

MEMORANDUM

July 7, 2009

To: WSPP Executive Committee

From: Arnie Podgorsky
Michael Thompson
Wright & Talisman, P.C.

Re: Retagging under WSPP Agreement, Service Schedule C

WSPP requested that we provide a legal analysis addressing whether the WSPP Agreement (the "Agreement") prohibits or restricts retagging of transactions entered into under Service Schedule C. As discussed below, at least in the WECC,¹ a preschedule is to be posted for firm energy transactions. Retagging is redesignating the source of firm energy, through the e-tag system and after the preschedule is posted.

WSPP's attorneys are not the arbiters of the meaning of the Agreement and their interpretations and analyses are not binding upon WSPP members. From time to time, WSPP attorneys provide analyses of issues that arise under the Agreement, to assist members in deliberations and in their consideration of potential contract amendments.

As set out below, in light of legal principles of contract interpretation, and NERC² and WECC scheduling standards that, we conclude, would apply to Service Schedule C transactions in WECC, the Agreement neither prohibits nor limits retagging of Service Schedule C transactions, provided that the retagging complies with NERC and WECC scheduling standards.

Some members may disagree with our conclusion, perhaps principally because traditional notions of Service Schedule C energy have not included flexible redesignation of resources for reasons other than reliability. We do not challenge that understanding and take no position about how the firm product should be defined or whether additional monetary consideration should be

¹ WECC refers to the Western Electricity Coordinating Council.

² NERC refers to the North American Electric Reliability Corporation.

extracted for flexibility. Those matters are for WSPP members to determine. We merely inform the members how a court or the Federal Energy Regulatory Commission would likely interpret the Agreement in its current form or with a single scheduling deadline as proposed.

I. BACKGROUND

WSPP's Contract Subcommittee and Operating Committee recently considered revisions to Service Schedule C regarding scheduling of firm energy transactions. The revised language would restate that scheduling must occur in accordance with the standards of the applicable Regional Reliability Organization ("RRO") and other applicable practices, and would further require that schedules be submitted a Business Day ahead of the transaction time.

In anticipation of the Executive Committee's consideration of the proposed revisions, some WSPP members have questioned whether specifying a deadline for submission of schedules would have the effect of prohibiting retagging³ after submission of the preschedule. Discussion of this concern led, in turn, to a request that WSPP Counsel analyze whether retagging is prohibited under the existing terms of Schedule C and the impact of the proposed revision. As discussed further below, we conclude that Service Schedule C does not preclude retagging if the retagging complies with NERC and WECC requirements. We also conclude that the proposed modification of Schedule C also would not preclude retagging that complies with NERC and WECC requirements.

II. APPLICABLE PROVISIONS OF WSPP AGREEMENT

Service Schedule C provides for firm capacity and/or energy transactions. Three provisions of the existing Service Schedule C pertain to the inquiry.

- C-3.1: "A Party may schedule Firm Capacity/Energy Sale or Exchange Service from another Party by mutual agreement . . ."
- C-3.2: "Unless otherwise agreed between the Purchaser and the Seller, all transactions shall be prescheduled, subject to any conditions agreed to by schedulers."
- C-3.10: "Seller shall be responsible for ensuring that Service Schedule C transactions are scheduled as firm power consistent with the most recent rules adopted by the applicable NERC regional reliability council."

³ "The electronic Transaction Information System (TIS) implemented by NERC is a process of electronically communicating a request for, securing approval of, and recording an energy transaction via the Internet. The process is more commonly referred to as Electronic Tagging, or ETAG." NERC, "Tagging Essentials for Etage 1.7" (Feb. 18, 2002), at 1 (hereafter, "NERC Tagging Essentials") (available at <http://reg.tsin.com/Tagging/e-tag/>).

Service Schedule C uses the term “preschedule” in one provision and “schedule” in the others. Neither term is defined in the Agreement or service schedule. Sections C-3.1 and C-3.2 have been part of Service Schedule C since the WSPP Agreement became effective on a permanent basis in 1992.⁴ That version of the Agreement did not include the present Section C-3.10, but, like the current schedule, also used both the term “schedule” as well as “preschedule.” WSPP’s transmittal letter submitting the Agreement for filing on December 30, 1991, did not refer to those terms or explain the intended meaning of either of them.

Section C-3.10 was added by an amendment to Service Schedule C that WSPP filed with the FERC⁵ on May 12, 2000. WSPP’s cover letter with the tariff sheets provided the following rationale for the additional provision:

This language was the product of extensive discussions lasting for over one year. These discussions demonstrated that the current definition of firm used in the WSPP Agreement was ambiguous with parties interpreting it in differing ways. The purpose of this change is to eliminate the ambiguity and to make clear that the Seller possesses the responsibility to ensure that the power is scheduled as firm.⁶

This explanation indicates that C-3.10 was intended to assign scheduling responsibility to the seller (C-3.2 did not assign responsibility) and require that the seller schedule Service Schedule C transactions as firm transactions.⁷ In the light of the history and intent, the term “schedule” as used in Service Schedule C appears to apply to all schedules, including preschedules.

III. SCHEDULING AND TAGGING REQUIREMENTS

⁴ The permanent agreement was accepted on April 23, 1991. *Western Sys. Power Pool*, 55 FERC ¶ 61,099 (1991).

⁵ FERC is the Federal Energy Regulatory Commission.

⁶ *Western Sys. Power Pool*, Docket No. ER00-2477, Transmittal letter at 3 (May 12, 2000). The amendment became effective after FERC acceptance on July 1, 2000.

⁷ The Commission’s letter order accepting this amendment did not address the purpose or meaning of the new provision. *Western Sys. Power Pool*, Letter Order (June 13, 2000) (unpublished).

As explained below, if presented with the question of retagging under the Agreement, a court would likely consider facts and circumstances surrounding the transaction at issue, including any applicable standards of NERC and the applicable RRO that may shed light on the parties' mutual intent behind the words and phrases of the contract. Inasmuch as the retagging issue has arisen in the WECC, we focus on NERC and WECC standards in this memorandum, but note that the Agreement applies to many parties and transactions outside of the WECC.

NERC Reliability Standards include the advance arrangements for energy transactions, referred to as "Arranged Interchange."⁸ NERC Reliability Standard INT-005-3 (R1) requires NERC Interchange Authorities, which include WECC, to distribute Arranged Interchange information (i.e., the parties' proposed schedules for transactions) for reliability assessment in accordance with timetables incorporated into the standard.

The standard includes a timing requirements table for the WECC. By this standard any tag submitted up to 10 minutes prior to the start of ramp for the schedule hour is timely, and any tag submitted after 10 minutes prior to start of ramp will be honored, though it is subject to longer processing times. The table states expressly that it applies to both initial interchange submittals and to subsequent tag changes.⁹

NERC's current E-tagging Functional Specification refers to changes in transaction schedules and tags as "Profile Changes."¹⁰ The Functional Specification states:

Profile Changes can be "requested by several different parties and for three primary reasons:

- To implement market-based modifications to the Transmission Allocation profile.
- To implement market-based desires to modify or extend energy flow

⁸ "Interchange" refers to an energy transfer that crosses a balancing authority area (control area) boundary. *See* NERC Tagging Essentials at 2.

⁹ Note also that NERC Tagging Essentials at 11 indicates tags include a category of information called "Transaction Administrative Information Requirements," which includes a category called "WSCC Prescheduled," to indicate "if tag is prescheduled per NERC Operating Manual Appendix 3A1." This may indicate that the term "preschedule" is unique to WSCC/WECC.

¹⁰ NERC, Electronic Tagging Functional Specification, Version 1.8.0, Nov. 7, 2007, at 33 (available at <http://reg.tsin.com/Tagging/e-tag/>).

- To implement reliability-based desires to modify energy flow (i.e., curtailments and reloads).¹¹

WECC standard INT-BPS-001-2, applicable to Balancing Authorities, Transmission Service Providers and purchasing and selling entities (“PSE’s”), states, “WECC e-tag requests may only be denied if information that is required by NERC Reliability Standards [or by NAESB or WECC business practice standards] is missing or incorrect.”¹² The standard states that an entity that “denies an e-tag request without proper justification . . . shall take corrective action.”¹³

WECC standard INT-BPS-003-0 (Interchange Prescheduling Calendar) states, “Interchange preschedules/e-tags shall be submitted per the WECC Prescheduling Calendar,” and thus treats “preschedules” and “e-tags” as synonymous. The standard similarly confirms that preschedules and e-tags are interrelated parts of the scheduling process when it states that “e-tags shall be submitted by 1500 PPT on or before the day the Interchange preschedule information is submitted.”¹⁴

IV. ANALYSIS OF SERVICE SCHEDULE C LANGUAGE

While we cannot assure how a court would ultimately rule if presented with the question in the context of a particular dispute, based on the terms and conditions of the Agreement, and the applicable NERC and WECC standards, we conclude that Service Schedule C does not prohibit or restrict retagging which occurs within applicable NERC and WECC parameters.

A. The Legal Standard for Interpretation of Contracts

Contracts for “goods” are governed nationwide by the Uniform Commercial Code (“UCC”) as enacted by each State. The UCC does not expressly address whether electricity is a “good” for the purposes of Article 2, and the Utah courts provide no direct guidance.¹⁵ Contracts

¹¹ *Id.* at 34, Section 1.6.1.3. *See also* NERC Tagging Essentials at 20.

¹² *See* INT-BPS-001-2 (Tagging Protocols) (available at http://www.wecc.biz/documents/library/Standards/BPs/INT-BPS-001-2_3-6-08.pdf)

¹³ *Id.*

¹⁴ *See* INT-BPS-003-0 (Interchange Prescheduling Calendar) (available at http://www.wecc.biz/documents/library/Standards/BPs/INT-BPS-003-0_Interchange%20Prescheduling%20Calendar.pdf).

¹⁵ See the information regarding electricity as a good provided in the appendix to this memorandum.

for sale of services (non-goods) are governed by traditional contract law. In this matter, it appears that under Utah law a court would generally apply the same framework for contract interpretation regardless of whether the UCC applies.¹⁶

In Utah as elsewhere,¹⁷ the mutual intent of the intent of the parties governs contract interpretation.¹⁸ To determine that mutual intent, a court would applying Utah law would consider the written contract and surrounding circumstances as follows:

Rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties so that the court can place itself in the same situation in which the parties found themselves at the time of contracting. If after considering such evidence the court determines that the interpretations contended for are reasonably supported by the language of the contract, then extrinsic evidence is admissible to

¹⁶ *WebBank v. American General Annuity Service Corp.*, 54 P.3d 1139 (Utah 2002).

¹⁷ In interpreting the Agreement (and associated schedules, including Schedule C), Section 24 of the Agreement provides for Utah law to govern, except in two situations. First, if both the Seller and Purchaser are organized under the laws of Canada, then the laws of the province of the Seller shall govern, or (2) if the Seller or Purchaser is an agency of or part of the United States Government, then the laws of the United States of America shall govern. This memorandum does not directly address these situations. First, we understand that relatively few transactions are undertaken under the Agreement where both the seller and the buyer are Canadian. In any event, interpretation of the Agreement under Canadian law is beyond the scope of this analysis at this time. Second, we have not analyzed the matter extensively, but recognize some potential that a United States power agency would assert that Federal common law of contract would apply to a WSPP transaction. *See generally, Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943);); *see also United States v. Seckinger*, 397 U.S. 203, 209-10 (1970). Because our review of federal common law indicates that it incorporates principles of contract interpretation similar to those of Utah, for purposes of this memorandum, we focus on relevant Utah law. The only potentially material difference appears to be that, under United States law, the court will not consider evidence other than the agreement in order to place itself in the same situation as the parties at the time of contracting. *See, e.g., Oklahoma v. New Mexico*, 501 U.S. 221 (1991). If ambiguity is found, however, the court may consider surrounding facts and circumstances relevant to resolving the ambiguity. *Id.*

¹⁸ *Willard Pease Oil v. Pioneer Oil & Gas Co.*, 899 P.2d 766, 770 (Utah 1995).

clarify the ambiguous terms. Conversely, if after considering such evidence, the court determines that the language of the contract is not ambiguous, then the parties' intentions must be determined solely from the language of the contract.^[19]

A court will find that an ambiguity exists when, after "consideration of any credible evidence offered to show the parties' intention, ... the language of the contract is reasonably capable of being understood in more than one sense."²⁰ Further, a contract term or provision is ambiguous "if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies.'"²¹ This does not mean, however, that contract provisions are ambiguous just because two parties ascribe different meanings to those provisions.²² Instead, "to demonstrate ambiguity, the contrary positions of the parties must each be tenable."²³ Thus, where the language of the agreement is reasonably susceptible to the parties' contended interpretations, the court will conclude that the agreement is ambiguous.²⁴

In short, applying Utah law, a court would consider all "credible evidence" to determine whether or not there is ambiguity. If there is no ambiguity, then the court would look only to the contract language, and if there is ambiguity, it would determine the parties' intentions based upon the contract language and that credible evidence.

B. Application of Legal Standard to the WSPP Agreement, Service Schedule C

Applying these principles, the court (applying Utah law) would first give a "preliminary consideration of all credible evidence offered to prove the intention of the parties so that the

¹⁹ *Reliance Ins. Co. v. Mast Construction Co.*, 1996 U.S. App. LEXIS 5673, at *5-*6 (citing *Ward v. Intermountain Farmers Ass'n.*, 907 P.2d 264, 268 (Utah 1995) (internal quotations, ellipses, and citations omitted)).

²⁰ *Lunceford v. Lunceford*, 139 P.3d 1073, 1075 (Utah 2006) (internal quotations, ellipses, and citations omitted).

²¹ *WebBank v. American General Annuity Service Corp.*, 54 P.3d 1139 (Utah 2002) (citations omitted).

²² *Id.* at 1076 (citations omitted).

²³ *Id.*

²⁴ *Id.*

court can place itself in the same situation in which the parties found themselves at the time of contracting.”²⁵

The time of contracting is the time the parties entered into the particular transaction in which the dispute arises. An earlier time, such as the time of drafting or filing the applicable WSPP Agreement language, is not the time of contracting. Thus, until the parties enter into a WSPP transaction, there is no contract for the purchase or sale of energy or capacity from which a retagging dispute could arise. The conclusion that the contract is made as of the time of the transaction is reinforced by the parties’ flexibility under the WSPP Agreement to vary terms of the Agreement, and further by the flexibility under C-3.2 to vary prescheduling requirements. Particularly in light of this flexibility, an interpretation of C-3.2 in light of facts and understandings of the early 1990’s would likely fail to implement the parties’ intentions. Instead, the facts and circumstances, and particularly scheduling procedures and standards that shed light on prescheduling, electronic tagging, and retagging in 2009, are pertinent.

More specifically, the extrinsic evidence includes evidence of trade usage or custom relevant to explain the meaning of technical terms found in the contract and to discern the intention of the parties.²⁶ Here, a court would likely consider the NERC and WECC standards

²⁵ The WSPP Agreement is a tariff filed with the FERC. Under the *Arkla* line of FERC cases, *Arkansas Louisiana Gas. Co. v. Hall*, 7 FERC ¶ 61, 175, at 61,322 (1979), *reh’g denied*, 8 FERC ¶ 61,031 (1979) (hereinafter “*Arkla*”), FERC retains discretion to determine whether to exercise primary jurisdiction over certain issues arising under contracts on file with FERC, which are within the concurrent jurisdiction of courts. The test for determining whether FERC should assert jurisdiction over such contractual issues consists of three factors: (1) whether FERC possesses some special expertise which makes the case peculiarly appropriate for FERC 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 FERC. *See id.* A case requiring construction of C-3.2 and C-3.10 may qualify for an exercise of FERC’s primary jurisdiction under *Arkla*. This is potentially significant because FERC may be even more likely than a court to construe these provisions of the Agreement in light of the NERC and WECC standards.

²⁶ *Brigham City v. Manuta Town*, 754 P.2d 1230 (Utah 1988) (citing *Craig Food Indus., Inc. v. Weihing*, 746 P.2d 279, 283 (Utah App. 1987) (“Trade usage or custom is permissible to explain technical terms in contracts to which particular meanings attach; to make certain that which is indefinite, ambiguous or obscure; to supply necessary matters upon which the contract itself is silent; and generally to elucidate the intention of the parties when the meaning of the contract cannot be clearly ascertained from the language”) (citations omitted)).

detailed above, and find that retagging is permitted to the extent allowed in the WECC. WECC freely permits retagging at least up to 10 minutes before ramp for both market and reliability reasons. Consequently, a court reviewing the extrinsic evidence would likely determine that retagging is an element of “scheduling” as well as “prescheduling” a transaction and, thus, contemplated and permitted under Schedule C.

More specifically, WECC scheduling requirements follow NERC procedures under which all transactions are tagged via an e-tag that provides certain information regarding the transaction. Generally, an e-tag is an electronic documentation of the transaction describing the source, sink, path, transmission contracts to be used, capacity profiles and parties to the transaction. E-tags were developed by the industry to maintain reliability by ensuring that all parties to interchange energy transactions receive relevant reliability information. The e-tag system is used to communicate intent to schedule energy and approval or denial and modifications to schedules (“retagging”).²⁷

Retagging is the procedure by which parties modify the scheduled transaction.²⁸ Retagging is permitted both for reliability reasons as well as market-based reasons. Thus, when transactions are scheduled or prescheduled, an e-tag is created that can be retagged in accordance with NERC requirements. As a result, such retagging, assuming that it meets any applicable transmission provider, control area operator and/or NERC requirements, is a component of “scheduling” or “prescheduling” a transaction.

Because of the industry knowledge attributed to, and the sophistication of, the parties transacting under Schedule C, all parties are aware of NERC and WECC’s e-tag and scheduling/prescheduling procedures when they enter into Service Schedule C transactions. This means that they are aware of the allowance of and limits upon retagging. It is likely that a court would construe the terms “preschedule” and “schedule” as used in Service Schedule C in light of these procedures (and unlikely that a court would find their meanings unambiguous such that industry custom, standards, and usage would be irrelevant). Indeed, the lack of definitions of these terms in the WSPP Agreement indicates intent that they be understood in the manner they are used by the applicable reliability organizations.

In summary, we conclude that the Schedule C provisions regarding scheduling would be understood and applied in a manner consistent with, and not more restrictive than, the applicable NERC and WECC standards.

²⁷ The term “retagging” appears to be a colloquial industry usage, and is formally referred to as Profile Changes and Modifications.

²⁸ See *North American Electric Reliability Council*, 113 FERC ¶ 61,013, n.3 (2005).

The conclusion that Service Schedule C does not preclude retagging that is within NERC and WECC standards would also apply if Service Schedule C were revised to state a Business Day-ahead deadline for submission of the schedule. As demonstrated above, the requirement that a preschedule or schedule be submitted by a certain time does not preclude changes to the schedule. The addition of a deadline for the submission of a schedule would not, without additional restrictive language, indicate an intention that the term “schedule” excludes the flexible allowance of schedule changes permitted under the NERC and WECC rules. In light of the considerable discussion and concern among some WSPP members that has accompanied the proposed language and the retagging issue, members would most likely avoid disputes if any changes to language were clear in this respect.

A member has queried whether the perfect tender rule of UCC 2-601 would permit a buyer to reject retagged transactions. Given our conclusion that the Agreement permits retagging within NERC and WECC parameters, retagging that is consistent with those parameters would not render the transaction imperfect. No basis for rejection would appear under the perfect tender rule.

V. OTHER CONSIDERATIONS

We note additional considerations some members have raised in the discussions. These considerations are not necessarily pertinent to the contract interpretation question, but they deserve recognition in the discussion.

Parties opposing retagging have cited the administrative costs they would bear and the potential reliability risks the system would incur that may arise from receipt of retags just prior to the WECC cutoff, particularly if the retags are too numerous to process timely. A possible remedy for administrative costs is to impose a flat fee on the seller for submission of the retag. This approach would need to be feasible in daisy chains. The risk of numerous retags just ahead of the 10-minute deadline in our view should be addressed in the WECC. WSPP Officers are considering proposing a WSPP reliability interface committee to address such issues in a coordinated manner with the WECC.

Parties favoring retagging and who possess a portfolio of resources have cited the advantages of least cost dispatch to the marketplace. As noted, WECC allows retagging for such market reasons. Other parties favoring retagging may be holders of intermittent (solar and wind) resources, who firm these resources by combining them with a hydro or thermal resource. These parties may require retagging to implement such firming. The FERC strongly favors the integration of these resources into the markets. Parties opposing retagging have urged that such a firmed product, which involves switching of resources potentially on a next-hour basis, is not firm energy as envisioned under Service Schedule C and should be subject to market differentiation.

The revision now proposed would state a requirement for submission of schedules a Business Day ahead of injection, with Business Day as defined under the Agreement (WECC may have a different definition). An effect of the requirement is to require submission of the preschedule on a Friday for Monday injection, which would apparently be less flexible than WECC requirements. While WSPP, in theory, can establish a different deadline than the applicable RRO, the approach raises the possibility of disparate scheduling requirements in daisy chains that involve both WSPP transactions and other transactions. Counsel does not recollect that this aspect was openly considered by the contract subcommittee or Operating Committee.

VI. CONCLUSION

The Agreement does not prohibit retagging of Schedule C transactions in circumstances where the retagging otherwise complies with NERC and WECC scheduling parameters.

APPENDIX

UCC Explanation

Article 2 of the Utah UCC defines “goods” as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action.” Utah Code Ann. § 70A-2-105 (2008). The Utah UCC does not specify whether electricity is a “good” for the purposes of Article 2, and the Utah courts provide no direct guidance on this question.

The United States District Court for the Southern District of New York explained that “Utah courts have not ruled on whether electricity should be considered a good covered by Article 2.” *Enron Power Mktg., Inc. v. Nev. Power Co.*, 2004 U.S. Dist. LEXIS 20351, *4 (S.D.N.Y. 2004). The court further explained that Utah courts “have held that other states’ interpretations of identical UCC provisions are relevant.” *Id.* (citing *Power Sys. & Controls, Inc. v. Keith’s Elec. Constr. Co.*, 765 P.2d 5, 10 n.2 (Utah Ct. App. 1988)). The court also explained that “[i]n other jurisdictions the sale of electricity is considered a good, and UCC Article 2 governs.” *Id.* at *4-5 (citations omitted).

The United States District Court for the Northern District of California held that electricity is a good for the purposes of UCC Article 2. *See In re Pac. Gas & Elec. Co.*, 2004 U.S. Dist. LEXIS 22023, at *13 (N.D. Cal. 2004) (“Transport of a quantity of electricity is considered a moveable “good” within the meaning of the UCC”); *see also Puget Sound Energy, Inc. v. Pac. Gas & Elec. Co. (In re Pac. Gas & Elec. Co.)*, 271 B.R. 626 (N.D. Cal. 2002).

It should be noted that “courts are divided on the general question of whether or not electricity is ‘goods’” and have held that is “more properly characterized as a ‘service.’” *In re Samaritan Alliance, LLC*, 2008 Bankr. LEXIS 1830, *9 (Bankr. E.D. Ky. 2008); *see also Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 705 N.E.2d 656, 682 (N.Y. 1998) (holding that UCC § 2-609 should apply as a matter of policy even though New York does not consider electricity as a good); *Cincinnati Gas & Elec. Co. v. Goebel*, 502 N.E.2d 713, 715 (Ohio Mun. Ct. 1986) (“metered electricity sold in consumer voltage and passed into the household system is a ‘good’ covered by the UCC, while raw electrical energy encountered in an unmarketed and unmarketable state in an overhead transmission cable [is] not”).