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## Supreme Court Appears Poised to Retain *Mobile-Sierra* Standards for Evaluating Lawfulness of Contract Rates in a Market-Based Environment

On February 19, 2008, the U.S. Supreme Court heard oral arguments on whether the long-standing *Mobile-Sierra* doctrine remains viable under a market-based rate regime, particularly when there is widespread dysfunction in the market. Under the *Mobile-Sierra* doctrine, the Federal Energy Regulatory Commission (FERC) may not overrule contractual agreed-to energy prices — even if they are unjust and unreasonable — unless the larger “public interest” would be injured if the contract remains in effect. The case before the Supreme Court involved an appeal from a Ninth Circuit decision that held that the *Mobile-Sierra* standard, which made regulatory contract abrogation rare, was not applicable where high contract prices are at issue and where FERC had not made advance findings about the continued competitiveness of the market.

Questioning by the seven Supreme Court Justices in attendance (Chief Justice Roberts and Justice Breyer recused themselves) revealed that the jurists were not sold on the Ninth Circuit’s analysis. Justices Scalia and Souter in particular seemed troubled by the court’s willingness for FERC to abrogate contracts in the absence of market power, bad faith, or market manipulation. Only Justice Ginsburg seemed likely to affirm the Ninth Circuit’s decision. Most observers felt that the Supreme Court likely would vacate the Ninth Circuit’s ruling by a comfortable margin, and reaffirm the continued viability of the *Mobile-Sierra* standards where market-based rates are in effect.

## FERC Mandates Reforms of Interconnection Queue Process

FERC recently issued an order requiring Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) to report to the FERC on the status of their efforts to improve the processing of their interconnection queues. FERC began by noting the two main reasons for the current interconnection queue backlog: the unprecedented demand for renewable generation that can be brought online more quickly than traditional generation, and the difficulties in accommodating new capacity markets that did not exist when the current queue management approach was developed.

In order to address these concerns, FERC held that RTOs and ISOs must provide the FERC with the following information by April 19, 2008:

1. The current size of their queues
2. The current timeframes for processing those requests

3. The nature and extent of problems that led to the backlogs
4. The status of stakeholder discussions on queue reform
5. The schedule for implementing reforms, including a target date for filing any necessary tariff amendments or waivers

FERC suggested that RTOs and ISOs also could make reforms without having to amend their tariffs, including increasing staff to conduct interconnection studies, adopting more efficient modeling for feasibility studies, and performing a single-system impact study for a cluster of interconnection requests. This order marks an increased effort by FERC to reduce the interconnection queue backlog and is motivated by a desire to enable more viable projects to interconnect with the grid.

## **FERC Provides Blanket Section 203 Authorization to Facilitate Asset Transfers While Providing Increased Protection for Jurisdictional Customers**

In February 2008, FERC revised its Section 203 rules dealing with the authorizations that must be received whenever jurisdictional companies wish to merge or otherwise acquire or dispose of FERC jurisdictional generation and transmission assets. With an objective of strengthening the commission's ability to guard against affiliate abuse, FERC restricted affiliate transactions between franchised public utilities that have captive customers or that own or provide transmission service over jurisdictional transmission facilities as well as market-based power sales by affiliates or non-utility affiliates.

FERC also granted blanket authorization for public utilities to dispose of less than 10 percent of their voting securities to a public utility holding company if the holding company and its affiliates own less than 10 percent of the public utility as a result of the disposition. In addition, FERC granted blanket authorization for regulated entities to acquire or dispose of jurisdictional contracts where neither the entity acquiring the contract nor the entity transferring the contract has captive customers or owns or provides transmission service over jurisdictional facilities. The contract must not convey control over the operation of a generation of transmission facility, the parties to the transaction must not be associate or affiliate companies, and the acquiring entity must not be a public utility.

These new rules demonstrate FERC's commitment to facilitating investment in the electric utility industry, while providing increased protection for public utility customers from the potential impacts of asset transfers and acquisitions.

## **FERC Proposes Reforms to Clarify Standards of Conduct for Transmission Providers**

On March 20, 2008, FERC issued a notice of proposed rulemaking (NOPR) to reform the Standards of Conduct rule for transmission providers in order to make the Standards of Conduct amenable to fair enforcement, and to establish appropriate safeguards against undue discrimination and preference.

FERC reasoned that the present Standards of Conduct rules have proven to be overly broad, complex, and difficult to understand, and have presented problems in terms of compliance and enforcement. The proposed rule will narrow the scope of the Standards of Conduct rule so that it focuses on the relationship between transaction providers and marketing affiliates rather than energy affiliates. This, FERC stated, will bring the focus of the Standards of Conduct to the areas with the highest risk of affiliate abuse and undue discrimination. The new rule will focus on the actual functions an employee performs rather than that employee's position on a corporate organizational chart. This new rule is intended to allow FERC to police affiliate abuse, while allowing transmission providers to effectively operate their business.

## **FERC Proposes Nuclear Reliability Standards and Considers Recovery of Reliability Penalty Costs**

Late last week, FERC proposed to approve a reliability standard filed by an Electric Reliability Organization (ERO) that coordinates certain activities between nuclear power plants and transmission entities. The Nuclear Plant Interface Coordination Reliability Standard would require a nuclear power plant operator and its suppliers of off-site power and related transmission and distribution services to coordinate with regard to the requirements for safe and reliable nuclear plant operation and system operating limits. FERC expects that the proposed reliability standard not only will provide a strong reliability framework for the nation's bulk power system, but also will encourage a culture of compliance at large grid operators. Comments on the notice of proposed rulemaking (NOPR) are due 30 days after the NOPR's publication in the Federal Register.

In a separate order, FERC provided guidance on the recovery of reliability penalty costs by RTOs and ISOs. FERC noted that, while under Section 215 of the Federal Power Act penalties may be assessed against RTOs and ISOs for noncompliance with mandatory and enforceable reliability standards, RTOs and ISOs may have insufficient reserves to pay those penalties. FERC considered two

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possible methods for RTOs and ISOs to seek recovery of the cost of a penalty for violation of a reliability standard: the direct assignment of such costs to an entity that the RTO or ISO believes to be responsible for its incurrence of the violation, and the recovery of such costs from all members and/or customers of the RTO or ISO. FERC stated that the direct assignment of the costs would not be allowed unless the entity received a prior notice of its potential liability for penalty costs in the event that it contributed to the RTO and ISO's violation of a reliability standard and incurrence the penalty. FERC noted the importance of RTOs and ISOs to include provisions concerning the appropriate responsibilities for reliability-related monetary penalties in their contracts with their members and customers and/or in their tariffs. FERC added that it will review rate filings made by RTOs and ISOs and will consider whether the RTO or ISO had a sound compliance program in place to prevent violations.

## FERC Investigates the Causes of the Florida Blackout

In response to the widespread blackout in Florida in February 2008, FERC announced that it was joining the North American Electric Reliability Corporation (NERC), the Florida Reliability Coordinating Council, and the relevant regional entity in conducting an analysis into the causes of the Florida blackout and into possible violations of the reliability standards. FERC directed its Office of Enforcement, Office of Electric Reliability, and other FERC offices to conduct a nonpublic but formal investigation, replete with subpoena authority, into possible violations of the reliability standards in connection with or related to the Florida blackout. The findings will be reported to the Commission. No deadline was imposed.