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ENERGY

States are dealt blow on power

June 27, 2008 | Elizabeth Douglass | Times Staff Writer

The U.S. Supreme Court ordered federal regulators Thursday to revisit a decision upholding high-priced electricity contracts that California utilities and others signed amid the chaos and soaring prices of the state's 2000-01 energy crisis.

The move gives officials from California, Washington and Nevada another chance to convince the Federal Energy Regulatory Commission that the long-term deals should be nullified or renegotiated because the terms were based on electricity prices that were grossly inflated by illegal trading schemes carried out by Enron Corp. and others.

But the chance is a slim one, because the high court's 5-2 decision asks only that FERC rework its analysis on two points it used to justify its position that no changes are needed in the contracts. And, judging from the comments of two FERC commissioners following the ruling, a reversal seems unlikely.

FERC's refusal to void the contracts years ago stemmed from what the agency called a "long-standing policy . . . to recognize the sanctity of contracts." The commission held to that position throughout the six-year court battle over the energy contracts and it appears unwilling to change its tune now.

"The court recognized the importance of contract certainty to both buyers and sellers in competitive wholesale power and gas markets," FERC Chairman Joseph Kelliher said in a statement. "The court has directed the commission to 'amplify or clarify' its findings on two specific points, so the commission will have further work to do in reviewing these contracts."

A second member of the commission, Philip Moeller, also applauded the court's decision, noting that, "contract uncertainty can have a chilling effect on needed investment in the energy industry and may deter parties from entering into long-term arrangements."

Roger Berliner, an attorney who worked on the case for Nevada utility Sierra Pacific Resources, said he was disappointed by the ruling: "This decision is not a positive decision for consumers."

California had hoped to renegotiate a handful of long-term contracts between the state Department of Water Resources and several power providers that are in still in force and were never renegotiated.

The California Public Utilities Commission and state officials believed that crisis-era pacts with San Diego-based Sempra Energy and others were costing consumers an extra \$1.45 billion to \$3.08 billion -- an amount they had hoped to return to electricity customers, possibly by reducing or eliminating future charges.

A Washington utility had hoped to get relief from a nine-year power contract with Morgan Stanley Capital Group. Under that contract, the Snohomish County Public Utility District is paying \$105 a megawatt-hour, well above the historic norm for the Pacific Northwest of \$24 a megawatt-hour, but also well under the \$3,300 a megawatt-hour hit at the peak of the energy crisis that spread beyond California's borders, according to the court's synopsis.

FERC and the power providers argued that the deals were set based on market prices at the time and that the contracts should stand. They lost that argument at the U.S. 9th Circuit Court of Appeals, which ruled in late 2006 that power deals could be overturned if manipulation skewed market prices, then sought a reversal at the Supreme Court.

In the majority opinion authored by Justice Antonin Scalia, the high court described the utilities' objections as a form of "buyers remorse" after the crisis was over and didn't constitute grounds for reversal. The court said federal regulators should reevaluate the contracts with an eye toward whether the contract costs imposed an "excessive burden" on customers and should opine on the merits of allegations that some power providers involved in the contracts engaged in market manipulation that boosted electricity prices.

Two justices dissented and two recused themselves.

Attorney Walter Dellinger, who argued on behalf of Morgan Stanley, said he was "very gratified" by the decision.

"It set aside a lower court opinion which would have destabilized long-term contracts for energy . . . by having those contracts subject to revision whenever market conditions change," Dellinger said. "The Supreme Court was emphatic that buyers remorse was not a basis for revising contracts."

Berliner rejected the comparison to buyers remorse.

"It was the failure of regulators to protect consumers from market manipulation" that caused the utilities to overpay for power. "I don't think the court appreciated the extent to which the dysfunction in the market made it impossible for there to be just and reasonable contracts."

California utility regulators nonetheless struck an optimistic tone. "We are pleased the Supreme Court agrees that FERC needs to take another look at this case," the state Public Utilities Commission said in a statement. "We look forward to further proceedings and continuing our challenge to long-term contracts entered into during what FERC itself has described the 'worst electricity market crisis in American history' in order to obtain financial relief for California electricity consumers."

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