

*THE MOBILE-SIERRA DOCTRINE
IN MISO:
STILL ALIVE AND KICKING
(FOR NOW)*

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MOBILE-SIERRA CONTRACTS AND THE MIDWEST ISO

- “Mobile-Sierra” contracts have been under attack in the Midwest ISO for the last six months.
- The contracts have been preserved for at least another three years.
- However MISO and some Transmission Owners are still attempting to require customers to bear costs and burdens that are inconsistent with their contracts.

THE MOBILE-SIERRA DOCTRINE – A REFRESHER

- In 1956 the Supreme Court held in *United Gas Pipeline v. Mobile Gas Service* and *FPC v. Sierra Pacific Power* that the Federal Power Act and Natural Gas Act did not abrogate contracts.
- Contracts that meet “Mobile-Sierra” standards cannot be modified unilaterally by a party or by the Commission absent a finding that modification is necessary in the public interest.
- The “public interest” standard for modification of contracts has been called “nearly insurmountable.” However, FERC modified Mobile Sierra contracts when it restructured the gas industry.

COURT OF APPEALS DECISIONS ON MOBILE-SIERRA

➤ *Texaco v. FERC*:

- ✓ A contract that is silent as to FERC's authority to modify it does not give FERC authority to modify it on "just and reasonable" grounds.
- ✓ The court disavowed dicta in *Union Pacific v. FERC* that could be interpreted as allowing FERC to modify contracts under the "just and reasonable" standard if the contract did not explicitly restrict FERC from doing so.

➤ *PEPCO v. FERC*: A rate disparity resulting from Mobile-Sierra protection does not make a contract unduly discriminatory.

COURT OF APPEALS DECISIONS ON MOBILE-SIERRA continued

➤ *Boston Edison v. FERC:*

- ✓ If the Commission has accepted a contract with a specified rate for filing, it cannot later modify it under the “just and reasonable” standard.
- ✓ A provision acknowledging that the contract is subject to FERC regulation does not make Mobile-Sierra inapplicable.
- ✓ FERC should stop trying to re-write Mobile-Sierra contracts and establish a policy for new contracts.

COMMISSION DECISIONS ON MOBILE-SIERRA

- *Sithe v. Niagara Mohawk*: If a waiver of the right to challenge or modify a contract is not stated explicitly, the contract may be modified on “just and reasonable” grounds. [*Texaco* rejects this principle.]
- *Nevada Power v. Enron: Union Pacific* held that absent an explicit limitation on the Commission’s authority, the Mobile-Sierra doctrine is inapplicable. [Dicta, relying on *Union Pacific* dicta that the *Texaco* court disavowed.]

MISO'S ATTACK ON GRANDFATHERED CONTRACTS

- In its March 31, 2004 filing of the Energy Market Tariff, MISO attempted to make a case for conversion of all Grandfathered Agreements (GFAs) to the EMT.
- MISO asserted that GFAs constituted 40,000 MW of capacity and that carving out those contracts would make the market unworkable.

MISO'S WEAKNESS IN ATTACK ON GFAS

- MISO did not evaluate whether the contracts provided for transmission service that would, absent grandfathering, be subject to the Energy Market Tariff.
- MISO evaluated only some of the contracts and projected its conclusions to the other contracts.



MISO'S WEAKNESS IN ATTACK ON GFAS continued

- MISO failed to distinguish between Mobile-Sierra contracts and contracts that could be modified under the "just and reasonable" standard.
- MISO's schedule for implementation of the markets did not leave enough time for an on-the-merits proceeding to evaluate whether to abrogate Mobile-Sierra contracts.

MISO'S SETTLEMENT PROPOSAL FOR GFAS

- MISO offered GFAs four choices:
 - ✓ Convert to the Energy Market Tariff.
 - ✓ Option A: Receive FTRs and be charged for congestion.
 - ✓ Option B: Do not receive FTRs; be protected against congestion costs associated with day-ahead schedules; and pay for congestion to the extent real-time loads differ from day-ahead schedules.
 - ✓ Option C: Do not receive FTRs and pay congestion costs.
- MISO actually argued strenuously against Option B, even though it had proposed it.

FERC'S ORDER ON GRANDFATHERED CONTRACTS

- In May, the FERC set all 445 GFAs for hearing.
- Step 1: All GFA parties were required, within 30 days to provide information on the GFAs, state whether the parties agreed to one of the settlement options and state whether the contract had Mobile-Sierra protection.
- Step 2: All GFAs as to which the parties could not agree in Step 1 were set for hearing, to be completed within another 30 days.

THE GFA HEARING

- Much of the effort in the hearing was devoted to organizing and clarifying the Step 1 information and encouraging settlements.
- The hearings on GFAs that did not settle generally were brief.
- The ALJs found that only 215 of the 450 GFAs actually provided for transmission service in MISO.
- The ALJs ultimately issued Findings of Fact on only 52 disputed contracts out of 450 GFAs.

THE GFA HEARING continued

- The ALJs held that if a contract does not explicitly limit the Commission's right to modify a contract, the Mobile-Sierra doctrine is inapplicable.
- The ALJs relied on the *Nevada Power* decision which relied on the discredited dicta in *Union Pacific*, and ignored the *Texaco* opinion holding that the *Mobile-Sierra* doctrine applies to silent contracts.
- The ALJs did not assert that the public interest required modification of explicit Mobile-Sierra contracts; that issue was beyond their mandate from the Commission.

THE GFA ORDER

- On September 16, the Commission issued its order on the GFAs.
- FERC concluded that GFAs representing only 15,000 MW had not agreed to one of the MISO's settlement options.
- FERC pointed out that MISO's concerns were based on the assumption that 2½ times as much transmission service would be excluded from the energy markets.



THE GFA ORDER continued

- The Commission required 50 GFAs (5000 MW) that were subject to the just and reasonable standard to adopt Option A or C or convert to the Energy Market Tariff.
- It carved out 77 GFAs (7000 MW) as explicit Mobile-Sierra contracts, holding that the record evidence suggests that the Energy Market can operate reliably despite the carve-out until early 2008.

THE GFA ORDER continued

- It also carved out 20 GFAs (1200 MW) that are silent on the standard of review without addressing *Texaco, Nevada Power, or Union Pacific*.
- Finally, it carved out 30 GFAs (2200 MW) for which the transmission provider is not a public utility.
- Result: Contract rights are preserved, but FERC still has not acknowledged that contracts that do not explicitly limit FERC's right to modify the contracts are subject to Mobile-Sierra protection.

MISO'S ADMINISTRATION OF CARVED-OUT CONTRACTS

- The service will not be physically carved out of MISO; it will be financially carved out.
- GFA parties are required to submit informational schedules to MISO.
- Carved-out GFAs will be represented in the FTR allocation model as "implicit FTRs."
- MISO will attribute congestion costs to carved-out GFAs and will use revenue distributions from the implicit FTRs to offset those costs.

MISO'S ADMINISTRATION OF CARVED-OUT CONTRACTS

continued

- MISO may require carved-out GFA parties to pay congestion costs and receive rebates equal to the payments.
- MISO apparently will uplift the difference between the congestion costs attributed to carved-out GFAs and the revenues from the implicit FTRs and allocate it to all load in MISO, including the carved-out GFAs.

MISO'S ADMINISTRATION OF CARVED-OUT CONTRACTS

continued

- MISO therefore intends to allocate congestion costs to carved-out GFAs.
- FERC has held that payments for congestion costs are payments for redispatch, which is implicit in a firm transmission contract. Therefore, the uplift charge would constitute a modification of the carved-out GFAs.

THE FUTURE OF CARVED-OUT GFAS IN MISO – TWO OPINIONS

- Opinion 1: Mobile-Sierra GFAs will not be modified.
 - ✓ Carved-out GFAs amount to only 10% of the MISO load.
 - ✓ FERC held that given the small percentage of carved-out service, the market can operate reliably and economically through the end of the transition period in February 2008.
 - ✓ It might be difficult for FERC to reverse itself in 2008 since the percentage of carved-out service will be even smaller in terms of impacts on reliability and cost shifting.

THE FUTURE OF CARVED-OUT GFAS IN MISO – TWO OPINIONS continued

- Opinion 2: Mobile-Sierra GFAs will be modified
 - ✓ FERC held that GFAs are protected only during the transition period.
 - ✓ MISO will be collecting data on the impact of carve-outs on reliability and economics.
 - ✓ FERC has required MISO to submit a post-transition proposal one year in advance, which gives enough time to create a record that would support a finding that the contracts should be modified under the public interest standard.

THE FUTURE OF CARVED-OUT GFAS IN MISO – TWO OPINIONS continued

- Opinion 2: Mobile-Sierra GFAs will be modified (continued)
 - ✓ Some Court of Appeals decisions state that the public interest standard is not insurmountable when the Commission is implementing broad-based policy initiatives.
 - ✓ Several gas industry orders modified contracts under the public interest standard.

CONCLUSION

- Explicit and implicit Mobile-Sierra contracts have been preserved for now.
- MISO will attempt to reduce the differences between carved-out GFAs and GFAs that operate under one of the four options.
- FERC is likely to require all carved-out GFAs to convert to Option A, Option C or Energy Markets Tariff service as of February 2008.