123 FERC ¶ 61,034
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Integrys Energy Group, Inc. Docket No. EL08-37-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued April 17, 2008)

1. On January 29, 2008, Integrys Energy Group, Inc. (Integrys Group) filed a petition on behalf of its subsidiaries with electric market-based rate authority seeking a declaratory order finding that a sale of the "Firm (LD)" product, as defined by the EEI Master Power Purchase & Sale Agreement (EEI Master Agreement), does not result in a transfer of control of generation capacity to the purchaser and therefore does not have to be reported by the purchaser in a change in status report under the Commission's regulations.[1] In this order we grant Integrys Group's petition.

I. <u>Background</u>

2. Integrys Group notes that the Commission requires public utilities that sell at market-based rates to report any changes in status that would reflect a departure from the characteristics that the Commission relied upon in granting market-based rate authority.[2] Integrys Group also notes that in Order No. 652, the Commission included "control" over generation capacity as "one of the factors that could result in a change in status filing."[3] Integrys Group states that in Order No. 652 the Commission provided an illustrative list of contractual arrangements that can trigger a change in status, viz., "agreements that

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[1] 18 C.F.R. § 35.27(c) (2007).

[2] *See Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, at P 47, *order on reh'g*, 111 FERC ¶ 61,413 (2005) (*Rehearing Order*). See also *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, at P 1009-1044 (2007) codifying the requirement, as amended, at 18 CFR 35.42).

[3] Application at 4; Order No. 652, FERC Stats. & Regs. ¶ 31,175 at P 47.

relate to operation (including scheduling and dispatch), maintenance, fuel supply, risk management, and marketing that transfer control of jurisdictional assets are subject to the change of status reporting requirement."[4] Integrys Group also notes that in the *Rehearing Order*, the Commission declined to clarify generically whether certain contractual arrangements transfer control of generation capacity to the purchaser and stated that the issue is complex, fact-specific and dependent on the specific terms and conditions of the contract in question.[5] It also notes that the Commission took the same position in Order No. 697.[6]

II. Petition for Declaratory Order

3. Integrys Group thus seeks a fact-specific evaluation of whether the sale of the Firm (LD) product as defined in the EEI Master Agreement results in a transfer of control of generation capacity to the purchaser. Integrys Group states that it would be risky for a market participant to determine unilaterally whether the Firm (LD) product should be included in or excluded from a change in status filing. It is concerned that given the widespread sale of this product, sellers potentially face unnecessary notice of change in status filings or filings that are unnecessarily complicated because they include contracts that actually transfer control to the purchaser as well as the Firm (LD) product, which Integrys Group states does not transfer control. According to Integrys Group, this would be wasteful of market participant and Commission time and resources.[7]

4. The Firm (LD) product under the EEI Master Agreement is a firm power purchase under which:

> either Party shall be relieved of its obligations to sell or purchase and receive without liability only to the extent that, and for the period during which, such performance is prevented by Force Majeure. In the absence of Force Majeure, the Party to which performance is owed shall be entitled to receive from the Party who failed to deliver/receive

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[4] Application at 5; Order No. 652, FERC Stats. & Regs. ¶ 31,175 at P 83. It should be noted that the Commission characterized this illustrative list as "non-exclusive."

[5] Application at 5; *Rehearing Order*, 111 FERC ¶ 61,413 at P 16.

[6] Application at 6; Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 210, 1031.

[7] Application at 6-7.

> an amount determined pursuant to Article Four [of the EEI Master Agreement].[8]

5. Article Four of the EEI Master Agreement provides that a seller who fails to schedule and/or deliver all or part of the power contracted for must pay the buyer any positive difference that results from subtracting the contract price from the price paid by the buyer for replacement power. Where the buyer fails to schedule and receive all or part of the power contracted for, it must pay the seller any positive difference that results from subtracting the price for which the power in question was sold from the contract price.

6. Integrys Group argues that the Firm (LD) product does not result in a transfer of control to the purchaser. It states that the Firm (LD) product contains only general commercial terms and conditions regarding such things as payment and netting, events of default and remedies, limitation of liabilities, credit and collateral requirements, representations and warranties and other miscellaneous provisions. It simply provides the purchaser with a contractual right to receive energy, whereas the seller retains a complete and unrestricted right to choose a generating resource (either the seller's own generation or a power purchase) that will deliver the energy to the purchaser. Integrys Group states that the purchaser thus does not gain control over operation of the seller's generation capacity.

7. Integrys Group also argues that the purchaser under a Firm (LD) product has no ability to withhold energy from the market or otherwise use the product as part of a capacity withholding strategy. The purchaser cannot force the seller to back down the output of any generator. If the purchaser refuses to receive delivery, that refusal does not keep the power from entering the market because the seller has the right to resell the Firm (LD) product, as well as to receive damages from the purchaser. In addition, the purchaser would not have an economic incentive to withhold and could effectively and at lower cost keep the Firm (LD) product out of the market by not purchasing it in the first place and hoping that no other party would purchase the energy. According to Integrys Group, the purchase of a Firm (LD) product itself is evidence that the product will not be withheld from the market, at least not through action by the purchaser.

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[8] Application at 8-9. This provision is found in Schedule P to the EEI Master Agreement. Section 1.23 of the EEI Master Agreement defines Force Majeure as "an event or circumstance which prevents one Party from performing its obligations under one or more Transactions, which event or circumstance was not anticipated as of the date the Transaction was agreed to, which is not within the reasonable control of, or the result of the negligence of, the Claiming Party, and which, by the exercise of due diligence, the Claiming Party is unable to overcome or avoid or cause to be avoided."

8. Integrys Group states that the determination it seeks from the Commission is limited to the specific facts concerning the sale of the Firm (LD) product as that standard product is defined in the EEI Master Agreement. It thus argues that the limited determination it seeks would be consistent with Commission policy that the issue of contractual control is fact-specific and dependent on the specific terms and conditions of the product in question.

III. Notice of Filing

9. Notice of Integrys Group's January 29, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 7,739 (2008), with interventions and protests due on or before February 28, 2008. Timely motions to intervene were filed by the American Public Power Association, Arizona Public Service Company, Exelon Corporation, San Diego Gas & Electric Company, and Southern California Edison Company. American Electric Power Service Corporation (AEP) filed a motion to intervene out of time.

IV. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant the unopposed motion to intervene out-of-time filed by AEP given its interest, the early stage of this proceeding, and the absence of undue prejudice or delay.

B. Commission Determination

11. Integrys Group states that it seeks a determination that a sale of the Firm (LD) product, as defined by the EEI Master Agreement, does not result in a transfer of control of generation capacity to the purchaser and therefore does not have to be reported by the purchaser in a change in status report under the Commission's regulations. Integrys Group states that the determination it seeks is limited to the specific facts concerning the sale of the Firm (LD) product, as defined in the EEI Master Agreement. Based on the facts as presented by Integrys Group, we find that the Firm (LD) product by itself gives the purchaser only a right to receive energy and thus no rights that would allow the purchaser to control generation capacity. Accordingly, consistent with the Commission's statement regarding energy-only contracts in the *Rehearing Order* that concluded that "to the extent . . . a contract for a fixed quantity of delivered energy does not confer control, it need not be reported,"[9] the sale of the Firm (LD) product would not reflect a departure from the characteristics the Commission relied upon in granting market-based rate

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[9] *Rehearing Order*, 111 FERC ¶ 61,413 at P 12.

authority and therefore would not necessitate the filing of a change in status report. In addition, consistent with the *Rehearing Order*, we note that our finding here is limited to the facts described by Integrys Group and is dependent on the specific terms and conditions specified for the Firm (LD) product in the EEI Master Agreement. Different or additional facts, terms, or conditions could change our analysis.

The Commission orders:

The petition of Integrys Group is granted as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.