

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Morgan Stanley Capital Group Inc.

Docket No. EL03-120-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued September 15, 2003)

1. On April 17, 2003, Morgan Stanley Capital Group Inc. (Morgan Stanley), filed a petition for declaratory order requesting the Commission to find that Nevada Power has a contractual obligation to make an immediate Termination Payment under the Western Systems Power Pool Agreement (WSPPA), even though the contract prices associated with the Termination Payment are subject to a pending complaint before the Commission. As discussed below, we find Morgan Stanley's request to be moot.

Background

2. On December 4, 2001, Nevada Power filed a complaint with the Commission arguing that the prices in eight electricity transactions Nevada Power had entered into with Morgan Stanley are unjust and unreasonable; the transactions are governed by the WSPPA.

3. On May 9, 2002, Morgan Stanley informed Nevada Power that, in Morgan Stanley's view, Nevada Power had defaulted on electricity transactions under the WSPPA (for reasons not relevant here), and that all electricity transactions with Nevada Power were terminated. Subsequently, Morgan Stanley demanded a Termination Payment under the WSPPA, which Nevada Power refused to pay. The parties attempted to mediate their dispute under the provisions of the WSPPA, but mediation efforts were unsuccessful.

4. On March 26, 2003, Nevada Power filed a complaint in the United States District Court for the District of Nevada. Nevada Power asked the District Court to declare that Nevada Power did not default under the WSPPA and that Morgan Stanley is not entitled to seek a Termination Payment. Alternatively, Nevada Power asked the District Court to stay the Termination Payment pending a final determination on the complaint filed at the

Commission as to the justness and reasonableness of the prices in the transactions between Morgan Stanley and Nevada Power.

5. On April 17, 2003, Morgan Stanley filed the instant petition for declaratory order, asking that the Commission find that, notwithstanding the pendency of Nevada Power's complaint before the Commission, Nevada Power is not absolved of its contractual obligation to pay Morgan Stanley a Termination Payment under the WSPPA.

6. In the meantime, on April 15, 2003, Nevada Power amended its complaint before the District Court, and eliminated its request for a stay of any Termination Payment pending resolution of the complaint it filed at the Commission. To date, the District Court case is ongoing.

Notice of Filing, Interventions and Responsive Pleadings

7. Notice of Morgan Stanley's filing in Docket No. EL03-120-000 was published in the Federal Register, 68 Fed. Reg. 22,690 (2003), with protests or interventions due on or before May 9, 2003. A notice of intervention was filed by the Public Utilities Commission of Nevada and a timely motion to intervene was filed by the City of Santa Clara, California. A timely motion to intervene and comments in support of Morgan Stanley's filing was filed by Sempra Energy Resources.

8. A timely motion to intervene and answer was filed by Nevada Power. Nevada Power states that the amended complaint before the District Court no longer includes a request for a stay of any Termination Payment while the contract prices are subject to the pending complaint proceeding before the Commission. Therefore, Nevada Power argues, Morgan Stanley's instant petition for declaratory order is essentially moot.

9. Metropolitan Water District of Southern California (Metropolitan) filed a timely intervention and protest. Metropolitan argues that the relief requested by Morgan Stanley should be resolved in the litigation ongoing in District Court in accordance with the Commission's customary practice where concurrent jurisdiction exists.

10. Morgan Stanley filed an answer to Nevada Power's answer and Nevada Power filed an answer to Morgan Stanley's answer.

Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the notice of intervention and timely, unopposed motions to

intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We are not persuaded to allow Morgan Stanley's answer and Nevada Power's answer thereto and will, therefore, reject them.

B. Analysis

12. We find Morgan Stanley's petition for declaratory order to be moot and we will dismiss it. Nevada Power's complaint before the District Court has been amended to withdraw Nevada Power's opposition, while the complaint before the Commission is pending, to the Termination Payment. Thus, Nevada Power no longer opposes, on the basis of the pending complaint here, paying the Termination Payment. Given these circumstances, we find it unnecessary to address Morgan Stanley's petition that we find that Nevada Power is obligated to make a Termination Payment.

The Commission orders:

Morgan Stanley's petition for declaratory order is moot, and is hereby dismissed.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.