

UNITED STATES OF AMERICA 115 FERC ¶63,011  
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission  
System Operator, Inc.

Docket No. ER05-6-052

Midwest Independent Transmission  
System Operator, Inc.  
PJM Interconnection, LLC, *et al.*

Docket No. EL04-135-054

Midwest Independent Transmission  
System Operator, Inc.  
PJM Interconnection, LLC, *et al.*

Docket No. EL02-111-072

Ameren Services Company, *et al.*

Docket No. EL03-212-068

PARTIAL INITIAL DECISION

(Issued April 13, 2006)

*Appearances*

*Becky Bruner, Esq. and Thomas C. Orvald, Esq.*, on behalf of AEP and Exelon.

*David R. Strauss, Esq.*, on behalf of American Municipal Power-Ohio, Inc.

*Noel H. Symons, Esq. and Kathleen Barron, Esq.*, on behalf of Cinergy Services, Inc.

*Andrew Young, Esq.*, on behalf of Constellation Energy Commodities Group.

*William Derasmo, Esq.*, on behalf of the Detroit Edison Co. and DTE Energy Trading Inc.

*Michael Engleman, Esq.*, on behalf of Duke Energy New York and Duke Energy Trading and Marketing.

*George H. Williams, Jr., Esq.*, on behalf of Dynegy Power Marketing, Inc.

*R. Michael Sweeny, Jr., Esq. and Linda Walsh, Esq.*, on behalf of LG&E Energy Marketing, Inc.

*Jason Lewis, Esq. and Tamara Linde, Esq.*, on behalf of PSEG Energy Resources.

CARMEN A. CINTRON, Presiding Administrative Law Judge

## I. INTRODUCTION

1. This decision grants the Motions for Summary Disposition filed by Dynege Power Marketing, Inc. (Dynege)<sup>1</sup>, DTE Trading, Inc. (DTET)<sup>2</sup>, and Cinergy Services, Inc. (Cinergy)<sup>3</sup>. In addition, the decision also grants Public Service Electric and Gas Energy Resources and Trade's (PSEG) oral Motion for Summary Disposition requested during the oral argument held on March 30, 2006.<sup>4</sup> With respect to the Motions for Summary Disposition raised by DTET and PSEG, a cross motion for summary disposition has been granted in favor of American Municipal Power-Ohio, Inc. (AMP-Ohio). This decision reconsiders a previous ruling and denies Cinergy's request for a procedural bar. Finally, this decision admonishes the parties concerning further development of the record in this proceeding.

## II. PROCEDURAL HISTORY

2. The Commission accepted for filing and set for hearing four sets of compliance filings<sup>5</sup> to implement a previous Commission order.<sup>6</sup> The November 18 Order directed

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<sup>1</sup> Expedited Motion for Summary Disposition of Dynege Power Marketing, Inc. (March 16, 2006) (Dynege's Motion or Dynege's Motion for Summary Disposition).

<sup>2</sup> Expedited Motion for Summary Disposition of DTE Energy Trading, Inc. (March 22, 2006) (DTET's Motion or DTET's Motion for Summary Disposition).

<sup>3</sup> Cinergy Services, Inc.'s Answer in Support of DTE Energy Trading, Inc., and Expedited Motion for Summary Disposition as to Constellation Energy Commodities Group, Inc. (March 24, 2006) (Cinergy's Motion or Cinergy's Motion for Summary Disposition). Cinergy's Motion was filed by Cinergy Services, Inc., on behalf of The Cincinnati Gas & Electric Company and Cinergy Marketing and Trading, L.P. (collectively, Cinergy).

<sup>4</sup> Tr. 631:5-632:8. PSEG's oral motion for summary disposition is referred to as PSEG's Motion.

<sup>5</sup> *Midwest Indep. Transmission Sys. Operator Inc.*, 110 FERC ¶ 61,107 (2005);

the Midwest Independent Transmission System Operator, Inc. (Midwest ISO), PJM Interconnection, L.L.C. (PJM) and their transmission owners to submit revised tariff sheets to implement: the elimination of through and out rates, the adoption of the replacement rate design and the SECA methodology. November 18 Order at P 61, 66. In the November 17 Order the Commission allowed load serving entities (LSEs) under existing contracts to demonstrate that the supplier is the shipper and propose to transfer a portion of their SECA obligation to the supplier. November 17 Order at P 45. This is referred to as the “shift-to-shipper” issue.

3. On March 10, 2006 a Partial ID<sup>7</sup> was issued which found that “[i]t is clear from the plain meaning of the cited orders that the Commission envisioned that the SECA would apply to transactions involving reservations pursuant to requests made on or after November 17, 2003 for service commencing after April 1, 2004.” Partial ID at P 16. The Partial ID also found that “SECA charges are for contracts for delivered power that continue into the transition period” and that “[a]ny other interpretation is contrary to the plain meaning of the words in the cited orders.” *Id.* Moreover, the Partial ID stated that the finding is consistent with the Commission’s orders in this proceeding and if the orders are taken in context and interpreted in their totality, it is clear that contracts, which terminated during the test period, should not be included in the transitional SECA charges. *Id.* at P 17. The Partial ID found that “SECA charges should not be imposed on

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111 FERC ¶ 61,409 (2005); 112 FERC ¶ 61,267 (2005) and 113 FERC ¶ 61,010 (2005).

<sup>6</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 109 FERC ¶ 61,168 (2004) (November 18 Order), *reh’g pending*. For a more comprehensive review of the history of this proceeding see *Midwest Indep. Transmission Sys. Operator, Inc.*, 104 FERC ¶ 61,105 (2003) (Order on Initial Decision) *order on reh’g*, 105 FERC ¶ 61,212 (2003) (November 17 Order) (eliminated Regional Through and Out Rates (RTORs) between PJM and the Midwest ISO regions); *Ameren Services Co.*, 105 FERC ¶ 61,216 (2003) (through and out (T&O) rate design of certain former Alliance Companies is unjust and unreasonable). In *Midwest Indep. Transmission Sys. Operator, Inc.*, 105 FERC ¶ 61,288 (2003), the Commission clarified its two previous orders (*Midwest Indep. Transmission Sys. Operator, Inc.*, 105 FERC ¶ 61,212 and *Ameren Services Co.*, 105 FERC ¶ 61,216) and eliminated existing rates for through and out service starting April 1, 2004, sinking into PJM, Midwest ISO and certain former Alliance Companies, when service is requested on or after November 17, 2003. *See also Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,262 (2004) (established going-forward principles); *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,313 (2004) (implemented section 206 proceeding); *Midwest Indep. Transmission Sys. Operator, Inc.*, 109 FERC ¶ 61,243 (2004) (allowed certain companies to recover *intra* Regional Transmission Operator (RTO) lost revenues through the Seams Elimination Cost/Charge Adjustments/Assignments (SECA)).

<sup>7</sup> *Midwest Indep. Sys. Operator, Inc.*, 114 FERC ¶ 63,037 (2006) (Partial ID).

contracts that do not continue into the transition period.” *Id.* Therefore, the Partial ID found, contracts that are not within the confines of the transition period beginning December 1, 2004 through March 31, 2006 cannot be used as a basis to shift SECA obligations. *Id.* The Partial ID also found that SECA charges cannot be imposed based on any “contract which terminated before the SECA transition period or did not involve “delivered power” in the transition period.” *Id.* at P 21. In sum, the Partial ID concluded that contracts that are the basis for shift-to-shipper claims must extend into the transition period. Oral argument on petitions for reconsideration of the Partial ID was held on March 30, 2006. The petition for reconsideration and request for clarification were denied on that same date. *See* Order Confirming Rulings (March 3, 2006).

4. Oral argument on the Motions for Summary Disposition was held on March 30, 2006 during which the parties advanced their various arguments on the motions for summary disposition.<sup>8</sup>

### III. ISSUES

**Issue 1(a):** Should DTET’s Motion for Summary Disposition be granted?

#### A. Parties’ Contentions

5. DTET’s Motion for Summary Disposition requests that AMP-Ohio’s shift-to-shipper claim against DTET be summarily dismissed.<sup>9</sup> DTET avers that the dismissal is called for and supported by the plain language in the Commission’s November 17 Order and the Partial ID.<sup>10</sup> According to DTET, the contracts that serve as the basis for AMP-Ohio’s shift-to-shipper claim against DTET do not extend into the transition period. Specifically, DTET notes, Contract No. 15 had a term of January 2002 through December

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<sup>8</sup> *See* Tr. 494-527:7, 631:5-632:25. Specifically, the Indicated Transmission Owners objected to the second portion of the Partial ID dealing with the underlying SECA charges. The Indicated Transmission Owners did not object to the portion of the Partial ID concerning the shift of those charges. LG&E Energy Marketing stated that it is against the Motions for Summary Disposition because there are insufficient facts in the record to make the determination. All arguments posed at oral argument are not reiterated here.

<sup>9</sup> On September 2, 2005 AMP-Ohio filed a Notice of Intent stating that it intended to shift a portion of its SECA obligation to DTET. AMP-Ohio’s Notice of Intent and its direct testimony identified Contract Nos. 15 and 25 as the basis for its claim against DTET. Ex. AMP-4 at 17:21-18:5.

<sup>10</sup> DTET notes that its motion only relies on the portion of the Partial ID concerning shift-to-shipper claims, and does not rely on the portion of the Partial ID concerning SECA charges in general.

2002 and Contract No, 25 had a term of July 1, 2003 through July 31, 2003.<sup>11</sup> Thus, DTET states, the contracts clearly do not extend into the transition period as required by the Commission's November 17 Order and the Initial Decision. DTET further states that the issue presented in its Motion is similar to the issue in Aquila's Motion<sup>12</sup> which was granted in the Partial ID. For those reasons, DTET avers, summary disposition is appropriate.

6. AMP-Ohio filed a Partial Answer<sup>13</sup> and an Answer<sup>14</sup> to DTET's Motion. AMP-Ohio states that it concurs that the issue presented in DTET's Motion is similar to the issue in Aquila's Motion. AMP-Ohio also agrees that its contracts with DTET terminated before the transition period began and based on DTET's Motion there is no genuine issue of material fact.<sup>15</sup> In addition, AMP-Ohio states that it agrees that Contract Nos. 15 and 25 are indistinguishable from Contract 22 which was the subject of the Partial ID. In conclusion, AMP-Ohio states that there should be no SECA charges associated with Contracts Nos. 15 and 25 and, accordingly, there can be no shift of the non-existent SECA charges.

7. Cinergy's Motion supports DTET's Motion.<sup>16</sup> Cinergy states that it agrees with DTET's interpretation of the requirements for asserting a shift-to-shipper claim, as set forth in the November 17 Order and the Partial ID.

## **B. Discussion/Findings**

8. Rule 217, 18 C.F.R § 385.217 (2005), provides that if there are no genuine issues of fact material to the decision, the matter may be resolved summarily. *See* Partial ID at P 10. DTET and AMP-Ohio agree that DTET's Motion does not raise issues of material

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<sup>11</sup> DTET Motion at 5 (citing Ex. AMP-22, Ex. AMP-4 at 34-35).

<sup>12</sup> Motion for Leave to Intervene Out of Time and Motion for Summary Disposition of Aquila Merchant Services, Inc. (February 10, 2006) (Aquila's Motion).

<sup>13</sup> Partial Answer of American Municipal Power-Ohio, Inc. to DTE Energy Trading, Inc.'s Expedited Motion for Summary Disposition (March 22, 2006). The motion basically requests that AMP-Ohio be given at least until March 31, 2006 to file its answer.

<sup>14</sup> Answer of American Municipal Power Ohio, Inc. to the Expedited Motion for Summary Disposition DTE Energy Trading, Inc. (March 27, 2006) (AMP-Ohio's Answer to DTET).

<sup>15</sup> AMP-Ohio's Answer to DTET at 2 (citing DTET's Motion at 2).

<sup>16</sup> Cinergy makes additional arguments which are discussed in the portion of this decision granting its Motion for Summary Disposition.

fact.<sup>17</sup> Thus, it is found that since there are no issues of material fact, summary disposition is appropriate and the issue will be resolved based on the analysis of the law. As stated in the Partial ID, summary disposition is appropriate when it primarily involves a “question of the appropriate legal standard applicable to the dispute.”<sup>18</sup>

9. The Partial ID cited and interpreted the Commission’s orders in this proceeding in order to determine the applicable law. *Id.* at P 11-18. Specifically, the Partial ID examined paragraph 45 of the November 17 Order and found that the Commission clearly stated that “SECA charges are for contracts for delivered power that continue into the transition period.”<sup>19</sup> The Partial ID explained that the November 17 Order also stated that “LSEs under existing contracts for delivered power that continue into the transition period” can demonstrate that the supplier is the shipper for such transactions and propose that the supplier be required to pay the SECA for that portion of the LSE’s load served by the contract.<sup>20</sup> Accordingly, based on the Commission’s orders, the Partial ID found that SECA charges cannot be shifted based on contracts that do not continue into the transition period.<sup>21</sup>

10. AMP-Ohio’s attempt to shift its SECA obligation to DTET is a shift-to-shipper claim.<sup>22</sup> The issue that needs to be decided is whether Contract Nos. 15 and 25 continued into the transition period. The testimony submitted by AMP-Ohio<sup>23</sup> states that Contract No. 15 had a term from January 2002 through December 2002 and Contract No. 25 had a term from July 1, 2003 through July 31, 2003.<sup>24</sup> These contracts clearly terminated before the transition period began and therefore are not reservations pursuant to requests made on or after November 17, 2003 for service commencing on or after April 1, 2004 as required by the Commission. Thus, there is no factual dispute and therefore no genuine

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<sup>17</sup> DTET’s Motion at 6, AMP-Ohio’s Answer to DTET at 2.

<sup>18</sup> Partial ID at P 10 (citing 11-56 Moore’s Federal Practice - Civil ¶ 56.11 at § 5(a),(c), n.64 (2005)).

<sup>19</sup> Partial ID at P 16. *See also* November 17 Order at P 45.

<sup>20</sup> *Id.* at P 17 (citing November 17 Order at P 45).

<sup>21</sup> *Id.* at 17-18. It should be noted that the Partial ID did not address how the SECA should be applied to contracts that commenced after April 1, 2004. As noted in paragraphs 9, 14 and 45 of the November 17 Order, the SECA shall apply to “new transactions during the transition period.”

<sup>22</sup> Tr. 495:2-7 (DTET stating that the claim is not a “ripple” claim, but a shift-to-shipper claim). For an explanation of “ripple” claims see footnote 29 below.

<sup>23</sup> The AMP-Ohio exhibits cited herein have not been admitted into evidence, but are part of the record in this proceeding.

<sup>24</sup> Ex. AMP-4 at 35:3-10, Ex. AMP-22 at 1.

issue of material fact concerning the contract dates. It is found that Contract Nos. 15 and 25 did not extend into the transition period as required by the Commission, and accordingly AMP-Ohio cannot assert a shift-to-shipper claim based on these contracts. This finding is consistent with both the Commission Orders in this proceeding and the findings in the Partial ID. *See id.* at P 17. As discussed in the Partial ID, it is consistent with cost causation principles not to apply SECA charges to non-existing transactions, as is the case here, since power was not delivered in the transition period pursuant to these contracts. *Id.* at P 18. Therefore, there are no “lost revenues” associated with this contract and, following cost causation principles, SECA charges cannot be shifted to DTET. Accordingly, since the contracts did not continue into the transition period there are no genuine issues of material fact and DTET’s Motion for Summary Disposition is hereby granted.

**Issue 1(b):** Should AMP-Ohio’s Answer to DTET’s Motion for Summary Disposition be treated as a cross motion for summary disposition?

**A. Parties’ Contentions**

11. Consistent with the Partial ID, the issue is inferred from AMP-Ohio’s Answer and its contentions at oral argument. Tr. 497:4-17.

**B. Discussion/Findings**

12. Based on the findings and conclusions in Issue No. 1 above and the Partial ID it is appropriate to treat AMP-Ohio’s Answer as a cross motion for summary disposition. *See* Partial ID at P 20-21. Here, as in the Partial ID, the testimony of witness Chris Norton on behalf of AMP-Ohio is persuasive. *See id.* at 20. Norton states that “if taken literally,” the language used by the Commission “limits the LSE’s ability to shift the SECA cost to those contracts that ‘extend into the transition period.’” AMP-1 at 31:1-3. “[C]ontracts that expired before the transition period present similar issues,” explains Norton, but it is not clear from the Commission’s orders whether “the phrase ‘that extended into the transition period’ is to be understood as an absolute limitation on the right to seek a shift in the associated SECA charge.” *Id.* at 31:4-12. For this reason, Norton states, AMP-Ohio included contracts that expired before the transition period on its list of contracts for which it seeks to shift the SECA to the seller. *Id.* at 31:7-12.

13. Norton then explained “why it is inappropriate to impose a SECA charge on an LSE that once used, but no longer uses, a transmission path that imposed a through and out rate on the seller, not the buyer.” *Id.* at 31:11-15. According to Norton, the transmission owner did not ‘lose’ any revenue as a result of the Commission eliminating RTORs.”<sup>25</sup> Importantly, Norton states that if a SECA has to be imposed, it should be

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<sup>25</sup> AMP-1 at 32:16-17. *See also* Partial ID at 21 (further explains why AMP-Ohio

paid by the seller (and not AMP-Ohio), “but the better result is that there should be no SECA at all, because there are no lost revenues the responsibility for which can be assessed as a result of the Commission’s action.” *Id.* at 34:1-5. Based on Norton’s testimony, the Partial ID granted AMP-Ohio’s Cross Motion for Summary Disposition and found that neither AMP-Ohio nor Aquila should pay SECA charges for this contract or a contract which terminated before the SECA transition period or did not involve “delivered power” in the transition period. The contracts related to the Partial ID are indistinguishable from the contracts at issue here. Moreover, Norton’s testimony is also persuasive as applied to these facts. Accordingly, it follows that the same result is appropriate here. AMP-Ohio’s Cross Motion for Summary Disposition concerning the DTET contracts is hereby granted, subject to the Commission’s disposition of exceptions to the Partial ID.

**Issue 2:** Should Dynegy’s Motion for Summary Disposition be granted?

### **A. Parties’ Contentions**

14. Dynegy’s Motion argues that Constellation Energy Commodities Group, Inc. (CCG) cannot shift SECA charges to Dynegy because the contracts at issue terminated in 2003.<sup>26</sup> Dynegy states that the Commission’s November 17 Order and the Partial ID placed limitations on a parties’ ability to shift SECA obligations to its suppliers. Thus, Dynegy avers, the shift of SECA costs only applies to those contracts in effect during some portion of the December 1, 2004 through March 31, 2006 transition period. Summary disposition is appropriate, Dynegy states, because it is not disputed that the contracts terminated in 2003 and, accordingly, there can be no cost shifting.

15. CCG filed an Answer<sup>27</sup> to Dynegy’s Motion on March 21, 2006 stating that Dynegy has failed to establish that there are no genuine issues of material fact. Specifically, CCG states that it is clear that the Partial ID only addressed attempts by an LSE to shift SECA charges to its suppliers based on a contract that does not extend into the transition period, and, accordingly, the treatment of upstream suppliers regardless of

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should not pay SECA charges based on Norton’s testimony).

<sup>26</sup> On March 1, 2006, in response to contingent notices of intent filed by LSE’s naming CCG as a company it may file a shift-to-shipper claim against, CCG filed a Contingent Notice of Intent Regarding Shift-to-Shipper Issues listing Dynegy as one of the parties that may be a ripple claim target. *See Ex. CCG-1* at 6:8-15. The CCG exhibits cited herein have not been admitted into evidence, but are part of the record in this proceeding.

<sup>27</sup> Answer of Constellation Energy Commodities Group, Inc. to Expedited Motion for Summary Disposition of Dynegy Power Marketing, Inc. (March 21, 2006) (CCG’s Answer).

whether the contract extends into the transition period presents an issue of material fact regarding the merits of the defense. CCG also claims that the argument advanced by Dynegy has already been rejected by the Presiding Judge.

## B. Discussion

16. Dynegy is one of CCG's upstream suppliers<sup>28</sup> and CCG's attempt to shift a portion of its potential SECA obligation to Dynegy is a "ripple" claim.<sup>29</sup> As discussed above, the Commission's rules allow an issue to be resolved summarily if there are no genuine issues of fact material to the decision.<sup>30</sup> Since the testimony submitted by Constellation corroborates Dynegy's assertion that the contracts did not continue into the transition period, there is no genuine issue of material fact and summary disposition is appropriate.<sup>31</sup> CCG's arguments do not establish genuine issues of fact, but are instead arguments based on its interpretation of the law applied to the facts. Again, the disposition of this issue turns on the analysis of the law.

17. The issue to be determined is whether the CCG/Dynegy contracts<sup>32</sup> permit the filing of a "ripple" claim against Dynegy. As discussed above, the Partial ID found that the Commission's orders in this proceeding stated that SECA charges cannot be shifted based on contracts that did not continue into the transition period. Partial ID at 17-18. CCG's testimony, which lists the contract termination dates, shows that the Bay City/MSCPA/MPPRPA and Columbus/CVEC contracts terminated in 2003. Ex. CCG-3 (Protected), CCG-1 at 10:1-11:2. Even if the facts are viewed in a light most favorable to CCG, it would still be clear that the contracts terminated before the transition period began. Thus, it is found that the contracts at issue did not continue into the transition period and, therefore do not meet the mandates established by the Commission.<sup>33</sup> As a

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<sup>28</sup> Ex. CCG-1 at 8:18-9:4.

<sup>29</sup> "Ripple" claims are defined, for purposes of this decision, as claims asserted by companies who had shift-to-shipper claims asserted against them by LSEs. As stated above, CCG had LSE entities assert shift-to-shipper claims against it. CCG in turn is trying to defend against the shift-to-shipper claim by asserting that its upstream (or downstream) suppliers are really the entities who should pay a portion of the LSEs SECA charges (not CCG).

<sup>30</sup> 18 C.F.R § 385.217. *See also* Partial ID at P 10 (citing 11-56 Moore's Federal Practice, *supra* note 18, at § 5(a),(c), n.64).

<sup>31</sup> Dynegy's Motion at 6. *See* Ex. CCG-3 (Protected).

<sup>32</sup> Ex. CCG-1 at 10:7-11:2. The claim is based on the CCG/Dynegy contracts. The contracts are listed in CCG-3 (Protected).

<sup>33</sup> It is found that the contracts are not "reservations pursuant to requests made on or after November 17, 2003 for service commencing after April 1, 2004." *See* Partial ID

result, based on the facts in this case, if the contracts had been between a LSE and Dynegy, the shift-to-shipper claim would not be allowed consistent with the holdings in this decision. Therefore, if a LSE cannot shift-to-shipper based on these contracts, “ripple” claims based on these contracts cannot be asserted either. Accordingly, Dynegy’s Motion for Summary Disposition is hereby granted.

**Issue 3:** Should Cinergy’s Motion for Summary Disposition be granted?

### **A. Parties’ Contentions**

18. Cinergy’s Motion states that it agrees with DTET’s interpretation of the requirements for asserting a shift-to-shipper claim and “ripple” claims, as set forth in the November 17 Order and the March 10 Partial ID. Cinergy also argues that a “daisy chain” of “ripple” shift-to-shipper claims may occur if “ripple” claims are not subject to the same criteria as LSE shift-to-shipper claims. Cost causation principles, Cinergy argues, require a showing that Cinergy benefited from the elimination of through-and-out rates before it can be assessed SECA charges.

19. Cinergy avers that the contracts used as the basis for CCG’s claim against Cinergy either were not in existence on November 17, 2003 or did not continue into the transition period.<sup>34</sup> Cinergy also states that there is no issue of material fact since it is accepting the testimony of Dale C. Meyer, as true for the purposes of its Motion. Thus, Cinergy asserts, CCG’s ripple claim against it should be dismissed.

20. CCG filed an Answer<sup>35</sup> arguing that Cinergy’s Motion should be denied because CCG’s defense against shift-to-shipper claims made against it presents genuine issues of material fact.<sup>36</sup> CCG states that it is not a LSE making the claim against Cinergy, but a party that is defending itself against a LSE’s claim. Specifically, CCG states that the testimony of its witness, Mr. Meyer explains that CCG was not the shipper that benefited from the elimination of the RTORs and that Cinergy is one of the upstream suppliers that should be responsible for any allowable shift of CCG’s SECA obligation. CCG also argues that Cinergy’s Motion should be denied since Cinergy forwarded a similar

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at P 16-17.

<sup>34</sup> Cinergy Motion at 6 (referring to the contracts listed in Exhibit No. CCG-3 of the March 6, 2006 Conditional Direct Testimony of Dale C. Meyer on behalf of CCG).

<sup>35</sup> Answer of Constellation Energy Commodities Group, Inc. to Expedited Motion for Summary Disposition of Cinergy Services, Inc. (March 29, 2006).

<sup>36</sup> CCG’s defense against claims made against it by LSEs states that CCG is not the shipper for many of the transactions at issue and identifies upstream suppliers.

argument in its Motion to Strike<sup>37</sup> and that argument was already considered and denied. There is only one difference between the argument presented here and the one in the Motion to Strike, CCG avers, and that is the new assertion that the contracts at issue fail to start prior to November 17, 2003 and continue into the transition period.

## **B. Discussion/Findings**

21. Pursuant to Rule 217, an issue is subject to summary disposition if there are no genuine issues of material fact.<sup>38</sup> CCG argues that the merits of the defense it will use against shift-to-shipper claims presents genuine issues of material fact.<sup>39</sup> The contract termination dates are not disputed. Both Cinergy's and CCG's exhibits show that the contracts terminated in 2003.<sup>40</sup> Thus, there are no issues of material fact and summary disposition is appropriate. CCG's arguments do not establish genuine issues of material fact, but are instead arguments based on its interpretation of the law applied to the facts. Therefore, the issue will be resolved based on the application of the appropriate law.

22. CCG's attempt to shift its SECA obligations to Cinergy is a "ripple" claim. As discussed above, SECA charges cannot be shifted based on contracts that do not continue into the transition period.<sup>41</sup> Since the contracts identified by CCG as the basis for its "ripple" claim against Cinergy do not extend into the transition period, it is found that they cannot form the basis of "ripple" claims against Cinergy.<sup>42</sup> Even if the facts are viewed in a light most favorable to CCG, it is clear from the exhibits that the contract dates do not continue into the transition period. Therefore, if the LSE could not assert shift-to-shipper claims for contracts that do not continue into the transition period, then "ripple" claims cannot be asserted either based on contracts which do not extend into the transition period. Accordingly, Cinergy's Motion for Summary Disposition is hereby granted.

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<sup>37</sup> Expedited Motion to Strike of Cinergy Services (March 9, 2006) (Motion to Strike). Cinergy's Motion to Strike was denied at oral argument on March 16, 2006 and confirmed in an Order Confirming Rulings issued on March 20, 2006.

<sup>38</sup> 18 C.F.R. § 385.217, Partial ID at P 10 (citing 11-56 Moore's Federal Practice, *supra* note 18, at § 5(a),(c), n.64).

<sup>39</sup> CCG's Answer at 6.

<sup>40</sup> Ex. CCG-19(c) (Protected), Ex. CCG-3 (Protected), Ex. CIN-3 (Protected), Ex. CIN-4 (Protected), Tr. 508:3-11(Cinergy states that the contracts used as the basis of CCG's claim against it are for time periods within 2003).

<sup>41</sup> Partial ID at 17-18. This is also discussed in Issue 1(a) above.

<sup>42</sup> Moreover, it is found that the contracts are not "reservations pursuant to requests made on or after November 17, 2003 for service commencing after April 1, 2004." *See* Partial ID at 16.

23. In a March 20 Order,<sup>43</sup> the parties were directed to update existing filings or submit new filings which clearly identify the name of the company and amount of any “ripple” claims. At oral argument on March 31, 2006, Cinergy requested a ruling that CCG’s “ripple” claim be procedurally barred since CCG’s contingent claim failed to identify the claims, specifically the name of the company and amount, as required by the March 20 Order.<sup>44</sup> Cinergy’s request was granted in a bench ruling at oral argument. Tr. 527:3-6. Upon further consideration and investigation, it is found that CCG complied with the March 20 Order by identifying the amount of the claims and the companies against whom it was asserting such claims. *See* CCG-6 at 54:3-12 (Protected). Accordingly, Cinergy’s request has been reconsidered and is hereby denied.<sup>45</sup>

**Issue 4(a):** Should PSEG’s motion for summary disposition be granted?

#### **A. Parties’ Contentions**

24. PSEG orally moved for summary disposition of a shift-to-shipper claim by AMP-Ohio against PSEG at oral argument on March 31, 2006. Tr. 631:17-632:23. AMP-Ohio’s Notice of Intent<sup>46</sup> identified Contract No. 24 as the basis for its shift-to-shipper claim against PSEG. According to PSEG, the contract did not extend into the transition period since it began on December 1, 2003 and terminated on December 31, 2003. *Id.* at 631:22-632:2. PSEG also stated that based on the November 17 Order and the Partial ID, AMP-Ohio’s claim is without merit. PSEG also argued that its claim is identical to DTE’s and moved for summary disposition on that basis.

25. AMP-Ohio stated that it has no objection to the issuance of an order similar to the orders issued concerning the Aquila and DTE Motions for Summary Disposition. *Id.* at 632:10-12. At oral argument, AEP, Exelon and the Indicated Transmission Owners noted their objection to the motion. *Id.* 632:17-18.

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<sup>43</sup> Order Confirming Rulings (March 20, 2006) (March 20 Order).

<sup>44</sup> Tr. 509:13-512:5; 524:23-11 (“[W]e also asked you to rule in our favor under procedural grounds, that the claim was procedurally barred because it doesn’t actually identify any person or party that’s bringing a claim against [Cinergy] at this point”).

<sup>45</sup> There is an additional ground for denying the request. The issue is moot based on the substantive disposition of Cinergy’s Motion for Summary Disposition in this section.

<sup>46</sup> Notice of American Municipal Power Ohio, Inc. to Intent to File a SECA “Shift-to-Shipper” Case (September 2, 2005).

## B. Discussion/Findings

26. Summary disposition is appropriate when there are no genuine issues of material fact.<sup>47</sup> AMP-Ohio did not dispute any of the facts presented by PSEG, in particular, that the contracts did not extend into the transition period.<sup>48</sup> Thus, it is found that there are no genuine issues of material fact and this matter can be resolved summarily based on the applicable law. *See* Partial ID at P 10.

27. The issue here is whether Contract No. 24 between PSEG and AMP-Ohio, which serves as the basis for the shift-to-shipper claim, permits the filing of such a claim.<sup>49</sup> As previously discussed, the Partial ID found that the Commission's orders in this proceeding stated that SECA charges cannot be shifted based on contracts that do not continue into the transition period. *Id.* at 17-18. PSEG's oral motion, as well as AMP-Ohio's exhibit AMP-4 state that the contracts terminated in 2003.<sup>50</sup> It is found that the contracts are not "reservations pursuant to requests made on or after November 17, 2003 for service commencing after April 1, 2004." *See id.* at 16. Even if the evidence is viewed in the light most favorable to AMP-Ohio, it still yields a finding that the contracts did not extend into the transition period. Therefore, it is found that Contract No. 24 did not continue into the transition period as required by the Commission<sup>51</sup> and, accordingly, AMP-Ohio cannot assert a shift-to-shipper claim based on Contract No. 24. *See id.* at P 18. Since there are no genuine issues of material fact and it is clear that Contract No. 24 did not continue into the transition period PSEG's Motion is hereby granted.

**Issue 4(b):** Should AMP-Ohio's claims be treated as a cross motion for summary disposition?

## A. Parties' Contentions

28. AMP-Ohio stated at oral argument that it would not object to a ruling similar to that in the Partial ID. Tr. 632:10-12.

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<sup>47</sup> 18 C.F.R. § 385.217, Partial ID at P 10 (citing 11-56 Moore's Federal Practice, *supra* note 18, at § 5(a),(c), n.64).

<sup>48</sup> Tr. 631:22-632:2 (PSEG states that the contracts did not extend into the transition period), Tr. 632:10-12 (AMP-Ohio basically states that it has no objection to PSEG's Motion being granted), Ex AMP-4 at 37:15-16.

<sup>49</sup> Tr. 631:20-632:1 (states that the contract at issue is Contract No. 24).

<sup>50</sup> Tr. 631:22-632:1, Ex AMP-4 at 37:15-16.

<sup>51</sup> Partial ID at 16-17, November 17 Order at P 45.

## **B. Discussion/Findings**

29. Based on the findings and conclusions in Issue 4(a) above and the ruling granting AMP-Ohio's Cross Motions for Summary Disposition with respect to Aquila and DTET, the similarity of the facts at issue compel granting a cross motion for summary disposition here. Again, the testimony of AMP-Ohio's witness Mr. Norton is persuasive. As discussed in Issue 1(b) above and the Partial ID, SECA charges should not be imposed based on a contract which terminated before the SECA transition period or did not involve "delivered power" in the transition period.<sup>52</sup> Issue 4(a) above found that Contract No. 24 terminated before the transition period began. Thus, AMP-Ohio should not be assessed any SECA charges based on that contract. This ruling is consistent with the principles of cost causation since there are no "lost revenues" associated with Contract No. 24. AMP-Ohio's Cross-Motion for Summary Disposition is hereby granted, with respect to PSEG, subject to the Commission's disposition of exceptions to the Partial ID.

## **IV. CONCLUSION**

### **A. Motions**

30. It is found that the contracts discussed above do not extend into the transition period and therefore do not meet the Commission's criteria for imposing or shifting SECA charges. Accordingly, the Dynegy, DTET, Cinergy and PSEG Motions for Summary Disposition are hereby granted. AMP-Ohio's Cross Motions for Summary Disposition concerning DTET and PSEG are hereby granted, subject to the Commission's disposition of the exceptions to the Partial ID. In addition, Cinergy's request that CCG and all other entities be procedurally barred from filing "ripple" claims based on the Cinergy/CCG contracts is hereby denied.

### **B. Admonition to Parties**

31. The findings in the Partial IDs are not substantive disposition of the ultimate issue concerning SECA charges for the transition period for the transactions discussed in the Partial IDs. Consequently, parties are admonished, that during the hearing they may examine pertinent witnesses in order to ascertain whether these contracts were replaced and by whom. This testimony will be necessary in order to develop a complete record on the appropriate SECA charges which will properly follow load in accordance with Commission orders. The examination shall be based on the data and information currently contained in the voluminous exhibits filed in this case.

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<sup>52</sup> Partial ID at 20-21. This is also discussed in paragraphs 13 and 14, above.

**V. ORDER**

32. **IT IS ORDERED**, that within thirty (30) days of issuance of the final Commission order in this proceeding, the Midwest ISO, PJM and their transmission owners are directed to file revised compliance filings and any pertinent refund report in accordance with the findings and conclusions of this Partial Initial Decision, as adopted or modified by the Commission. The compliance filing shall exclude the amounts associated with the above cited transactions from the lost revenues calculation. Additionally, the transmission owners shall not pass through to other parties the above cited amounts.

Carmen A. Cintron  
Presiding Administrative Law Judge