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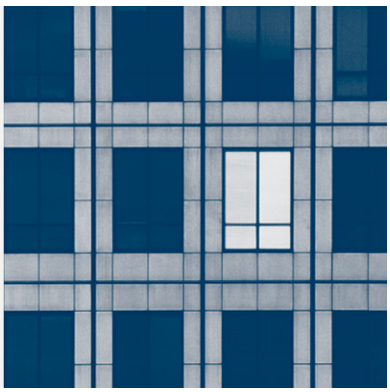
On the Subject



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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