



Federal Energy Regulatory Commission
October 19, 2006
Open Commission Meeting
Talking Points
Commissioner Suedeen Kelly

Mobile-Sierra Doctrine Statement

"On October 18, 2006, the Commission issued an Order on Compliance Filing accepting tariff provisions involving the establishment of an Independent Coordinator of Transmission (ICT) for Entergy's transmission system and a related ICT Agreement between Entergy and its ICT. The ICT Agreement contained a provision specifying that the standard of review for any changes to the agreement proposed by a party, non-party or the Commission acting *sua sponte* shall be the "public interest" standard of review set forth in *Mobile* and *Sierra*. For the reasons provided in my concurring statement, I believe that it is appropriate under the circumstances presented in the case to accept the ICT Agreement.

I think it is important to lay out what the *Mobile-Sierra* doctrine is about. It concerns the degree of risk that, after a contract has been approved by the Commission, the Commission will take action, either on its own, or at the request of one of the parties, or on complaint by third parties, to change that contract.

I believe there is a narrow point of disagreement as to what the law should be regarding the risk of such a change. In the unregulated world, the risk of a future change by a tribunal is very small—less than one percent. In the Commission-regulated world, under the Federal Power Act's and Natural Gas Act's "just and reasonable" standard, the risk is still very small—less than one percent. Similarly, under the "public interest" standard, the risk is still very small—less than one percent. There will always be some level of risk that a contract may be changed, and parties will need to contract around that risk.

For the past seventy years, the "just and reasonable" standard has been used almost exclusively by the Commission to review electric and natural gas contracts. And I believe that the Commission has behaved responsibly with respect to contracts. The Commission has recognized that under the "just and reasonable" standard, it does not take contract modification lightly. The risk of contract modification by the Commission has not changed; therefore, the perception of risk of such modification should not have changed.

Nevertheless, I would say that, in recent years, there has been quite a bit of unwarranted hysteria about the risk of contract modification. For example, it has become an unreasoned either-or proposition; either you pledge your allegiance to the *Mobile-Sierra* "public interest" standard and the world believes you to be a proponent of upholding contract parties' bargain or you pledge allegiance to the "just and reasonable" standard and it appears you are soft on contracts. It is time to end the use of slogans and have a reasoned discussion about the narrow point that is really at issue here.

The law in this area is confused. But clearly, not all contracts are such that they should be entitled to less risk of future change. In a recent D.C. Circuit Court case, *Maine PUC v. FERC*, 454 F.3d 278 (D.C. Cir. 2006), the court upheld the Commission's rejection of a "public interest" standard provision proposed by parties to a Transmission Owners Agreement regarding withdrawal from RTO-NE. The court noted that the contract was a "complex agreement establishing a new regional structure impacting all market participants," which "hardly seems the situation

Federal Energy Regulatory Commission
October 19, 2006
Commissioner Suedeen Kelly

Mobile-Sierra was designed to guard against, viz., where one party to a rate contract on file with FERC attempts to effect a unilateral rate change by asking FERC to relieve its obligations under a contract whose terms are no longer favorable to that party." *Id.* at 284. This is one reason I disagree with the Notice of Proposed Rulemaking (NOPR) for Standard of Review for Modifications to Jurisdictional Agreements, which would require the Commission to review all jurisdictional agreements under the Federal Power Act and the Natural Gas Act (except transmission service agreements executed under an OATT or transportation agreements executed pursuant to the standard form of service agreement in a pipeline tariff) under a "public interest" standard, unless parties include certain language in the agreement specifying that the Commission may review proposed modifications under a "just and reasonable" standard.