

# Client Alert

Global Transactions and National Appellate Practice Groups

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## Ninth Circuit Denies Challenges to FERC's Market-Based Rate Policies

Since the early 1990s, the Federal Energy Regulatory Commission (FERC) has allowed sellers that lack (or have adequately mitigated) market power to make wholesale sales of electric energy, capacity, and certain ancillary services at market-based rates. Market-based rate pricing is an alternative to selling power at traditional cost-of-service rates. In 2007, in Order No. 697, the Commission promulgated regulations codifying its market-based rate policies. Order No. 697 was challenged by several parties, including Public Citizen, Inc., the Connecticut, Illinois, and Rhode Island Attorneys General, the Montana and Colorado consumer counsels, and the Public Utility Law Project of New York, Inc. On October 13, 2011, in Montana Consumer Counsel v. FERC, the United States Court of Appeals for the Ninth Circuit rejected these challenges and re-affirmed the lawfulness of the Commission's market-based rate approach under the Federal Power Act.

In its decision, the Ninth Circuit explained that “[b]y screening for market power before authorizing market-based rates, and by continually monitoring sellers for evidence of market power,” the Commission had “adopted a permissible approach to fulfilling its statutory mandate to ensure that rates are just and reasonable.” In particular, the Court held that “[w]here sellers do not have market power or the ability to manipulate the market (alone or in conjunction with others), it is not unreasonable” for the Commission “to presume that rates will be just and reasonable.” The Court also made clear that it was bound by its earlier decision in *California ex rel. Lockyer v. FERC*, which had affirmed the lawfulness of the Commission's market-based rate approach in a case arising out of the 2000-2001 Western energy crisis.

The Commission's market-based rate policies have promoted competition and helped bring stability and certainty to the Nation's energy markets. As the Ninth Circuit emphasized, however, the question before it was not whether the court thought that “market-based rates are a good idea; instead, it is whether the market-based rate policy embodied in Order 697 exceeds” the Commission's authority under the Federal Power Act. Taking into account its own precedent and that of other circuits, as well as Supreme Court precedent regarding review of agency decision-making, the Ninth Circuit found that Order No. 697 “does not per se violate the” Federal Power Act. Nonetheless, the Court did “leave open the possibility that,” in an appropriate

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case, petitioners or other parties could bring an as-applied challenge to the Commission's implementation of Order No. 697.

The Electric Power Supply Association, represented by King & Spalding LLP, was a key contributor in the *Montana Consumer Counsel* case. It submitted a substantial brief on the merits and participated at oral argument in support of the Commission. The decision is a major victory for the Electric Power Supply Association and companies who are able to sell power at market based rates due to the Commission's market-based rate policies.

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