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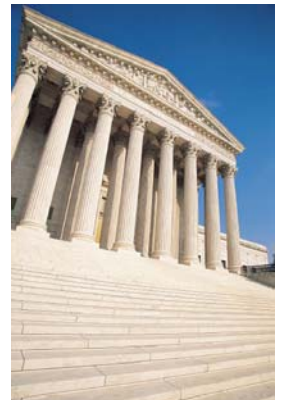
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Supreme Court Issues Decision in California Energy Meltdown Litigation

On June 26, a divided Supreme Court issued its long-awaited opinion in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*. The opinion addressed a Ninth Circuit decision concerning the extent to which the Federal Energy Regulatory Commission has authority to modify or terminate contracts entered into during the California "energy crisis" of 2000-2001. The Court affirmed the Ninth Circuit's judgment, though on very different grounds, and sent the case back to FERC with the direction that the Commission determine whether the rates under the challenged contracts imposed an "excessive burden" on customers. The Court explained that, in determining whether the burden was excessive, the Commission must examine the disparity between the contract rates and those that "consumers would have paid (but for the contracts) further down the line, when the open market was no longer dysfunctional." The Court also instructed FERC to consider whether the contracting sellers, or possibly other entities who were not parties to the contracts, engaged in market manipulation that affected the contracts.



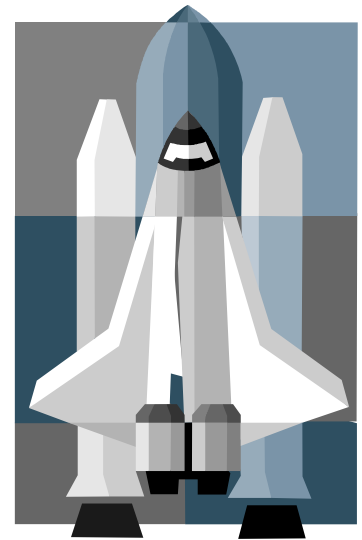
Justice Scalia wrote the majority opinion, joined by Justices Alito, Kennedy and Thomas. Justices Stevens and Souter dissented, while Justice Ginsburg joined only in the result and one part of the majority's analysis. Chief Justice Roberts and Justice Breyer did not participate in the decision.

Firm attorneys Scott Strauss, Mark Hegedus and Jeff Schwarz filed an amicus brief in this case on behalf of the American Public Power Association and the National Rural Electric Cooperative Association. The decision is available [here](#); the APPA/NRECA amicus brief is available [here](#).

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Plaintiffs Represented By Spiegel & McDiarmid Obtain \$25 Million in False Claims Act Settlement

A California federal court has approved a \$25 million settlement that is the last in a series of settlements resolving a lawsuit brought by private citizens on behalf of the United States against Toray Industries and eleven other manufacturers of carbon fiber. Carbon fiber is used in manufacturing products ranging from golf clubs to space shuttles and is a strategically vital defense material. The plaintiffs, who were represented by Spiegel & McDiarmid and co-counsel Ross, Dixon & Bell, alleged that Toray and others had engaged in a conspiracy to fix carbon fiber prices and thereby defrauded the government, one of the largest end purchasers of carbon fiber products. The plaintiffs brought their allegations to the Department of Justice and wore wires for the FBI. The case was brought under the “whistleblower” provisions of the False Claims Act, through which individuals with knowledge of fraud upon the government, and who report the wrongdoing to the government, can file a civil action in the name of and on behalf of the United States seeking treble damages. Exclusive of sums for fee recoveries, the overall FCA settlement amount obtained from all twelve of the defendants in this lawsuit was \$76.25 million—one of the largest sums ever recovered by FCA citizen-plaintiffs in an action in which the federal government was not a party.



The plaintiffs were represented by firm attorneys Dan Davidson and Peter Hopkins. For additional information, including the international implications of this case and the plaintiffs' role in the FBI's investigation of the defendants, [click here](#).

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Children's Advocacy Groups Defend Constitutional Validity of Children's Television Act

A coalition of children's advocacy groups recently filed an *amicus* brief defending the validity of the Children's Television Act in *FCC v. Fox Television*, a Supreme Court case involving the use of “fleeting expletives” on television. The advocacy groups were represented *pro bono* by the Spiegel communications practice in conjunction with the Institute for Public Representation at Georgetown University Law Center.

The appeal arose out of an FCC decision finding that isolated uses of expletives during the 2002 and 2003 Billboard Music Awards violated a federal statute and FCC rules prohibiting indecency in TV broadcasts. The *amicus* brief filed by the firm did

not take sides in the *Fox* case. Rather, the brief urged the Court not to resolve the case in a way that would threaten the constitutional validity of the Children's Television Act and other rules that require broadcasters to provide educational programming to children and to enable parents to protect their children from programming that they believe is inappropriate.

Because the decision under appeal suggested that technological advances like the V-Chip rendered FCC oversight unnecessary, the *amicus* brief supplied the Court with the latest research about the V-Chip's performance. The V-Chip, which was mandated in most TV sets manufactured after 2000, can be programmed to block TV programs based on their ratings. Research reveals, however, that the effectiveness of the V-Chip and its associated program ratings system is weakened by several shortcomings. The program ratings system is entirely voluntary, meaning



that some programs are unrated, and there is no mechanism to ensure consistency and accuracy of ratings. Moreover, research indicates that parental awareness and use of the V-Chip remains low, while parental confusion about the ratings system remains high. Finally, many TV sets do not even have the FCC-required upgraded V-Chip installed. The *amicus* brief was filed on behalf of the American Academy of Pediatrics, the Benton Foundation, Children Now, the National Institute on Media and the Family, the Parent Teacher Association, and the United Church Of Christ, Office of Communications, Inc. The case will be argued in the fall, and a decision is expected next year.

The amicus brief was drafted by firm attorneys Jim Horwood, Tim Lay, Gloria Tristani and Ruben Gomez, together with the Institute for Public Representation at Georgetown University Law Center, and is available here.

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Consumers to Benefit from Proposed Settlement of Complaint Challenging Reliability Must Run Agreement

A complaint filed jointly at the Federal Energy Regulatory Commission by the Connecticut Municipal Electric Energy Cooperative and the Connecticut Attorney General has produced a proposed settlement of enormous value to Connecticut electric ratepayers. This settlement is projected to save ratepayers nearly \$40 million over the next two years. These savings will be achieved through a \$4 million refund to Connecticut consumers, coupled with early termination of a Reliability Must Run agreement involving Milford Power LLC, a Connecticut generator.

RMR agreements are "last resort" contracts available to individual New England generators upon a showing that a particular generator is needed for reliability and is

insufficiently profitable to remain in operation absent the agreement. As currently structured, RMR agreements guarantee cost-of-service compensation (including a profit) to qualifying generators, provided that they remain available and bid into the market at stipulated prices. RMR agreements are "make-whole" agreements, and cover the difference between a generator's full cost of service and its market revenues.

Milford initially sought RMR agreement rates based on an \$82 million annual cost-of-service. In a settlement reached with other parties, Milford agreed to reduce that amount to \$72.5 million, provided that the contract would remain in effect through May 2010. CMEEC and CTAG did not sign that settlement. They wanted to preserve their right to seek early termination of the agreement if Milford's financial fortunes improved. FERC subsequently accepted the deal, but agreed with CMEEC and CTAG that parties who had not signed would be free to challenge the RMR agreement if an appropriate showing could be made.

In December 2007, CMEEC and CTAG filed a complaint, alleging that Milford's market revenues had increased to the point where it was no longer RMR agreement-eligible. FERC set the complaint for settlement talks and, if needed, a hearing. On June 11, 2008, the parties filed a settlement under which (a) Milford is required to make an upfront, lump-sum payment of \$4 million; and (b) the agreement is terminated as of September 30, 2008. Early termination will eliminate charges estimated at \$34 million for the period between September 30, 2008 and June 1, 2010. The settlement is unopposed, and is awaiting FERC approval.

CMEEC was represented in this proceeding by firm attorneys Scott Strauss and Jeff Schwarz, and by Philip Sussler, CMEEC's General Counsel.

SPIEGEL & MCDIARMID LLP

From the firm's founding in 1967, the lawyers of Spiegel & McDiarmid LLP have sought to practice law in accordance with three very basic propositions:

- ▶ *Public sector and consumer-owned entities are entitled to legal representation of the highest quality, at a cost they can afford. No public agency or consumer-owned enterprise should be forced to operate from a position of weakness because of its legal representation.*
- ▶ *In any technical area, lawyers should be conversant with more than just the fine points of the law. We must be able to communicate effectively with clients, expert witnesses, judges and others about highly technical matters.*
- ▶ *Our clients are entitled to lawyers who approach problems with a broad perspective. Narrow thinking leads to narrow solutions, and narrow solutions are usually poor solutions.*