

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Morgan Stanley Capital Group, Inc.  
and Barclays Bank, Plc

Docket No. EL07-46-000

ORDER REJECTING PETITION FOR DECLARATORY ORDER

(Issued June 21, 2007)

1. On March 15, 2007, Morgan Stanley Capital Group Inc. and Barclays Bank, Plc (Petitioners) filed a petition for declaratory order asking the Commission to develop a generic solution to resolve issues concerning delivery obligations under certain so-called seller's choice contracts in Regional Transmission Organization (RTO) markets that use locational marginal prices (LMP) to manage congestion (Petition). In this order, we reject the Petition, finding that the issues raised by the Petitioners are not susceptible to being resolved through a declaratory order and need to be resolved by the parties to these contracts on a case-by-case basis.

**Background**

2. Throughout 1999 and early 2000, the Edison Electric Institute (EEI) and the National Energy Marketers Association developed a Master Power Purchase & Sale Agreement (EEI Master Agreement) that has become widely used by parties in arranging for the sale and delivery of energy. As related to this proceeding, a commonly traded product under the EEI Master Agreement (Version 2.1 as amended on April 25, 2000)<sup>1</sup> provides for physical delivery of energy into a designated control area at a location of the seller's choosing (Seller's Choice product). Under such contracts, the seller has flexibility to specify the exact delivery point on a daily basis. The delivery point may be

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<sup>1</sup> See

[http://www.eei.org/industry\\_issues/legal\\_and\\_business\\_practices/master\\_contract/contract0004.pdf](http://www.eei.org/industry_issues/legal_and_business_practices/master_contract/contract0004.pdf).

a point within the designated control area if the product is provided from a source of generation within the control area, or at the control area boundary if the source of generation is outside the control area. Generally, as long as firm transmission service is available for the buyer to take the power away from the delivery point, the buyer is responsible for all transmission costs at and from the delivery point to its load.<sup>2</sup>

3. Under the Commission's Order No. 888 *pro forma* open access transmission tariff,<sup>3</sup> transmission providers generally applied a uniform embedded-cost firm transmission rate to all transactions within their systems and used mechanisms other than price to manage congestion on their systems. As Independent System Operators (ISOs) and RTOs began to develop, these organizations started to use market mechanisms for managing congestion on their systems. Under these market mechanisms, parties paying for firm transmission service pay for the costs of any congestion associated with the movement of power from the point of receipt to the point of delivery.<sup>4</sup> Congestion costs reflect the marginal cost of redispatching the system when transmission congestion is present. For example, if the price of energy at Point A is \$100/MW and the price at Point B is \$150/MW, and the scheduled nominations between Point A and Point B exceed the ability of the transmission system to carry that amount of power, then

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<sup>2</sup> The seller would be responsible for all costs (including transmission costs, congestion costs, and costs associated with interruption or curtailment) for delivering the product to its selected delivery point.

<sup>3</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888 FERC Stats. and Reg., Regulations Preambles January 1991-June 1996 ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. and Regs., Regulations Preambles July 1996-December 2000 ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>4</sup> In the NOPR issued on May 13, 1999, which led up to Order No. 2000, and in Order No. 2000 itself, the Commission stated that it envisioned using such market mechanisms to manage transmission congestion in RTOs. *Regional Transmission Organizations*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,541 (May 13, 1999); *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. Regulations Preambles ¶ 31,089 (Dec. 20, 1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), FERC Stats. and Regs., Regulations Preambles July 1996-December 2000 ¶ 31,092 (2000), *aff'd sub nom. Public Utility District. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

customers at Point B seeking to buy power at, and deliver it from, Point A are assessed a \$50 congestion charge. This reflects the need to dispatch \$150 energy to meet all the demand at Point B. Customers at Point B, however, can request and pay to acquire so-called financial transmission rights that will hedge against the risk of congestion charges.

4. In each market that has transitioned to using price to manage congestion, questions arose as to how parties would perform their obligations under their Seller's Choice contracts under the new market design, because the choice of delivery point can significantly affect the level of congestion charges incurred by each party in order to meet their delivery obligations. In orders addressing American Electric Power Service Corporation's (AEP) and Commonwealth Edison Company's and Commonwealth Edison Company of Indiana's (ComEd) integration into PJM Interconnection, L.L.C. (PJM) and the commencement of Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) market, the Commission found that this issue should be addressed as a commercial matter between the parties who had agreed to such contract terms and be resolved without Commission intervention.<sup>5</sup> At the Commission's urging, PJM and Midwest ISO created financial trading hubs for each of the control areas in which seller's choice contracts existed, and a number of parties agreed to modify their Seller's Choice contracts to fix the delivery point at these trading hubs and clarify the obligations of each party under the new market design. To facilitate such amendments, EEI and market participants developed standard amendments to the generic Seller's Choice contract that would permit parties to choose delivery at financial trading hubs specified by the RTOs to effectuate energy market settlements.<sup>6</sup>

5. Many parties to older, so-called legacy Seller's Choice contracts have adopted the standard amendment (or minor variations thereto) in order to allocate the risk of congestion costs. Some parties to legacy Seller's Choice contracts, however, have yet to resolve these issues.

### **Petition for Declaratory Order**

6. Petitioners filed a petition for declaratory order to resolve issues concerning delivery obligations under legacy Seller's Choice contracts *i.e.*, Seller's Choice contracts entered into before the commencement of Midwest ISO's markets, or before certain

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<sup>5</sup> See *PJM Interconnection, LLC*, 106 FERC ¶ 61,253 at P 52, *order on reh'g*, 109 FERC ¶ 61,094 (2004); *Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,157 at P 161-62 (2004), *order on reh'g*, 111 FERC ¶ 61,043, *order on reh'g*, 112 FERC ¶ 61,086 (2005).

<sup>6</sup> See, e.g., [http://www.eei.org/industry\\_issues/legal\\_and\\_business\\_practices/master\\_contract/IntoProductConversionConvention\\_final-PJM.pdf](http://www.eei.org/industry_issues/legal_and_business_practices/master_contract/IntoProductConversionConvention_final-PJM.pdf).

transmission owner's systems were integrated into PJM's markets. Petitioners indicate that they are both buyers and sellers under such contracts.

7. Petitioners note that a number of legacy Seller's Choice contracts have been modified by adopting a standard amendment that requires delivery at financial trading hubs specified by the RTOs for the purpose of designating financial transmission rights/auction revenue rights and effectuating energy market settlements (modified Seller's Choice contracts). But they allege that not all of their counterparties have agreed to this standard conversion amendment. Petitioners purchase from upstream sellers under legacy Seller's Choice contracts and resell the product to downstream buyers under such contracts; as a result, they are exposed to conflicting delivery demands and associated liquidated damage claims, when there is disagreement between upstream and downstream counterparties as to which delivery point satisfies the delivery obligations under the legacy Seller's Choice contracts.

8. Petitioners request that the Commission issue an order that addresses the issue of delivery obligations under legacy Seller's Choice contracts used in the LMP markets in Midwest ISO and PJM. Petitioners request that the Commission resolve this ambiguity by adopting one of the following implementation strategies and by requiring parties to such contracts in these markets to act in accordance with the adopted approach: (1) the seller's delivery obligation under a Seller's Choice contract is satisfied by delivery at any LMP node point or control area interface at or within the designated market; or (2) the seller's delivery obligation under a Seller's Choice contract is satisfied by delivery to an established financial hub within the designated market, or by delivery at a specific physical node where the seller has contractual rights to physical generation, the generation at such point is actually running, and physical transmission is available to the buyer at such point.

9. Petitioners state that they have no preference as to which approach is adopted. Their primary interest is to eliminate uncertainty and to facilitate resolution of outstanding claims through adoption of a single, uniform approach. Furthermore, Petitioners state that, given the unique circumstances associated with introduction of locational marginal pricing into the Midwest ISO and PJM markets, the order should be limited to outstanding legacy Seller's Choice contracts in those markets. Although Seller's Choice contracts exist in markets outside of Midwest ISO and PJM, Petitioners assert that there is no need at this time to apply the Commission's result in this proceeding to markets other than Midwest ISO and PJM.

10. Petitioners recognize that the Commission generally prefers that the parties reach a commercial resolution of contract disputes in these circumstances, but they note that the Commission indicated a willingness to serve as a forum to resolve issues stemming from the introduction of nodal pricing into established markets in New England and

California.<sup>7</sup> Petitioners further argue that it is appropriate for the Commission to assert jurisdiction and resolve this matter under the standards enumerated in *Arkansas Louisiana Gas Co. v. Hall*.<sup>8</sup> First, Petitioners assert that, because of its familiarity both with the introduction of nodal pricing and its impact on legacy Seller's Choice contracts, the Commission has the special expertise needed to resolve how delivery is to be accomplished under these contracts. Second, Petitioners assert that there is a need for uniform implementation of Seller's Choice contracts for Midwest ISO and PJM to avoid conflicting and perhaps irreconcilable delivery obligations. Third, Petitioners assert that resolution of the uncertainty concerning millions of dollars of liquidated damage claims is important to the Commission's market oversight responsibilities.

### **Notice of Filing, Answer, and Responsive Pleadings**

11. Notice of the Petitioners' petition for declaratory order was published in the *Federal Register*,<sup>9</sup> with interventions or protests due on or before April 16, 2007. E.ON U.S., LLC, on behalf of its public utility subsidiaries Louisville Gas and Electric Company, Kentucky Utilities Company, and LG&E Energy Marketing, Inc.; NRG Power Marketing Inc., Conemaugh Power LLC, Indian River Power LLC, Keystone Power LLC, NRG Energy Center Dover LLC, NRG Energy Center Paxton LLC, NRG Rockford LLC, NRG Rockford II LLC, and Vienna Power LLC; Ameren Services Company; PacifiCorp Energy; and Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. filed timely motions to intervene. Midwest ISO filed a timely motion to intervene that conditionally supports the Petition.<sup>10</sup> Motions to intervene out of time were filed by American Municipal Power-Ohio, Inc., on behalf of itself and its members;

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<sup>7</sup> Petitioners cite *Richard Blumenthal, Attorney General of the State of Connecticut v. NRG Power Marketing Inc.*, 103 FERC ¶ 61,344 (2003) (*Blumenthal*), and *California Independent System Operator Corp.*, 107 FERC ¶ 61,274 (2004) (*CAISO*), *order on reh'g*, 111 FERC ¶ 61,138 (2005).

<sup>8</sup> 7 FERC ¶ 61,175 at 61,322 (*Arkla*), *reh'g denied*, 8 FERC ¶ 61,031 (1979).

<sup>9</sup> 72 Fed. Reg. 14,092 (2007).

<sup>10</sup> Midwest ISO requested assurance that any such decision by the Commission would be narrowly focused on establishing uniform standards that apply to the counter-parties to the subject contracts, and that the Commission's decision not impose new requirements on how Midwest ISO should treat such contracts for scheduling or settlement purposes.

and Tenaska Power Services Co. Exelon Corporation filed a motion to intervene out of time with comments.<sup>11</sup>

12. Separate interventions and protests were filed by J. Aron & Company, a subsidiary of Goldman Sachs (J. Aron), American Electric Power Service Corporation, as agent for the AEP Operating Companies (collectively, AEP); and Duke Energy Corporation (Duke Energy). Each of the protestors urges the Commission to deny the petition. They note that when issues related to Seller's Choice contracts were first raised in connection with the introduction of LMP markets in PJM and Midwest ISO, the Commission urged parties to such contracts to resolve such commercial matters among themselves. They state that most market participants in PJM and Midwest ISO have modified the legacy Seller's Choice contracts to adopt delivery points compatible with the LMP markets. They argue that the ruling sought by Petitioners would constitute material modification of the contracts and lead to new controversy and uncertainty, because a generic Commission pronouncement on this matter could be used as leverage to challenge or seek reformation of the vast number of contracts already converted. They also argue that a ruling of general applicability would be inappropriate, because the Seller's Choice product under the EEI Master Agreement includes provisions that may allocate congestion costs differently between buyers and sellers depending on circumstances such as whether firm or non-firm transmission is available or whether transmission is interrupted or curtailed. In addition, they state that parties to a particular contract may negotiate a specific allocation of the congestion risk and costs that deviate from the default language of the EEI Master Agreement. Thus, they argue, without case-by-case review of the facts and circumstances of each delivery, of the provisions of each contract, and of the parties' intent, the Commission cannot decide whether the buyer or seller should be responsible for congestion costs.

13. Protestors argue that the Commission should not assert primary jurisdiction over the outstanding bilateral disputes relating to legacy Seller's Choice contracts in PJM and Midwest ISO. They argue that the heart of these commercial disputes is not the generic issue of how LMP markets should allocate responsibility for congestion costs, which may fall within the Commission's unique expertise. Rather, the dispute is the parties' intent at the time of execution prior to the introduction of LMP markets, an issue that does not require the Commission's unique expertise as this kind of issue is routinely adjudicated in

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<sup>11</sup> Exelon stated that it does not object to the Commission's establishing a consistent policy going forward, so long as that policy does not disturb existing contractual settlements. Exelon states that it has worked with its counterparties to successfully convert its Seller's Choice contracts to recognize LMP markets. To the extent that the Commission takes any action in response to the petition, Exelon requests that any such action not interfere or impact in any manner contracts such as those entered into by Exelon where the parties have agreed on terms to recognize LMP markets.

the courts. Further, they assert that because the issue raised by the Petition relates only to a limited subset of legacy Seller's Choice contracts that have not been successfully converted to the LMP markets, and in light of the successful implementation of LMP markets in PJM and Midwest ISO, the ultimate resolution of the outstanding disputes at issue here is not particularly significant in relation to the Commission's regulatory responsibilities.

14. On April 24, 2007, Petitioners filed an answer to the protests.

## **Discussion**

### **A. Procedural Matters**

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>12</sup> the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given the early stage of this proceeding, their interests, and the absence of undue delay or prejudice, we find good cause to grant the untimely, unopposed motions to intervene.

16. Rule 213(a) (2) of the Commission's Rules of Practice and Procedure<sup>13</sup> prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the Petitioners' answer and will therefore, reject it.

### **B. Substantive Issues**

17. The Commission has discretion as to whether to issue a declaratory order in particular circumstances in order to terminate a controversy or remove uncertainty.<sup>14</sup> For the reasons stated below, we find that the Petitioners have not provided sufficient basis for our issuing a declaratory order providing a generic interpretation of legacy Seller's Choice contracts in Midwest ISO and PJM. First, Petitioners' application provides no basis upon which to interpret the delivery obligations under the legacy Seller's Choice contracts. Second, because of the individual circumstances surrounding the negotiation and execution of individual legacy Seller's Choice contracts, we find that these contracts are not susceptible to generic resolution through a declaratory order proceeding.

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<sup>12</sup> 18 C.F.R. § 385.214 (2006).

<sup>13</sup> 18 C.F.R. § 385.213(a)(2) (2006).

<sup>14</sup> 5 USC § 554(e) (2000); *Continental Oil Co. v. FPC*, 285 F.2d 527 (5th Cir. 1961); *Arkansas Power & Light Company*, 35 FERC ¶ 61,358 (1986).

18. Petitioners have failed to provide a basis upon which to grant their requested declaratory order. While Petitioners state that they are not requesting that the Commission abrogate or reform any particular legacy Seller's Choice contract, they fail to provide any basis for finding that the proposed approaches for implementing delivery obligations under these contracts would not modify such contracts. Rather, they have simply recounted the conflicting positions taken by their counterparties, attached a copy of the generic EEI Master Agreement, and asked the Commission to adopt one position or the other. Petitioners provide no discussion as to how the alternative interpretations are consistent with the buyers' and sellers' rights and obligations under the generic contract, let alone under the specific contracts at issue, which are not even before the Commission to review. Thus, the Petitioners' request does not provide any basis for granting the relief they seek.

19. Further, based on the pleadings filed here, we do not find that this is the kind of issue that can be resolved generically. The Petition requires contract interpretation that affects potential liquidated damages at issue in individual contracts. The individual contracts may deviate from the generic EEI Master Agreement, requiring that they be interpreted on a case-by-case basis. In addition, because of the introduction of LMP markets by RTOs, determining the parameters of acceptable performance under the contracts in RTO markets may not be straightforward based on the four corners of the contract and may require addressing extrinsic evidence related to the parties' intent in executing specific contracts.<sup>15</sup>

20. Even if the Petition were adequately supported and susceptible to resolution on a generic basis, the Commission retains discretion to determine whether to exercise primary jurisdiction over certain issues arising under contracts on file with the Commission, which are within the concurrent jurisdiction of courts.<sup>16</sup> The test for

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<sup>15</sup> For example, the date on which a contract was signed could have a bearing on the parties' intent and understanding. The Commission made clear on May 13, 1999, in the Notice of Proposed Rulemaking leading up to Order No. 2000, that it envisioned using market mechanisms to manage transmission congestion. *Regional Transmission Organizations*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,541 (May 13, 1999). Buyers entering into contracts after that date would have been on notice of a possible regulatory change in the pricing of transmission service that might affect the financial implications of the contract. See *Richmond Power Enterprise, L.P.*, 70 FERC ¶ 61,313 at 61,958 (1995) (examining the parties' understanding of potential regulatory changes in determining whether a party should have addressed such risks in the contracting process).

<sup>16</sup> See *Doswell Limited Partnership v. Virginia Electric and Power Company*, 61 FERC ¶ 61,196 (1992).

determining whether the Commission should assert jurisdiction over such contractual issues consists of three factors:

- (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision;
- (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and
- (3) whether the case is important in relation to the regulatory responsibilities of the Commission.<sup>17</sup>

21. In this case, we conclude that the Petition has not satisfied these standards. Resolution of these matters does not require the Commission's special expertise nor is such resolution important to the ongoing operation or efficiency of the RTO markets.<sup>18</sup> Petitioners have presented no evidence that the disputes over performance under a limited set of legacy Seller's Choice contracts have impaired the operation or efficiency of the Midwest ISO or PJM markets. As the protestors point out (and as even Petitioners concede), many of the parties already have settled these contracts based on the individual circumstances they faced, and we find no compelling reason to step in at this point to render a generic determination on the remainder of the legacy Seller's Choice contracts. While we can appreciate the Petitioners' desire to save legal costs, we cannot mandate a generic solution to these individual contractual issues.

22. We do not agree with Petitioners that the New England and California proceedings support our issuance of a declaratory order in this matter. The circumstances presented here are significantly different. In *Blumenthal*, the actual standard offer sales agreements were before the Commission, unlike this case in which Petitioners are requesting a generic determination for a category of contracts. The issues were brought to the Commission at the onset of LMP markets in New England, and the Commission found that there was a need for uniformity in interpretation.

23. In *CAISO*, the Commission intervened at the outset of the implementation of the markets, due to concerns that the Seller's Choice contracts would hinder implementation of the markets, and instituted hearing procedures to investigate specific contracts. The

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<sup>17</sup> See *Blumenthal*, 103 FERC ¶ 61,344 at P 71 (citing *Arkla*, 7 FERC at 61,322).

<sup>18</sup> The Commission has refused to assert primary jurisdiction over contractual matters that are otherwise litigable in another forum if it finds that resolution of the controversy does not require the Commission's special expertise but turns on standard contract and/or tort principles, and does not have market-wide implications. See *City of Vernon, California*, 115 FERC ¶ 61,374 (2006); *Puget Sound Power & Light Company*, 74 FERC ¶ 61,192 (1996).

Commission explained that ordinarily it would leave the resolution of those contracts to the parties, but that the situation in the California ISO was different than that faced in PJM and Midwest ISO, requiring that the Commission institute a proceeding under section 206 of the Federal Power Act, 16 U.S.C. § 824e (2000), to ensure that those contracts did not prevent the reliable operation of the market:

In the October 28 Order, we found that sellers' choice contracts in other regions had been successfully addressed by the parties to those contracts as commercial matters.... While we continue to believe that these contracts represent commercial matters best left to resolution between parties to these contracts, these contracts appear to stand in the way of needed reforms to the reliable operation of the CAISO grid and may therefore be unjust and unreasonable.<sup>19</sup>

24. In this case, two to three years have elapsed since commencement of the relevant Midwest ISO and PJM markets and the Petitioners have cited no evidence that uniform interpretation of these contracts is necessary to ensure reliable market operation.<sup>20</sup>

The Commission orders:

Petitioners' petition for declaratory order is hereby rejected for the reasons stated in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>19</sup> *CAISO*, 107 FERC 61,274 at P 165-66.

<sup>20</sup> In addition we note that, in a subsequent order, the Commission further confirmed that it had set for hearing only certain specific contracts alleged not to be "operationally and economically compatible with the CAISO's proposed Market Redesign" and dismissed from the proceeding the other Seller's Choice contracts that did not raise analogous concerns. *See California Independent System Operator Corporation*, 111 FERC ¶ 61,138 at P 13 (2005). The instant Seller's Choice contracts present no such concerns.