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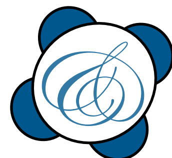

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Supreme Court Defines Broad Role of *Mobile-Sierra*—Protecting All Parties

Anthony Michael Sabino and Michael A. Sabino

The U.S. Supreme Court has just ruled that a uniform standard of "just and reasonable" will be applied whenever *any* party challenges Federal Energy Regulatory Commission (FERC) approval of a rate schedule for the provision of generated electrical capacity. This landmark case, *NRG Power Marketing, LLC* v. *Maine Public Utilities Commission*[1] (*NRG*), revitalizes a doctrine from the 1950s that comprises limitations upon FERC authority, and thus we will preface our review with a few words about that law.

FERC has the authority to regulate the interstate sale of electricity. All charges must be "just and reasonable." The commission may set aside any rate it deems unjust or unreasonable in the "public interest." In 1956, the Supreme Court decided *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*[2] and *Federal Power Commission* v. *Sierra Pacific Power Company*,[3] giving rise to the aptly named *Mobile-Sierra* doctrine. As recently as last year, the Court confirmed the efficacy of the *Mobile-Sierra* doctrine in *Morgan Stanley Capital Group Inc.* v. *Public Util. Dist. No. 1 of Snohomish Cty.*,[4] where the justices emphasized the essential role of freely bargained contracts as a key factor in fostering stability in the electricity

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market, to be usurped by FERC only in situations involving extraordinary circumstances.

> Last year in *Morgan Stanley* . . . the justices emphasized the essential role of freely bargained contracts . . . to be usurped by FERC only in situations involving extraordinary circumstances.

QUESTION: EXACTLY WHO DOES *MOBILE-SIERRA* PROTECT?

Yet does this "public interest" standard apply only to a challenge by a contracting party or can it be applied to any party that opposes the rate? That was the precise question in *NRG*. This controversy stems from New England's difficulties in maintaining the reliability of its "capacity market," where, in order to maintain reliability of the grid, providers generally overbuy capacity from generators. New England's problem was insufficient capacity. After years of intense effort, FERC approved a comprehensive settlement that would have resolved this challenge.

Holding out were objectors who were nonparties to the energy contracts. The D.C. Circuit court disapproved the commission's hard-won accord. That court held that the "public interest" standard only applied to challenges raised by contracting parties.

And that is where the lower court erred. Writing for a nearly unanimous Court, Justice Ginsburg found that the question was, Does the *Mobile-Sierra* "public interest" standard apply when a rate is challenged by a nonparty? The *NRG* Court declared yes.

ANSWER: EVERYBODY!

First, *Morgan Stanley* "strongly suggest[ed]" that the vitality of *Mobile-Sierra* could only be preserved if it was uniformly applied, no matter the identity of the challenger. To be sure, the "public interest" standard is not at odds with the overarching "just and reasonable" rule.

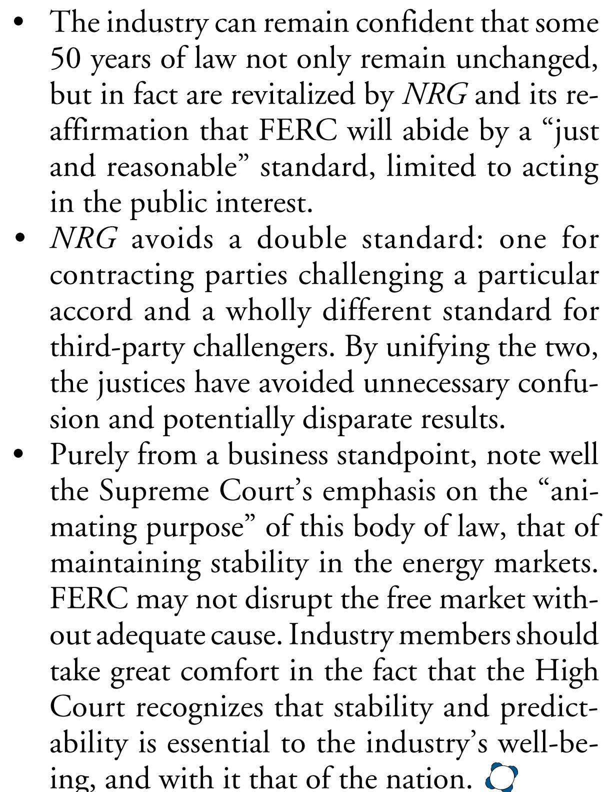
"If FERC itself must presume just and reasonable a contract rate resulting from fair, arms-length negotiations, how can it be maintained that noncontracting parties nevertheless may escape that presumption?" said the Court. The concerns of noncontracting parties are not overlooked by the *Mobile-Sierra* doctrine; much to the contrary, it "is framed with a view to their protection." Applying Mobile-Sierra's "just and reasonable" standard, no matter if the challenger is a contract party or an outsider, fulfills the doctrine's "animating purpose"—the promotion of the stability of energy contracts. If the doctrine applied only to the parties to an energy contract, but not consumers or advocacy groups, then the very stability that it seeks would be unraveled.[5]

Applying *Mobile-Sierra*'s "just and reasonable" standard, no matter if the challenger is a contract party or an outsider, fulfills the doctrine's "animating purpose"—the promotion of the stability of energy contracts.

The Court's ultimate holding was that the application of *Mobile-Sierra*'s "public interest" standard for FERC review does not depend on the identity of the complaining parties. *NRG* levels the playing field and harmonizes the standard of review applicable to everyone.

In closing, we find the key takeaways from *NRG* are the following:

- The industry can remain confident that some 50 years of law not only remain unchanged, but in fact are revitalized by *NRG* and its reaffirmation that FERC will abide by a "just and reasonable" standard, limited to acting in the public interest.
- *NRG* avoids a double standard: one for contracting parties challenging a particular accord and a wholly different standard for third-party challengers. By unifying the two, the justices have avoided unnecessary confusion and potentially disparate results.
- Purely from a business standpoint, note well the Supreme Court's emphasis on the "animating purpose" of this body of law, that of maintaining stability in the energy markets. FERC may not disrupt the free market without adequate cause. Industry members should take great comfort in the fact that the High Court recognizes that stability and predictability is essential to the industry's well-being, and with it that of the nation.



NOTES

1. ___ U.S. ___ (January 13, 2010).
2. 350 U.S. 332.
3. 350 U.S. 348.
4. 554 U.S. ___ (2009).
5. FERC Commissioner Mark Spitzer (and probably a majority of the other commissioners) has been in favor of FERC's role in balancing of all competing interests to ensure just and reasonable rates. See www.ferc.gov/about/com-mem.asp. Of course, the decision lays to rest complaints about *Mobile-Sierra*'s use for this purpose.—*Ed.*

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