



FEDERAL ENERGY REGULATORY COMMISSION

December 18, 2008

Chairman Joseph T. Kelliher

Docket Nos. EL02-28-006, EL02-33-007, EL02-38-006; EL02-29-006, EL02-30-006, EL02-31-006, EL02-32-006, EL02-34-006, EL02-39-006; EL02-43-006 and EL02-56-0000

Item No. E-1

Statement of Chairman Joseph T. Kelliher on Morgan Stanley Remand Order

"Today, we act on remand from the Supreme Court and the Ninth Circuit and establish a procedure to reopen the record to determine whether contracts entered into during and after the time of the California and Western energy crisis of 2000-2001 should be modified. This order takes an important step towards final resolution of the power crisis.

In *Morgan Stanley*, the Supreme Court reversed the Ninth Circuit decision in *Snohomish* on various grounds, clarifying that there is only one statutory standard under the Federal Power Act for reviewing wholesale power rates – the just and reasonable standard. *Morgan Stanley* held that *Mobile* and *Sierra* did not create an extra-statutory standard for review of contract rates. Instead those cases defined what it means for a contract rate to satisfy the just and reasonable standard. Unless the parties expressly provide otherwise, a mutually agreed upon contract rate is presumed just and reasonable unless it seriously harms the public interest. The Supreme Court also rejected the Ninth Circuit's holding that the *Mobile-Sierra* presumption operates differently depending on whether a challenge is brought by a buyer or seller. The Supreme Court agreed with the Ninth Circuit on other *Mobile-Sierra* issues, such as the default standard.

However, the Supreme Court remanded the case to the Commission for further consideration of whether the contracts at issue imposed an excessive burden on consumers "down the line", and whether any seller under a particular contract engaged in unlawful activities that directly affected the specific contract negotiations, thereby eliminating the presumption that the contract was reasonable when entered into. If a buyer under one of the contracts at issue has alleged unlawful market conduct by the seller under that contract, then under the Supreme Court's opinion, there must be a showing of both unlawful market activity by the seller, and that such activity had a direct effect on the negotiations of the particular contract, before the presumption of reasonableness of the contract can be overcome. If the buyer is unable to overcome the presumption of reasonableness with respect to a contract in this case, then it must demonstrate that the contract imposes an excessive burden on consumers. In the remand order, the Commission establishes a paper hearing to examine these issues. Given the unique circumstances of these contracts, most of which have run their term, we interpret that the "down the line" analysis should compare the contract price during the full term to the market prices prevailing at the time.

We establish a paper hearing to allow the parties to supplement an already voluminous record. We believe there is no need for trial type hearing, and that a paper hearing offers the most administrative efficiency.

This consideration is not insignificant, since the events that will be examined occurred years ago, and most of the contracts in question have run their full term. If we had elected for a trial type hearing that would have foreclosed final resolution until more than a decade after the wholesale transactions took place.





STATEMENT

However, the Commission has long encouraged settlement of the disputes arising out of the California and Western power crisis. To that end, the FERC Dispute Resolution Service (DRS) contacted the parties to determine the level of interest in settlement, even at this late stage. The response was encouraging. For that reason, the paper hearing is suspended during these settlement discussions. DRS is directed to report to the Commission on the progress and prospects of settlement. If settlement cannot be achieved for a particular contract, the paper hearing will proceed as to that contract."