would “remain open” for the D.C. Circuit’s “consideration on remand.”

Justice Stevens dissented, arguing that the majority’s decision was “[t]he third chapter in a story about how a reasonable principle, extended beyond its foundation, becomes bad law.” According to Justice Stevens, the majority’s decision imposes a “special,” unjustified “burden on third parties exercising their statutory right to object to unjust and unreasonable rates.”

¹ 16 U.S.C. § 824(d); 15 U.S.C. § 717c.

² 350 U.S. 332 (1956).

³ 350 U.S. 348 (1956).

⁴ 128 S. Ct. 2733 (2008).

⁵ 520 F.3d 464 (D.C. Cir. 2008).

⁶ The “*Memphis* clause” derives its name from the Supreme Court’s decision in *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958), and is a specific contract reservation that gives parties the unilateral right to seek revisions to the contract.

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