

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Morgan Stanley Capital Group)	Docket No. EL03-160-000
)	Docket No. EL03-195-000
		(not consolidated)

**COMMENTS OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR
CORPORATION ON AGREEMENT AND STIPULATION**

**To: Presiding Administrative Law Judge Carmen A. Cintron
Presiding Administrative Law Judge Isaac D. Benkin**

On August 29, 2003, the Federal Energy Regulatory Commission Trial Staff ("Staff"), on behalf of Staff and Morgan Stanley Capital Group ("MSCG") submitted an Agreement and Stipulation ("Agreement") to the Commission in full and final resolution of all issues related to MSCG set for hearing on June 25, 2003 in *American Electric Power Service Corp., et al.*, 103 FERC ¶ 61,345 (2003) (the "Gaming Show Cause Order" or the "Gaming Order"), as well as in *Enron Power Marketing, Inc., et al.*, 103 FERC ¶ 61,346 (2003) (the "Partnership Show Cause Order" or "Partnership Order"). Pursuant to Rule 602 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602 (2003), and to the ruling of the Presiding Judge extending the deadline for comments on the Agreement until September 30, 2003, the California Independent System Operator Corporation ("CAISO") submits these comments on the Agreement.

I. Background

The Gaming Show Cause Order required MSCG to show cause why it should not be found to have engaged in Circular Scheduling, Cutting Non-Firm, and Scheduling Service on Out-of-Service Lines (also known as “Wheel Out”), as those practices were described in the Order. The Partnership Show Cause Order required MSCG to show cause that it did not have an arrangement with the Public Service Company of New Mexico (“PSNM”) to engage in Gaming Practices in violation the CAISO and California Power Exchange Tariffs. In the Agreement, MSCG and Staff propose to settle as to Circular Scheduling for \$223,674, and as to Cutting Non-Firm for \$633,415. They propose to settle as to Scheduling on Out-of-Service Lines for no money. Staff and MSCG also propose to settle the Partnership Show Cause proceedings directed against MSCG for no money.

II. Discussion

The CAISO has no objection to settlement of the Show Cause Order as to Cutting Non-Firm and Circular Scheduling on the terms in the Agreement. With respect to the allegations concerning Scheduling on Out-of-Service Lines, the Agreement states that settling for no money is appropriate because Staff was unable to find any “substantial evidence” to support the charge that MSCG engaged in this practice. Agreement at P. 3.2. The Agreement then states that “MSCG acknowledges that these transactions encompass transactions attributable to MSCG in the ISO’s July 15, 2003 data.” *Id.* The CAISO is not

altogether certain what is meant by this statement. The CAISO believes that this statement may be referring to transactions that MSCG and Staff propose to settle under the other two categories: *i.e.* Circular Scheduling and Cutting Non-Firm. In any event, the CAISO did not allege that MSCG engaged in the practice of Scheduling on Out-of-Service Lines, in either the CAISO Data or in the CAISO's June, 2003 "Supplemental Analysis of Trading and Scheduling Strategies Described in Enron Memos." Therefore, the CAISO does not object to settling the Show Cause Order as to Scheduling Out-of-Service Lines on the terms of the Agreement.

However, the CAISO's concurrence with these portions of the Agreement is limited only to those matters set for resolution in this Docket pursuant to the Order. The CAISO does not believe that it is appropriate for this Agreement to resolve or affect any other proceeding, any pending rehearing or clarification requests with respect to the Order, or the possibility of subsequent proceedings against MSCG based on the outcome of those requests, or relating to different time periods, practices, or transactions.

The CAISO does, however, object to the terms of the Agreement with respect to the issue of the Partnership Show Cause Order. The Agreement states that the discussion contained in the affidavit submitted by MSCG "provides a credible explanation of MSCG's agreements with PSNM and is consistent with Staff's understanding of this issue as it relates to other California market participants that wheeled power from the Southwest to the Northwest." Agreement at 3.2. The CAISO submits that this provision of the Agreement is

different than the others, in that it reflects the result of a finding on the merits made by Staff based on evidence provided by only one party, MSCG. However, MSCG has been subjected to no discovery nor cross-examination, and neither the CAISO nor any other party is privy to any evidence beyond the affidavit provided by MSCG's witness. Under these circumstances, it would be inappropriate for the Commission to accept a settlement that dismissed MSCG from the Partnership proceeding. To do so would be to make a finding on the merits without having really investigated those merits through the procedure that the Commission initiated in the Gaming Show Cause Order.

In opposing the Agreement on the issue of the Partnership Order, the CAISO does not mean to cast any aspersions on Staff's good faith or its competence. To the contrary, the CAISO has complete faith in both. In many circumstances, the Commission rightly relies upon Staff investigations to make decisions whether to initiate proceedings or even take enforcement action. But in this situation, the Commission initiated a trial-type proceeding before a Presiding Judge, and Staff's suggestion of settlement for no money (which, in effect, is really no more than a request for dismissal) would amount to a short-circuiting of that procedure.

III. Conclusion

While the CAISO would not object to approval of the Agreement with respect to Circular Scheduling, Cutting Non-Firm, and Scheduling Service on Out-of-Serve Lines, it requests that the Commission reject the portion of the Agreement relating to the Partnership Show Cause Order

Respectfully submitted,



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Dated: September 30, 2003

CERTIFICATE OF SERVICE

In accordance with the order issued by the Presiding Administrative Law Judge I hereby certify that I have this day served the foregoing document by posting an electronic copy on the Listserv for this proceeding, as maintained by the Commission.

Dated at Washington, DC, on this 30th day of September, 2003.



Michael Kunselman