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DC Circuit Remands Mobile-Sierra Case Back to FERC

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The U.S. Court of Appeals for the District of Columbia Circuit recently remanded *Maine Public Utilities Commission v. FERC* to the Federal Energy Regulation Commission. FERC must now explain why the *Mobile-Sierra* doctrine applies to auction rates.

On November 5, 2010, the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit) remanded a case concerning the *Mobile-Sierra* doctrine back to the Federal Energy Regulatory Commission (FERC). The case, *Maine Public Utilities Commission v. FERC*, involves the issue of whether the *Mobile-Sierra* doctrine applies to the auction rates resulting from a settlement agreement involving the New England capacity market. This proceeding was previously remanded to the DC Circuit by the Supreme Court of the United States in January.

The DC Circuit case arises out of a line of judicial decisions surrounding the *Mobile-Sierra* doctrine, which presumes that freely negotiated wholesale contract rates are just and reasonable. In 2008 the Supreme Court decided *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, *Washington*, holding that FERC must apply the *Mobile-Sierra* doctrine to all negotiated wholesale power contracts unless it determines the contract harms the public interest. (For more information about this decision, see "Summary of MSCG v. Snohomish.")

In January of this year, the Supreme Court held that the *Mobile-Sierra* doctrine applies to challenges by non-parties to wholesale energy contracts. However, the Supreme Court remanded the case to determine whether the rates at issue qualify as contractually negotiated rates and, if not, whether FERC had the discretion to apply *Mobile-Sierra* to such contracts. (For more information on this decision, see NRG Power Marketing, LLC v. Maine Public Utilities Commission.)

In *Maine Public Utilities Commission v. FERC*, the DC Circuit issued its remand order concerning FERC's application of the *Mobile-Sierra* doctrine to the auction rates resulting from the New England capacity market settlement. The plaintiffs argued that FERC incorrectly applied the *Mobile-Sierra* doctrine to non-settling parties who challenged the settlement agreement that established the rates. FERC conceded that the rates at issue were not contract rates, but argued that it had the discretion to apply the *Mobile-Sierra* doctrine because the rates shared a number of key features of freely negotiated contracts.

Calling the case a "jurisprudential Kabuki dance," the DC Circuit remanded the case because FERC failed to articulate a rationale in its orders regarding why the auction rates are entitled to *Mobile-Sierra* treatment. The court first noted the uncertainty and "doctrinal difficulties" surrounding the *Mobile-Sierra* doctrine, citing the Supreme

Court's holding that the public interest standard is merely an application of FERC's just and reasonable standard, while also indicating that the public interest standard is a higher standard. The DC Circuit ultimately found that it could not decide this case because FERC never gave a reason for applying the *Mobile-Sierra* doctrine outside of the contract context. Instead, the DC Circuit ordered FERC to explain "why, if the auction rates are not contract rates, they are entitled to *Mobile-Sierra* treatment."