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INSIGHTS

Industry Groups Alert FERC that the Viability of Contract Formation and Contract Sanctity are at Stake in Review of Initial Decision

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On May 22, 2015, the Federal Energy Regulatory Commission ("Commission") issued Opinion No. 537,***[1]*** reversing the March 28, 2014 Initial Decision***[2]*** in part and remanding for clarification and further findings by the Administrative Law Judge (ALJ). The issues on which the Commission sought clarification through the remand related to the *Mobile-Sierra* presumption, which the Commission had determined applied to the contracts at issue which had been made pursuant to the WSPP Agreement.***[3]*** The *Mobile-Sierra* presumption holds that qualifying contracts are just and reasonable under the Federal Power Act unless a complaining person can make a specific showing that either unlawful acts by its contract counterparty had a direct impact on contract negotiations, which rendered the contract not the product of fair arms-length negotiations, or that the impact of the contract was so great that the public interest demands it be altered.***[4]***

With regard to the remanded portion of the Initial Decision, the Commission directed the ALJ to "make findings . . . on what constitutes an individual contract and to apply that definition consistently in the analysis of whether" there were unlawful activities "that directly affected the rates under specific contracts."***[5]*** The Commission specified that the ALJ should carry out the task by (1) using a consistent definition of "contract" to "conclusively identify which, if any of the contracts was affected" by specific unlawful acts and (2) discussing "the evidence that demonstrates the causal link between any unlawful activity and the effect it had on a specific contract rate."***[6]***

On January 8, 2016, the ALJ issued a Revised Initial Decision in which he concluded that the *Mobile-Sierra* presumption would not apply to the contracts he identified.***[7]*** The Revised Initial Decision does not appear to have followed the directives of the Commission in considering either contract formation or the direct impact of activities on contract negotiations. The matter is pending before the Commission on exceptions.

However, the story does not stop there. Alarmed by the apparent core defects in the Revised Initial Decision and the significant potential for material problematic precedent if it is affirmed, industry groups have taken the very unusual step of filing letters in the docket apprising the Commission of the significance of the issues.

For example, on April 7, 2016, WSPP filed a letter with the Commission noting "the potential significance to WSPP's 260 electric utility members and their need for clear and certain contract

formation rules"[8] in a Commission order on the Revised Initial Decision. WSPP went on to state:

[T]he Revised Initial Decision does not refer to the WSPP Agreement's detailed contract formation provisions; nor does it refer to formation on a contract-by-contract basis. WSPP is concerned that the absence of such context and analysis could be understood to indicate that a WSPP transaction could occur and be legally binding without conformity to those detailed provisions. Such a precedent could expose WSPP members to unexpected results, potentially creating risk that parties' communications could create binding obligations even when not fulfilling WSPP contract formation requirements. The resulting uncertainty could diminish the utility of the WSPP Agreement and the liquidity it adds to Western markets. Further, because the WSPP Agreement is filed with the Commission, the Commission's statements regarding formation of binding obligations under the WSPP Agreement would likely have great weight in future disputes before this Commission or the courts—potentially greater weight than pronouncements regarding an agreement format that is not filed.[9]

Previously, on February 8, the Western Power Trading Forum ("WPTF") and the Electric Power Supply Association ("EPSA") (together, "Trade Associations") filed a joint letter expressing concern regarding the Revised Initial Decision's failure to properly apply the *Mobile-Sierra* standards as directed by the Commission.[10] WPTF and EPSA stated:

The Trade Associations have become concerned that the January 8 Revised Initial Decision does not apply the *Mobile-Sierra* presumption as set forth by the Supreme Court . . . . The Commission's orders in this proceeding are consistent with these recent Supreme Court decisions, and affirmed the *Mobile-Sierra* presumption as [a] general matter and its application to the contracts at issue in this proceeding. The Revised Initial Decision, on the other hand, appears to find that the *Mobile-Sierra* presumption can be avoided based upon different and less stringent grounds than those articulated by the Court or the Commission.[11]

The *Mobile-Sierra* presumption has been established precedent since the 1950's and has recently been reaffirmed by the Supreme Court;[12] the issue of contract sanctity is a lynchpin of the Commission's market-based rates program. The need to recognize the contract-specific nature of the *Mobile-Sierra* analysis and to faithfully require complainants to carry the burden that analysis imposes is critical to confidence in contracts entered into under the Federal Power Act and subject to Commission regulation.

The fact that these industry groups undertook the unusual action of alerting the Commission to the risk that this Revised Initial Decision has raised issues that go to the core of power market participants' confidence that they can enter into enforceable contracts that will be upheld as negotiated absent a proper *Mobile-Sierra* showing is notable. The Commission's treatment of the issues raised by the letters will be of significant import in determining the sanctity of power contracts.

[1] *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 151 FERC ¶ 61,173 (2015) (Opinion No. 537), *reh'g denied*, 153 FERC ¶ 61,386 (2015).

[2] *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 146 FERC ¶ 63,028 (2014).

[3] Opinion No. 537 at PP 94-101.

[4] *E.g.*, *id.* at P 95. The doctrine arose from a pair of cases issued by the Supreme Court on the same day six decades ago. *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

[5] Opinion No. 537 at P 105.

[6] *Id.* at P 120.

[7] *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 154 FERC ¶ 63,004 (2016) (Revised Initial Decision).

[8] *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, Correspondence from WSPP, Inc. at 1, Docket No. EL01-10-136 (filed on Apr. 7, 2016)(***attached***).

[9] *Id.* at 3.

[10] *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, Correspondence from WPTF & EPSA, Docket No. EL01-10-136 (filed on Feb. 8, 2016) (WPTF & EPSA Letter)(***attached***). AES Corporation filed a similar letter in the same docket on February 15, 2016(***attached***).

[11] WPTF & EPSA Letter at 2 (internal citations omitted).

[12] *See, e.g.*, *NRG Power Marketing, LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2011); *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527 (2008).