

INSIGHTS

## FERC Confirms Contract-Specific Nature of Mobile-Sierra Presumption and WSPP Agreement Requirements

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Earlier this [year](#), we alerted you to a January 8, 2016 Revised Initial Decision by an administrative law judge (ALJ) at the Federal Energy Regulatory Commission (Commission) that implicated issues of concern to the industry as a whole, as well as to the parties to the proceeding. The Commission recently issued an [order](#) reversing the Revised Initial Decision and, in doing so, upheld the well-established contract-specific nature of a challenge to bilaterally negotiated contracts pursuant to the *Mobile-Sierra* presumption. [\[1\]](#)

### Background

As described in more detail in our April 11, 2016 post, in its review of a 2014 Initial Decision after hearing, the Commission's Opinion No. 537 [\[2\]](#) remanded certain issues to an ALJ for clarification and additional factual findings as to (1) the identification of the short-term contracts at issue, which had been made pursuant to the WSPP Agreement; and (2) the determination of whether complainants had shown those identified contracts were directly affected by specific types of allegedly unlawful or manipulative activities by the seller, as required under *Mobile-Sierra*.

The resulting January 8 Revised Initial Decision [\[3\]](#) ignored the requirements of the WSPP Agreement for confirmation of transactions and the Commission's clear instructions to make contract-specific findings.

Alarmed by the core defects in the January 8 Revised Initial Decision and the potential for material problematic precedent if it was affirmed, industry groups filed letters in the docket apprising the Commission of the significance of the issues. WSPP's letter noted that the Revised Initial Decision did "not refer to the WSPP Agreement's detailed contract formation provisions; nor does it refer to formation on a contract-by-contract basis." [\[4\]](#) The Western Power Trading Forum (WPTF) and the Electric Power Supply Association (EPSA) filed a joint letter expressing concern that the Initial Decision did not apply the *Mobile-Sierra* presumption as set forth by the Supreme Court and the Commission; the AES U.S. Strategic Business Unit filed a letter raising similar issues regarding the *Mobile-Sierra* presumption. [\[5\]](#)

Opinion No. 552 Adheres to *Mobile-Sierra*

The Commission's October 18, 2016, Opinion No. 552 reversed the Revised Initial Decision on every point, and directly addressed the concerns expressed regarding the interpretation of the WSPP Agreement and the requirements of the *Mobile-Sierra* analysis (albeit without discussing the industry entities' letters in detail<sup>[6]</sup>).

In addressing the question of whether the Revised Initial Decision appropriately identified contracts confirmed pursuant to the WSPP Agreement, the Commission held that a contract for purposes of the proceeding is a transaction properly entered into under the terms of the WSPP Agreement. Specifically, the WSPP Agreement provides generic terms pursuant to which its members enter into bilateral transactions; written or verbal confirmations establish the specific details such as price, quantity, and delivery point. The individual confirmation agreements, along with the umbrella WSPP Agreement, represent the contracts at issue. The Revised Initial Decision's methodology for identifying the contracts did not take into account the WSPP Agreement procedures, and was thus invalid.<sup>[7]</sup>

Opinion No. 552 also appears to reflect the Commission's adherence to the *Mobile-Sierra* presumption of just and reasonable rates in bilaterally negotiated contracts. For example, the Commission emphasized that, pursuant to *Mobile-Sierra* and the Supreme Court's 2008 *Morgan Stanley*<sup>[8]</sup> opinion, "a causal connection between unlawful activity and a contract rate is a prerequisite to the Commission abrogating a bilaterally negotiated contract in circumstances like those presented here." In addition, "claims of general market dysfunction are insufficient to avoid application of the *Mobile-Sierra* presumption in the circumstances presented here." Evidence purporting to demonstrate a mere "pattern and practice" did not meet the requirements for avoiding the application of the *Mobile-Sierra* presumption as to specific contracts.<sup>[9]</sup> Even if the Revised Initial Decision had properly identified the contracts at issue, there was no demonstrated causal connection between allegedly unlawful behavior and any identified contract.<sup>[10]</sup>

#### Future Commission Action on *Mobile-Sierra*

Opinion No. 552 is a positive development with respect to Commission adherence to the *Mobile-Sierra* presumption in the market-based rate framework. But future Commission action on an Initial Decision<sup>[11]</sup> in a separate proceeding could also affect parties to bilateral market-based rate contracts. That Initial Decision also improperly deviated from Supreme Court and Commission precedent regarding the application of the *Mobile-Sierra* presumption to long-term bilateral contracts. The Commission's approach to issues presented in that proceeding will instruct parties on whether the legal standards and contract protection they relied upon in entering into the contracts will be upheld.

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<sup>[1]</sup> *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 157 FERC ¶ 61,026 (2016) (Opinion No. 552).

[\[2\]](#) *Puget Sound Energy, Inc.*, 151 FERC ¶ 61,173 (2015) (Opinion No. 537), *reh'g denied*, 153 FERC ¶ 61,386 (2015) (Opinion No. 537-A).

[\[3\]](#) *Puget Sound Energy, Inc.*, 154 FERC ¶ 63,004 (2016) (Revised Initial Decision).

[\[4\]](#) *Puget Sound Energy, Inc.*, Correspondence from WSPP Inc., Docket No. EL01-10136 (Apr. 7, 2016).

[\[5\]](#) *Puget Sound Energy, Inc.*, Correspondence from WPTF and EPSA, Docket No. EL01-10-136 (Feb. 8, 2016); Correspondence from the AES U.S. Strategic Business Unit, Docket No. EL01-10-136 (Feb. 15, 2016).

[\[6\]](#) See Opinion No. 552 at n.25.

[\[7\]](#) Opinion No. 552 at PP 21-22.

[\[8\]](#) *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527 (2008); see also *NRG Power Marketing, LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2011).

[\[9\]](#) Opinion No. 552 at PP 42-48, 66-69.

[\[10\]](#) Opinion No. 552 at P 42.

[\[11\]](#) *Cal. Pub. Utils. Comm'n v. Sellers of Long-Term Contracts*, 155 FERC ¶ 63,004 (2016).