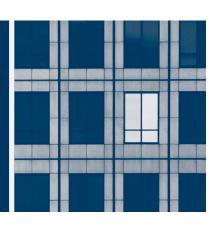
McDermott Will&Emery

On the Subject



Energy & Commodities Advisory

January 21, 2010

The January 2010 Supreme Court of the United States decision held that the Mobile-Sierra doctrine applies to challenges by non-parties to wholesale energy contracts.

NRG Power Marketing, LLC v. Maine Public Utilities Commission

On January 13, 2010, the Supreme Court of the United States issued an opinion in NRG Power Marketing, LLC v. Maine Public Utilities Commission. In an 8-1 decision, the Supreme Court held that the *Mobile-Sierra* doctrine applies to challenges by non-parties to wholesale energy contracts. According to the Supreme Court, the Mobile-Sierra doctrine, which presumes that freely negotiated wholesale contract rates are just and reasonable, does not depend on the identity of the challenger. The Supreme Court's decision clarified its 2008 ruling in Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, Washington, which had held that the Federal Energy Regulatory Commission (FERC) must apply Mobile-Sierra to all negotiated wholesale power contracts, unless it determines that the contract harms the public interest. For more information about that decision, please see McDermott's previous On the Subject "Summary of MSCG v. Snohomish."

Writing for the Supreme Court in NRG, Justice Ruth Bader Ginsburg reasoned that if FERC must presume that wholesale contracts are just and reasonable, so too should non-contracting parties. Rather than overlooking third parties, the *Mobile-Sierra* doctrine is meant to protect their concerns by examining whether a rate contract would adversely affect the public interest. The Supreme Court found that confining rate challenges to contracting parties would thwart the very purpose of this presumption: to promote stability in the energy markets by

ensuring the sanctity of contracts. According to the Supreme Court, a "presumption applicable to contracting parties only, and inoperative as to everyone else—consumers, advocacy groups, state utility commissions, elected officials acting parens patriae—could scarcely provide the stability *Mobile-Sierra* aimed to secure."

The Supreme Court's decision reversed the judgment of the U.S. Court of Appeals for the District of Columbia Circuit, which had ruled that *Mobile-Sierra* only applies to contracting parties. Nonetheless, the Supreme Court remanded the case for a determination of whether the rates at issue in the case qualify as contractually negotiated rates and, if not, whether FERC had the discretion to apply *Mobile-Sierra* to such contracts. Only Justice John Paul Stevens dissented from the decision.

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