

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARGILL-ALLIANT, LLC : CIVIL ACTION
: :
: :
v. : :
: :
GPU SERVICE, INC. : No. 99-5312

Decision Under Fed. R. Civ. P. 52(a)

Ludwig, J.

February 7, 2001

On October 11 and October 12, 2000, this action was tried without a jury. Fed. R. Civ. P. 52(a). Plaintiff Cargill-Alliant, LLC, claims \$2,275,083.85, plus statutory pre-judgment interest, for breach of a contract to supply electricity. Jurisdiction is diversity. 28 U.S.C. § 1332. A decision will be entered in favor of defendant GPU Service, Inc. and against Cargill-Alliant, LLC.

I. Findings of Fact

A. The following undisputed facts are taken from the parties' pre-trial stipulation:

1. Plaintiff, Cargill-Alliant, LLC, is a Wisconsin limited liability company with its principal place of business in Minnetonka, Minnesota. In 1997, the company was formed as a joint venture between Cargill, Inc. (a trading company) and Alliant Energy Corporation (a Midwestern utility). Cargill-Alliant's business included buying and selling electricity.

2. Defendant, GPU Service, Inc. (GPU), is a Pennsylvania corporation with its principal place of business in Reading, Pennsylvania. It provides services to and acts as an agent for three affiliated electric operating companies: Jersey

Central Power and Light Company, Metropolitan Edison Company and Pennsylvania Electric Company. In the spring of 1998, GPU was in the business of buying and selling electricity, including electricity generated by its three affiliated operating companies.

3. PJM Interconnection, LLC, is a Delaware limited liability company formed pursuant to an order of the Federal Energy Regulator Commission (FERC). It is the successor to an unincorporated association that came into existence in September of 1956. PJM is a membership organization that is governed by an Amended and Restated Operating Agreement that sets out its powers and the duties of its members (PJM Operating Agreement). Exh. P-17. Both GPU and Cargill-Alliant are members of PJM.

4. One often-used and widely-recognized type of energy purchase transaction is a “Firm LD” transaction, also referred to as a “financially firm” transaction. In a typical “Firm LD” transaction, if a seller fails to deliver the contracted for electricity to the buyer at the designated delivery point, the seller may be called upon to pay the buyer the difference between the contract price and the buyer’s cost of obtaining substitute energy.¹ Similarly, if the buyer fails to take or receive the electricity at the designated delivery point, the buyer may be called upon to pay the seller the difference between the contract price and whatever price the seller is able to obtain in the market. Although the letters “LD” refer to “liquidated damages,” in this context the term “liquidated damages” does

¹ The terms “energy” and “electricity” are used interchangeably.

not mean a pre-determined damage figure but the difference between the contract price and the cost of obtaining substitute energy (or the price obtained on a subsequent sale).

5. The term “megawatt” (MW) describes a unit of generating capacity. The term “megawatt hour” (MWh) represents a unit of electric energy. One megawatt hour is the amount of electric energy generated by one megawatt of generating capacity during one hour. Accordingly, 100 MW of generating capacity over a period of 10 hours can also be described as 1,000 MWhs (100 MW x 10 hours) of electric energy referable to that generating capacity.

6. The physical nature of electricity is such that it is free-flowing and instantaneous. Electricity is delivered over wires. The process by which electrical energy moves from point A to point B is called transmission. To arrange transmission, a party must purchase and reserve capacity on the wires. Purchase of transmission service is generally distinct from the purchase of electricity itself. Transmission can be purchased from a party other than the party selling the electricity. A party can purchase “firm” or “non-firm” transmission. “Firm” transmission typically costs more than “non-firm” transmission. The end point of a transmission transaction is called the “sink.”

7. Trading in wholesale energy is typically conducted by reference to “delivery hubs.” One such delivery hub at which trading commonly occurs is the “PJM Western Hub” on the PJM system. A delivery hub is essentially a hypothetical construct used for accounting purposes. Therefore, the “PJM

Western Hub” is not a single physical location but is, instead, a mathematical combination of over 100 physical locations.

8. Generally, the seller of wholesale energy arranges for the transmission service to deliver the contracted-for energy to the delivery hub and the buyer of the energy arranges transmission services from the delivery hub to a sink.

9. In addition to providing rules governing participants’ actions in connection with energy purchase transactions, PJM plays a separate role in managing and supplying transmission services. For example, pursuant to a transmission tariff filed with the FERC, PJM makes transmission services available and sells transmission services directly to private parties. The reservation of such transmission service is recorded on what is called the PJM OASIS system. The PJM OASIS system, which stands for “open access same-time information system,” is an Internet-based system on which transmission customers reserve transmission service with PJM, the transmission provider in the PJM region.

10. GPU files tariffs with the FERC on behalf of its affiliated electric operating companies. Exh. D-1.

11. Under the tariff, GPU may enter into service agreements. In May of 1995, GPU entered into a service agreement with Heartland Energy Services, Inc. Exh. D-2.

12. In February of 1998, the service agreement between GPU and Heartland was assigned to Cargill-Alliant, effective November 1, 1997. Exh. D-3.

13. The PJM Operating Agreement and Schedule 1 authorize the PJM Office of Interconnection (“PJM-OI”) to take certain steps in the event of a Maximum Generation Emergency. A “Maximum Generation Emergency” is a high-use situation in which the PJM-OI anticipates that insufficient amounts of electricity may be available within PJM to serve the demands of all the end-use customers located within the PJM area.

14. The power plants operated by the three GPU affiliated operating companies are all “Capacity Resources” within the meaning of the PJM Operating Agreement.

15. On June 19, 1998, Cargill-Alliant entered into negotiations with GPU for the purchase of electricity. Those negotiations resulted in an agreement between Cargill-Alliant and GPU for the “Firm LD” purchase of 100 MWhs of electricity per hour at \$45 per MWh for delivery at the PJM Western Hub during each of seven business days in late June 1998. Accord: finding ¶ 34, infra.

16. Nothing in the agreement between GPU and Cargill-Alliant required Cargill-Alliant to designate any particular destination or sink to which the electricity would be transmitted from the PJM Western Hub. Finding such a sink – whether inside or outside the PJM Pool – and making arrangements to transmit the energy to that sink were the responsibilities of Cargill-Alliant.

17. At no point in the course of their negotiations did either Cargill-Alliant or GPU discuss the original source of the energy that GPU was selling, and their agreement did not specify the source of the electricity.

18. In June of 1998, Cargill-Alliant and American Electric Power Company (AEP) entered into an agreement whereby Cargill-Alliant promised to sell and AEP promised to buy 200 MWhs of electricity per hour during seven business days in late June of 1998. The contract price was \$90 per MWh and delivery was to an AEP sink outside the PJM Pool. Exh. D-10.

19. On June 24, 1998, Cargill-Alliant and AEP entered into a second agreement whereby Cargill-Alliant promised to sell and AEP promised to buy an additional 100 MWhs per hour on June 25, 1998. The contract price was \$490 per MWh and delivery was to an AEP sink outside the PJM Pool. Exh. D-11.

20. With respect to all its sales of energy to AEP, Cargill-Alliant arranged for the transmission of the energy from the PJM Western Hub to the PJM border by buying transmission service from PJM itself. Cargill-Alliant arranged for transmission from the PJM border to AEP by purchasing transmission services from a neighboring Regional Transmission Operator known as APS.

21. Cargill-Alliant purchased non-firm transmission service from the PJM Western Hub to the AEP sink.

22. GPU commenced delivering electricity at the PJM Western Hub pursuant to the agreement on June 22, 1998 and continued to do so on June 23 and June 24. During the peak hours on those days, the transactions arranged

by Cargill-Alliant with AEP occurred, including those scheduled and sourced from GPU.

23. On June 24, 1998, Cargill-Alliant entered into an agreement with PJM whereby Cargill-Alliant agreed to buy 200 MWhs of electricity per hour on June 25 at the “LMP” or “locational marginal price.” The delivery point was the PJM Western Hub. Exh. D-15.

24. At 11:00 a.m. on June 25, 1998, the PJM-OI declared a Maximum Generation Emergency. Thereafter, transactions arranged by Cargill-Alliant with AEP did not occur, including those scheduled and sourced from GPU.

25. The June 25, 1998 Maximum Generation Emergency ended at 17:06 (5:06 p.m.) that day. Nevertheless, Cargill-Alliant’s scheduled transactions with AEP, including those that were scheduled and sourced from GPU, did not resume for the remaining hours of June 25.

26. The PJM-OI did not cut transmission service on either June 25 of 26, 1998.

27. The PJM-OI also declared a Maximum Generation Emergency on June 26, 1998. On that day, the transactions arranged by Cargill-Alliant with AEP occurred, including those scheduled and sourced from GPU.

28. Cargill-Alliant’s agreement to supply energy to AEP was on a Firm LD basis. When the transaction with AEP did not occur, Cargill-Alliant attempted to purchase replacement energy on the spot market. Cargill-Alliant checked multiple sources, received multiple price quotes, and made the most economic

purchases possible at the time. Cargill-Alliant was unable, however, to satisfy all of its obligations with purchases from the spot market, and it was therefore assessed liquidated damages by AEP during some hours for the energy that Cargill-Alliant could not supply from other sources.

29. On July 2, 1998 Richard A. Drom (of PJM) wrote a letter to David Gabriel (of Cargill-Alliant) setting forth PJM's position with respect to the events of June 25. On July 8, Cargill-Alliant's counsel wrote a letter to counsel for PJM setting forth certain additional questions, to which letter PJM's counsel responded on July 9. Exhs. P-15, P-24, P-16.

B. The following fact findings are based on evidence received at trial:²

30. Electrical energy cannot be left at a pick-up point; if transmission is not cut, electricity will flow automatically and instantaneously from a generating resource to an end-user sink. Finding ¶ 6, supra; tr. Oct. 11, 2000 at 148, 150; Oct. 12, 2000 at 19.

31. While the PJM Western Hub is not a sink in the physical sense, it is used as a contractual delivery point. Finding ¶ 7, supra; tr. Oct. 11, 2000 at 103-104, 131; tr. Oct. 12, 2000 at 29; exh. D-17.

32. On June 19, 1998, Gaston Garrido, Cargill-Alliant's Vice-President of Business Development and Customer Origination, called Robert

² Because defendant GPU is not found to be liable, findings as to damages have not been made.

Strayer, GPU's Energy Transaction Operator, to discuss purchasing energy from GPU later that month.³ Tr. Oct. 11, 2000 at 24, 209; exh. P-4.

33. During the telephone conversation, Garrido told Strayer that Cargill-Alliant might have the energy sent outside the PJM Pool, and they discussed "ramping" issues, which are relevant when electricity is exported out of the pool.⁴ Exh. P-4; tr. Oct. 11, 2000 at 27. They also reached an agreement, the

³ At that time, Cargill-Alliant's decision to purchase from GPU was motivated by differences in energy prices between the East Coast and Midwest. Tr. Oct. 11, 2000 at 23.

⁴ A recording of the conversation:

Gaston: The uh one thing that I have potential interest in is when I take this out of the pool every once in a while or at least take it out of the pool itself, PJM the region[.]

Bob: Yes[.]

Gaston: Um, ah, it would help if I had some flexibility from you guys in terms of ah ah being able to ah adjust it, either move it or work inside the pool itself. You know, if it's GPU generation I think that would help me from knowing what my source is and things along those lines.

Bob: Yeah[.]

Gaston: And I don't know if that's a problem for you or not.

Bob: I'm not quite following you Gaston.

Gaston: Well, when we go to ah, when we go to schedule with PJM there's strict time limits in terms of getting the full string together.

Bob: Right[.]

Gaston: One of the issues is working our way up the stream and down the stream.

Bob: Right.

Gaston: And when I know that it's coming from you anyway or that I've got it bought from you and would . . . the amount of generation that you've got then maybe you could kick something out to me that's actually GPU generation or something along those lines for which I can um work back in the stream or even adjust by um giving it to me an hour earlier, an hour later or adjusting the schedule in some capacity. I don't know how that plays out with you.

Bob: Um hum.

essential terms of which were memorialized in a confirmation form sent by Garrido to Strayer. Tr. Oct. 11, 2000 at 28-29; exh. P-1.

34. The terms of the agreement were: (1) GPU would sell and Cargill-Alliant would buy; (2) 100 MW per hour for 16 peak hours per day (hours ending 8:00 a.m. to 11:00 p.m.), during the seven business days between June 22 and June 30, 1998, totaling 11,200 MWh; (3) delivered to the PJM Western Hub; (4)

Gaston: Do you know what I'm saying?

Bob: Uh, I

Gaston: You know sometimes they move it 15 minutes plus, 15 minutes minus and they don't hold it to the 16 hours cause it's really more about management of the transmission itself.

Bob: Yeah, it's a ramping issue.

Gaston: Yeah, a ramping issue . . . that's exactly right.

Bob: Yeah, we could help out on a ramping issue.

Gaston: OK

Bob: Probably.

Exh. P-4 at 3-4.

at \$45 per MWh; and (5) the transaction would be “Firm LD.”⁵ Finding ¶ 15, supra; exh. P-1; tr. Oct. 11, 2000 at 30-34.

35. GPU and Cargill-Alliant did not discuss the possibility of a Maximum Generation Emergency and GPU did not identify the source of energy to be supplied to Cargill-Alliant. Finding ¶ 17, supra; tr. Oct. 11, 2000 at 28, 100.

⁵ The confirmation form:

This letter shall confirm the agreement reached on the Transaction date (as defined herein) between General Public Utilities Services and Cargill-Alliant, LLC. General Public Utilities Services and Cargill-Alliant, LLC have previously executed a master agreement governing the purchase and sale of electric power dated 6/22/98.

The provisions of the Master Agreement are incorporated herein by reference, except that, in the case of a conflict or inconsistency between the terms of this letter and the terms of the Master Agreement, the terms of this letter shall prevail. Terms used but not defined in this letter shall have the meanings given to them in the Master Agreement.

* * *

Unless and to the extent prevented from doing so by Force Majeure (as defined herein), if buyer fails to receive all or part of the Quantity pursuant to a Firm, transaction, Buyer shall pay seller on the date payment would otherwise be due, an amount equal to the product of (I) the deficiency in the Quantity received and (II) the positive difference, if any, obtained by subtracting the Sales Price from the Price.

Exh. P-1.

Although the form provided a remedy to GPU in the event that Cargill-Alliant did not accept the energy, the form did not specify Cargill-Alliant's remedy in event of non-delivery. Garrido attributed the discrepancy to Cargill-Alliant's “changeover in systems, and at that point in time the clause on the double side of the remedy was being left off, and we corrected that once we saw – recognized it and fixed it.” Tr. Oct. 11, 2000 at 75. Nevertheless, because both parties agree that “Firm LD” embodies a remedy for the buyer in the event of non-delivery, finding ¶ 4, supra; tr. Oct 11, 2000 at 123, the omission is immaterial to this adjudication.

The agreement did not state how Cargill-Alliant would use the purchased electricity or designate a particular end-user sink within the PJM pool or elsewhere. Finding ¶ 17, supra. Other than the commitment to deliver “Firm LD” to the PJM Western Hub, the contract did not speak to Cargill-Alliant’s ability to transmit energy out of the PJM Pool. Tr. Oct. 12, 2000 at 5.

36. In June 1998, GPU’s sales of electricity were governed by a “Capacity, Energy and Capacity Credit Sales Tariff,” which effectively limited GPU’s charges to Cargill-Alliant to about \$125 per MWh (by reason of historical charges).⁶ Finding ¶¶ 10-11, supra; tr. Oct. 11, 2000 at 78-79, 213-14; tr. Oct. 12, 2000 at 37. The tariff:

Article III: Commitments

3.1 All Transactions under this Tariff shall be voluntary and subject to the availability and capacity, energy and/or capacity credits to complete the Transaction. Transactions are subordinate to and subject to System Constraints. . . . “System Constraints” are defined as conditions on the GPU Energy system or the system of the Pennsylvania-New Jersey-Maryland Interconnection (“PJM”) members which . . . require the interruption of a Transaction made pursuant to this Tariff in order to maintain the integrity of the integrated system in a safe and reliable manner.

* * *

3.5 By signing a Service Agreement, the Purchaser agrees to take and pay for, and GPU Energy agrees to supply, such capacity, energy and/or capacity credits as is mutually agreed upon, subject to the terms and conditions of this Tariff as amended from time to time, and subject to the action of the FERC or its successor agency with jurisdiction over sales of electric energy for resale in interstate

⁶ According to Cargill-Alliant, the references to PJM “system constraints” apply only to Capacity Resource energy.

commerce. In addition, both Parties agree to comply with all applicable requirements established by PJM or any other entity having authority with respect to regional power transactions.

* * *

Article XIV: Liability

14.1. GPU Energy shall not be responsible to the Purchaser in tort, contract or otherwise for any damages of any kind whatsoever which may result from events such as interruptions, failures of service or deficiencies in the quality or quantity of services provided hereunder. It is the intent of this provision that the Purchaser shall assume the risks of interruptions, failures or deficiencies in quality and quantity of service caused by hazards of the business as if the Purchaser were operating the facilities providing capacity, energy and/or capacity credits for the purpose of supplying itself with electricity.

Exh. D-1.

37. It is not GPU's practice to sell energy outside the PJM Pool on a firm basis. Tr. Oct. 11, 2000 at 210-11. GPU's standard product at the PJM Western Hub is firm energy.⁷ Id. at 212.

38. GPU was not a party to, and did not participate in the negotiations of, either of Cargill-Alliant's contracts with AEP. Tr. Oct. 11, 2000 at 96-97, 218-19. GPU learned of Cargill-Alliant's intention to deliver electricity to AEP the day before the transaction took place. Exh. P-20; tr. Oct. 11, 2000 at 52-53; tr. Oct. 12, 2000 at 12-13. As of June 25, 1998, however, GPU did not know whether transmission to AEP was reserved on a firm or non-firm basis. Tr. Oct. 11, 2000 at 96-97, 226-27; tr. Oct. 12, 2000 at 4-5.

⁷ Strayer testified that GPU had never failed to deliver within the PJM Pool and that PJM does not have the authority to curtail internal transactions. Tr. Oct. 11, 2000 at 212.

39. Under the PJM Operating Agreement, when a Maximum Generation Emergency occurs, the PJM-OI exercises control over “Capacity Resources” – i.e., generating resources owned or contracted for by entities that serve end-use customers within the PJM region. Tr. Oct. 11, 2000 at 100; tr. Oct. 12, 2000 at 8; exh. P-17. During such an emergency, the PJM-OI may direct that energy from Capacity Resources, scheduled to be delivered outside the PJM, to be made available for use within the PJM Pool.⁸ Finding ¶ 13; exh. P-17.

⁸ PJM Operating Agreement and Schedule 1:

1.6 Capacity Resource.

“Capacity Resource” shall mean the net capacity from owned or contracted for generating facilities all of which (i) are accredited to a Load Serving Entity pursuant to the procedures set forth in the Reliability Assurance Agreement and (ii) are committed to satisfy that Load Service Entity’s obligations under the Reliability Assurance Agreement and [the PJM Operating Agreement].

* * *

1.3.10 Internal Market Buyer.

“Internal Market Buyer” shall mean a Market Buyer making purchases of energy from the PJM Interchange Energy Market for consumption by end-users inside the PJM Control Area.

* * *

1.7.10 Other Transactions.

Market Participants may enter into bilateral contracts for the purchase or sale of electric energy to or from each other or any other entity, subject to the obligations of the Internal Market Buyers to make Capacity Resources available for dispatch by the Office of the Interconnection.

* * *

1.10.4 Capacity Resources.

(continued...)

40. “Non-Capacity Resource” energy may be obtained by: (1) “delisting” a particular generating plant for a specific transaction, which must be scheduled about a week in advance; or (2) bringing in such energy from outside the PJM Pool and rerouting it to another point outside the PJM Pool. Tr. Oct. 12, 2000 at 9. Arrangements must be made with PJM to deliver energy from non-Capacity Resources; otherwise PJM will presume the transaction involves Capacity Resources.⁹ Id.

⁸(...continued)

(b) Energy from a Capacity Resource that has not been selected as a pool-scheduled resource may be sold on a bilateral basis by the Market Seller, or may be self-scheduled. A Capacity Resource that has not been selected as a pool-scheduled resource and that has been sold on a bilateral basis must be made available upon request to the Office of the Interconnection for scheduling and dispatch if the Office of the Interconnection declares a Maximum Generation Emergency. Any such resource so scheduled and dispatched shall receive the applicable Locational Marginal Price for the energy delivered.

Exh. P-17.

On June 25, 1998, Cargill-Alliant was not an Internal Market Buyer, as defined by the PJM Operating Agreement and, therefore, was not paid for the energy it had scheduled to provide AEP. Tr. Oct. 11, 2000 at 51-52; tr. Oct. 12, 2000 at 26.

⁹ Cargill-Alliant maintains that GPU had energy from non-Capacity Resources available to it during June 25, 1998. However, Strayer’s testimony makes this contention questionable:

A: We did have our generators, which are capacity resources in PJM. We did have other purchases, firm LD purchases, at the Western Hub, and we had some I believe call options, which, of course, are firm also.

However, they were all sourced from inside the pool, so we cannot state that they were actually a capacity resource or not. We knew that they were firm LD to us at the Western Hub.

(continued...)

41. During a Maximum Generation Emergency, the PJM-OI will curtail delivery of Capacity Resource energy using lower priority transmission reservations (non-firm), prior to those with firm reservations; however, the energy, not the transmission is curtailed. Exh. D-7; tr. Oct. 11, 2000 at 98-100, 181-183, 226-228. PJM, typically, will not interfere with the delivery of Capacity Resource energy to an end-user sink within the PJM Pool.¹⁰ Exh. P-16; tr. Oct. 11, 2000 at 186, 212.

⁹(...continued)

Q: I'm going to show you your affidavit in this matter, Mr. Strayer. . . . Would you read the first sentence of that affidavit out loud for me, please.

A: "Throughout June of 1998 GPU had available to it both energy that it had generated by its operating companies and energy it had purchased or could purchase with its options from others, including non-capacity resources. GPU also had the ability in June 1998, although probably not the inclination, to enter into a capacity-backed transaction whereby it could reserve the capacity of a particular generating asset for a particular customer or transaction. At no time did Cargill ask us to enter into a capacity-backed transaction and at no time did it ask to provide it with energy obtained from a particular source."

* * *

Q: And it's true, is it not, that in June of 1998 GPU had available to it energy that it had purchased or could purchase with its options from others, including non-capacity resources; correct?

A: At that time we didn't know if they were non-capacity resources, and we still don't know today.

Tr. Oct. 11, 2000 at 195-96.

¹⁰ When it recalls Capacity Resource energy that would have been transmitted out of the pool, the PJM-OI pays the owner of the Capacity Resource a "Locational Marginal Price" calculated under the PJM Operating Agreement. Exh. P-17.

42. At 11:00 a.m. on June 25, 1998, PJM-OI declared a Maximum Generation Emergency and directed that all Capacity Resource energy scheduled to be delivered outside the PJM region be made available for use within PJM. Finding ¶ 24, supra; exh. P-14. Cargill-Alliant's transaction with AEP was thereby curtailed. Tr. Oct. 12, 2000 at 21, 32.

43. On June 25, 1998, PJM-OI informed GPU that it had declared a Maximum Generation Emergency. Exh. P-18; tr. Oct. 11, 2000 at 198-99. On June 25, 1998, Cargill-Alliant was notified that its energy supply schedules had been curtailed, but Cargill-Alliant did not know whether transmission service had been cut or energy had been curtailed.¹¹ Tr. Oct. 11, 2000 at 45-46. Initially, Cargill-Alliant attributed the curtailment to cut transmission. Tr. Oct. 11, 2000 at 43-44, 108-110.

¹¹ Garrido testified as to his actions upon learning of the Maximum Generation Emergency:

A: Well, we called around to various players in the marketplace, anywhere from power marketers to utilities themselves, PJM utilities. We spoke with PJM direct inquiring, we were trying to better understand what occurred. And again this really happens on the 26th, after the fact, trying to gain a better understanding of what happened on the 25th.

Q: Did PJM respond with their statements about their understanding of the events on the 25th?

A: Directly over the phone, yes, although we were getting some mixed reactions in terms of what actually had occurred, didn't feel like we were getting a sound, straightforward answer. . . .

Tr. Oct. 11, 2000 at 45.

44. During the relevant times on June 25, 1998, GPU had generated sufficient energy to have met its obligation to Cargill-Alliant to make delivery to the PJM Western Hub. Tr. Oct. 11, 2000 at 187.

45. On June 26, 1998, in reconciling its books, GPU discovered it was “long” on energy at the PJM Western Hub – that is, it had 100 MWh of surplus energy available.¹² Exh. D-6; tr. Oct. 12, 2000 at 6-7, 31-33.

46. PJM-OI records show that the “source,” or location, of the curtailed transaction was the PJM Western Hub. Exh. D-12; tr. Oct. 12, 2000 at 5.

47. During the Maximum Generation Emergency on June 25, 1998, PJM-OI did not curtail some transactions using firm transmission to destinations outside the PJM region, including to APS. Exh D-8; tr. Oct 11, 2000 at 228-29.

48. Cargill-Alliant had until 12:00 p.m. on June 26, 1998 to re-sell the energy sourced by GPU to a sink within the PJM Pool.¹³ Tr. Oct. 12, 2000 at

¹² Strayer and James Sensenig, Manager of Regulatory Billing for GPU, both testified that they did not learn of the curtailment until the morning of June 26, 1998. Tr. Oct. 11, 2000 at 232; tr. Oct. 12, 2000 at 31. According to GPU, because it was not contacted by PJM-OI, Cargill-Alliant’s transactions with AEP, and not GPU’s transaction with Cargill-Alliant, were curtailed. GPU maintains that this is consistent with PJM’s policy of not curtailing internal transactions. Tr. Oct. 12, 2000 at 3, 39. However, as Cargill-Alliant’s expert, William Fenerty, explained, PJM-OI may not have notified GPU because “the individual who was in charge of scheduling at PJM [may have been] involved in other . . . more important operations at the time, they may have neglected, and it could have fallen in a crack. You know, we’re dealing with human beings.” Tr. Oct 11, 2000 at 190.

¹³ According to Strayer, in this circumstance, Cargill-Alliant could have
(continued...)

33-34. Cargill-Alliant did not arrange for an alternative sink; and, on June 26, 1998, PJM paid GPU for the electricity at the locational marginal price. Tr. Oct. 11, 2000 at 57; tr. Oct. 12, 2000 at 22, 35.

II. Discussion

At issue is whether GPU performed its obligations under the terms of the contract with Cargill-Alliant.¹⁴ Proof of breach of contract consists of three elements: (1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. Corestates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999). Cargill-Alliant charges GPU with having violated the obligation to deliver electricity imposed by the term “Firm LD,” which it interprets to include availability at the PJM Western Hub for transmission to AEP.

It is agreed that, in the absence of a cut in transmission, electricity will flow instantaneously to an end-user sink. It is also undisputed that the PJM-

¹³(...continued)

sold the energy either back to GPU or to another internal market buyer for a percentage of the locational marginal price. Id. at 225. The buyer, in turn, could have subsequently profited by selling the energy to PJM at locational market price. Id. Strayer testified that “in that time frame, that time area 1998, possibly 1997, we would get calls not daily, but maybe every several days, especially in the summertime, where [marketers] were stuck with energy inside the pool, and they had to find a buyer for it or lose it.” Id. at 224.

¹⁴ On June 30, 2000, the parties’ cross-motions for summary judgment were denied. The material questions of fact were “whether GPU delivered the electricity, and if so, whether a certain form of electricity was contemplated.” Order, June 30, 2000.

OI would not have curtailed the transaction had GPU provided non-Capacity Resource energy. According to Cargill-Alliant, upon learning of the Maximum Generation Emergency, GPU should have arranged for an alternative delivery from non-Capacity Resources. GPU's response is that it fulfilled the "Firm LD" obligation by supplying energy to the PJM Western Hub from Capacity Resources and that Cargill-Alliant took the risk that its transaction with AEP would be curtailed. It must therefore be determined whether the term "Firm LD" required GPU in the event of a Maximum Generation Emergency to deliver non-Capacity Resource energy, which would have been transmissible to AEP.

"In construing a contract, the intention of the parties is paramount and the court will adopt an interpretation which under all circumstances ascribes the most reasonable, probable, and natural conduct of the parties, bearing in mind the objects manifestly to be accomplished." Charles D. Stein Revocable Trust v. General Felt Industries, Inc., 749 A.2d 978, 980 (Pa. Super. 2000) (quoting Village Beer & Beverage, Inc. v. Vernon D. Cox, Inc., 327 Pa. Super. 99, 107, 475 A.2d 117, 121 (1984) (citing Unit Vending Corp. v. Lacas, 410 Pa. 614, 190 A.2d 298 (1963)). "[I]f there is any doubt as to the meaning of a term of a contract, such term should receive a reasonable construction and one that will accord with the intention of the parties; and, in order to ascertain their intention, the court must look at the circumstances under which the [contract] was made." United Refining Co. v. W.L. Jenkins, Jr., 410 Pa. 126, 137-38, 189 A.2d 574, 579 (1963) (citations omitted); see also Allegheny Energy v. DQE, Inc., 74 F. Supp. 2d

482, 513 (W.D. Pa. 1999) (citing United Refining). Here, extrinsic evidence – of the parties’ dealings and industry practice – is helpful in ascertaining the intent and the meaning of the agreement.

The effect and legal consequences of a Maximum Generation Emergency are not dealt with in the agreement. Cargill-Alliant is correct that “Firm LD” required GPU to supply energy from any available source, without reference to where the energy originated. Nevertheless, GPU fulfilled that commitment, which was to deliver energy to the well-recognized trading place within the PJM Pool, as was its custom. See, e.g., finding ¶ 37. It did not promise or guarantee delivery to AEP, which was located outside the pool. Delivery to AEP was Cargill-Alliant’s responsibility, which it undertook to perform through a separate provider, APS.¹⁵

Cargill-Alliant’s contention that GPU should have arranged for non-Capacity Resources when it learned of the Maximum Generation Emergency must be rejected. Cargill-Alliant was a member of PJM. It knew that GPU’s tariff, which limited Cargill-Alliant’s price, was for energy within the PJM system. This by itself should have alerted Cargill-Alliant to the risk of not having a commitment for non-Capacity Resource energy. Moreover, the availability of non-Capacity Resource electricity entailed advance preparation and additional cost. Time constraints in

¹⁵ By booking non-firm transmission with APS to the AEP sink, Cargill-Alliant gambled that its transaction with AEP would not be curtailed by the PJM-OI. If Cargill-Alliant’s argument were accepted, buyers would not need to purchase firm transmission to destinations outside of the PJM region as a hedge against such curtailment.

a sudden emergency would have made the supply of such energy impossible or economically impracticable. Finding ¶ 40. Cargill-Alliant reads “Firm LD” to have imposed the obligation of making alternative arrangements on GPU. However, the evidence does not at all suggest that the parties intended GPU to deliver anything other than its standard product, Capacity Resource energy, which is what it did.¹⁶

Cargill-Alliant argues that because the electricity was not available for transmission to AEP, it was delivered only to PJM. It cites *Black’s Law Dictionary* at 440 (7th ed. 1999) for the definition of delivery as “the giving or yielding of possession or control”; and *Servicios-Expoarma, C.A. v. Industrial Maritime Carriers, Inc.*, 135 F.3d 984 (5th Cir. 1998) for the proposition that delivery occurs “when the carrier places the cargo into the custody of whomever is legally entitled to receive it.” *Id.* at 992. However, GPU delivered as promised; Cargill-Alliant did not accept the delivery. Had it acted timely, Cargill-Alliant could have re-sold the electricity within the PJM Pool or returned it. It is specious to say that the agreed upon delivery did not occur simply because AEP did not receive the energy.

According to Cargill-Alliant, these alternatives are improper because the result is to create an unintended term in the contract – that Cargill-Alliant keep or re-sell energy within the PJM Western Hub – citing *Hutchison v. Sunbeam Coal Corp.*, 513 Pa. 192, 198, 519 A.2d 385, 388 (1986) (“The law will not imply a different contract than that which the parties have expressly adopted.”). Yet, in

¹⁶ The discussion between Garrido and Strayer was unclear as to GPU’s energy source. See note 4, supra.

these circumstances, this interpretation is what most nearly approximates the parties' bargain, given that the agreement does not explicitly contemplate the possibility of a Maximum Generation Emergency.

Cargill-Alliant did not prove its case by a preponderance. It did not establish that GPU was bound to deliver non-Capacity Resource energy in the event of a Maximum Generation Emergency or to ensure transmission to AEP. Accordingly, its breach of contract claim must be denied.

III. Conclusions of Law

The following conclusions are entered:

1. This court has jurisdiction over the parties and the subject matter of this action.
2. Defendant GPU Service, Inc. is not liable in that plaintiff Cargill-Alliant, LLC, did not meet its burden of showing a breach of contract.
3. A decision will be entered in favor of defendant GPU Service, Inc., and against plaintiff Cargill-Alliant, LLC.

Edmund V. Ludwig, J.