

173 FERC ¶ 61,153
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;
Neil Chatterjee and Richard Glick.

Shell Energy North America (US), L.P.

Docket No. EL20-49-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued November 19, 2020)

1. On May 29, 2020, Shell Energy North America (US), L.P. (Shell) filed a petition for declaratory order, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,¹ relating to disputes between Shell and GreenHat Energy, LLC (GreenHat). First, Shell requests that the Commission interpret provisions regarding bilateral transfers of Financial Transmission Rights (FTRs) under the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (PJM Tariff).² Shell states that an interpretation of the PJM Tariff will clarify whether the entry of price, volume, and other data regarding FTR bilateral transfers into PJM's FTR Center automatically establishes stand-alone bilateral contracts at the stated price. Shell also asks the Commission to assert primary jurisdiction to resolve on the merits a lawsuit that GreenHat has filed against Shell in Texas state court.

2. For the reasons discussed below, we grant Shell's request, in part, to provide an interpretation of the PJM Tariff. We find that entry of data into the FTR Center for bilateral trades does not automatically establish stand-alone bilateral contracts at the stated price, absent a separate agreement by the parties to do so. We decline to assert primary jurisdiction to resolve the dispute under Texas law as to whether Shell and

¹ *Shell Energy N. Am. (US), L.P.*, Petition for Declaratory Order, Docket No. EL20-49-000 (May 29, 2020) (Petition); *see also* 18 C.F.R. § 385.207 (2020).

² PJM Interconnection, L.L.C., Intra-PJM Tariffs, PJM Tariff, Attach. K-App., § 5.2.2(d) (12.0.0); Operating Agreement (OA), Sched. 1, § 5.2.2(d) (12.0.0) (containing identical provisions). Tariff references throughout the order are to PJM Interconnection, L.L.C., Intra-PJM Tariffs. For purposes of this filing, unless otherwise noted, capitalized terms not defined herein have the meanings set forth in the PJM Tariff and Operating Agreement. All references to the PJM Tariff provisions also refer to the identical provisions in the OA, Schedule 1.

GreenHat entered into separate contracts that Shell would make payments based on entries in the FTR Center.

I. Background

A. PJM Tariff Provisions Relating to FTR Trades

3. An FTR is a right to receive transmission congestion credits in accordance with the PJM Tariff. FTRs can be traded in two ways: through a PJM-run auction or bilaterally.³ When parties sell FTRs through an auction, PJMSettlement becomes the contracting party and settles the transaction. Parties must submit bids or offers for FTRs in auctions using software in the PJM FTR Center. The FTR Center software requires parties to provide various types of information, including the names of the parties. Of importance to this proceeding, the software includes a mandatory price field that auction sellers use to specify the lowest price at which they will sell (called a “reservation price”) and that auction bidders use to specify the highest price at which they will buy. PJM determines who prevails in the auction by selecting the set of simultaneously feasible FTRs with the highest net total auction value as determined by the bids of buyers and taking into account the reservation prices of the sellers.⁴

4. PJM Tariff, Attachment K-Appendix, section 5.2.2(d) contains the provisions governing bilateral FTR transactions.⁵ Market participants may sell or transfer FTRs to a third party through bilateral agreements, but the FTR transfers must “be reported” to PJM in the FTR Center as the posting enables PJM to credit or invoice the correct party at settlement⁶ and to verify the buyer’s credit.⁷

³ The PJM Tariff provisions cited herein generally were in effect during the time at issue from August 2016 to June 2017. The PJM Tariff provisions cited herein also are substantively similar to those in effect today.

⁴ PJM Tariff, Attach. K-App. § 7.3, Auction Procedures (3.0.0), § 7.3.6.

⁵ *Id.* § 5.2.2(d) (providing that, in “addition to . . . auctions,” an FTR “may be sold or otherwise transferred to a third party by bilateral agreement, subject to compliance with . . . procedures . . . for verification of the rights of the purchaser or transferee.”).

⁶ *Id.* § 5.2.2(d)(i).

⁷ *Id.* § 5.2.2(d)(iii).

5. In a bilateral FTR trade, the rights and obligations of the FTR seller pass to the buyer, subject to the provisions of the PJM Tariff.⁸ The Tariff's reporting requirement enables PJM to determine whether to consent to the trades being effective, based on PJM's assessment of the buyer's "ability to perform the [relevant] obligations, including meeting applicable creditworthiness requirements."⁹ The seller posts the bilateral transaction in PJM's FTR Center and the buyer must confirm the transaction. As relevant to this proceeding, the PJM Tariff provides that PJMSettlement has no role in settling the transaction or determining the price for the FTRs traded: "All payments and related charges associated with such a bilateral contract shall be arranged between the parties to such bilateral contract and shall not be billed or settled by PJMSettlement or the Office of the Interconnection."¹⁰

6. The PJM FTR Center software interface requires parties to bilateral transactions to enter a value in the price field, even though PJM "has not used the price-field information input into FTR Center by the parties to FTR bilateral transactions for purposes of FTR settlements to date."¹¹

B. Relevant Entities and History of the Dispute

7. In 2016 and 2017, GreenHat and Shell executed three written bilateral agreements (Agreements).¹² GreenHat transferred FTRs to Shell, and Shell then offered them for sale in a PJM auction.

8. As required by the PJM Tariff,¹³ the parties entered their FTR transactions into PJM's FTR Center, including both GreenHat's transfer of FTRs to Shell and Shell's return of unsold FTRs to GreenHat after the PJM auctions. Shell was required by PJM's Tariff to be the "holder" of the FTRs to be able to submit them into PJM auctions. The

⁸ *Id.* § 5.2.2(d)(ii).

⁹ *Id.* § 5.2.2(d)(iii) (The reporting requirement facilitates PJM's assessment of the buyers' "ability to perform the [relevant] obligations, including meeting applicable creditworthiness requirements.").

¹⁰ *Id.* § 5.2.2(d)(v).

¹¹ PJM Comments at 8 n.25.

¹² The following description of the relevant entities and the history of the dispute that led to the instant Petition are derived from generally undisputed facts presented in the Petition, Protest, and Shell and GreenHat Answers.

¹³ PJM Tariff, Attach. K-App., § 5.2.2(d)(i).

Agreements provided that GreenHat would transfer FTRs to Shell. Shell could then try to sell the FTRs in the next long-term FTR auction administered by PJM. If the FTRs did not clear the auction, Shell could either return the FTRs to GreenHat or pay an agreed-on price to keep them. Each of the Agreements required Shell to pay GreenHat the Final Purchase Price, calculated in accordance with the formula set forth in the Agreements,¹⁴ after the auction was completed and the deadline for Shell to return unsold FTRs passed. It is undisputed that Shell paid the Final Purchase Price specified in the Agreements.¹⁵

9. From June 2014 through mid-February 2020, the FTR Center had approximately 137,000 entries for bilateral FTR trades, all of which had some entry in the price field. Over 69,000 of them have non-zero numerical values in that field.

10. In 2016 and 2017, GreenHat and Shell posted, accepted, and/or confirmed transfers of thousands of FTRs on the FTR Center, and entered non-zero numerical values in the price field.

11. In 2018, GreenHat contacted Shell to seek payment of additional amounts based on entries in the FTR Center, and began to invoice Shell for additional payments, based on the numerical data entered in the price field in the FTR Center in 2016 and 2017. Shell later calculated that the invoiced amounts totaled to \$62 million, an amount that GreenHat had pledged to PJM as collateral to meet credit requirements for its FTR portfolio.

12. In the fall of 2018, GreenHat filed a claim against Shell in Texas state court, alleging that Shell owes it an additional \$68 million, separate from their three Agreements, based on entries in the price field for trades of approximately 3,870 FTRs. Shell alleges that GreenHat has asserted in the lawsuit that entry of numerical values into the FTR Center automatically creates new payment obligations.¹⁶

¹⁴ The term “Final Purchase Price” is defined in each of the Agreements.

¹⁵ For the first two Agreements, Shell made one-time lump sum payments to GreenHat of the Final Purchase Price on October 18, 2016 and February 10, 2017. Petition at 10-11. Shell paid the one-time lump sum Final Purchase Price for the third Agreement on June 16, 2017. *Id.* at 11. Shell states that no other payments were contemplated in the Agreements or otherwise. *Id.* at 19, 22, 26-27; *see also* GreenHat’s Protest and Request for Expedition, Docket No. EL20-49, at 30 (filed Jul. 14, 2020; corrected Jul. 15, 2020) (GreenHat Protest) (“the letter agreements’ fees had already been paid, which was obvious from their terms”); *id.* at 56 (discussing “fee paid by Shell under the . . . agreements”).

¹⁶ Shell Exhibit AM (GreenHat Energy, L.L.C.’s First Amended Petition, No. 2018-69829-A, at ¶ 29 (Harris Cnty. Tex. Dist. Ct., 190th Judicial District) (filed Jan. 8, 2019) (“By conducting trades over the PJM bilateral trading system,

Shell agrees that parties can, if they so choose, enter into contracts that rely on numerical values in the price field.¹⁷

13. In January 2019, GreenHat filed a First Amended Petition seeking a declaratory judgment against both Shell and PJM, as well as a monetary judgment against Shell. Shell contends that GreenHat's claim for additional payments is fraudulent.¹⁸

II. The Petition

14. Shell asserts that the FTR Center is a mechanism by which the transfer of FTRs pursuant to bilateral agreements is reported to PJM, and not an online exchange operated by PJM for bilateral trading of FTRs, as GreenHat contends. Shell maintains that its written bilateral Agreements control Shell's payment obligations to GreenHat, and that no separate stand-alone contracts are created between the bilateral contract parties by entering data into FTR Center to report a transfer.¹⁹ Shell asserts that the dispute in the Texas lawsuit about whether Shell owes GreenHat additional money is "rooted in [Shell's] obligation as a market participant to adhere to the requirements of the PJM Tariff[] . . . this question hinges upon interpretation of the PJM Tariff."²⁰

15. Shell asserts that when PJM filed proposed revisions to its Tariff provisions concerning bilateral trades in 2010, staff issued a delegated letter order approving the (unopposed) revisions, which states: "The tariff changes clarify that the use of PJM's eTools [i.e., the FTR Center] serve as a reporting mechanism only"²¹

GreenHat agreed to sell, and Shell Energy agreed to buy, each FTR at the price specified in the price box.").

¹⁷ Shell Energy North America (US), L.P., Motion for Leave to Answer and Answer of Shell Energy North America (US), L.P., Docket No. 20-49, at 2-3 (Jul. 29, 2020) (Shell Answer).

¹⁸ See Petition at 28 (discussing "fraudulent pledge to PJM"); *id.* at 40 (discussing "fraudulent invoices" to Shell); *id.* ("GreenHat . . . fabricat[ed] a \$62.2 million receivable from Shell Energy. . . .").

¹⁹ *Id.* at 7, 30-36.

²⁰ *Id.* at 31-32.

²¹ *PJM Interconnection, L.L.C.*, Letter Order Accepting PJM Interconnection, LLC's Revisions to Open Access Transmission Tariff and Amended and Restated Operating Agreement, Docket No. ER10-1003-000, at 1 (May 5, 2010) ("The tariff changes clarify that the use of PJM's eTools serve as a reporting mechanism only").

16. Shell asks the Commission to: (1) interpret PJM Tariff provisions relating to bilateral FTR transfers;²² and (2) resolve on the merits a dispute currently pending in Texas state court. Specifically, as related to the PJM Tariff, Shell asks the Commission to provide the following interpretations:

- i. The parties' bilateral agreements control, as between the parties to the bilateral agreements, the terms and conditions of their transactions;
- ii. In the context of bilateral FTR transfers, FTR Center is only a reporting mechanism for the transfers; and
- iii. Entering data into FTR Center to report the transfer of FTRs does not create a separate, stand-alone contract between the parties to the bilateral agreement, or modify the parties' bilateral agreement.²³

17. As to its request regarding the Shell-GreenHat litigation, Shell asks the Commission, under *Arkla*,²⁴ to assert primary jurisdiction and resolve the merits of the Texas lawsuit. Shell states that GreenHat does not allege that the Agreements have been breached, but rather that the parties entered into additional contracts when they entered data about their bilateral FTR transfers into PJM's FTR Center, and that Shell breached those contracts. Shell argues that the PJM Tariff would govern contracts like these, if such contracts were possible, and that the Commission's jurisdiction over the PJM Tariff is clear.²⁵

²² See Petition at 33-35 (citing PJM Tariff, Attach. K-App., §§ 5.2.2(d)(i), (ii), (v)). The other Tariff provisions cited by Shell are §§ 6.A.2 [sic] [Reserved for Future Use (1.0.0)], 7.1 [Auctions of FTRs (1.0.0)], 7.1A.1 [Auctions (2.0.0)], 7.11 [PJMSettlement as Counterparty (0.0.0)]; OA, Sched. 1, §§ 5.2.2, 6.A.2 (1.0.0), 7.1 (1.0.0), 7.1A.1 (2.0.0), 7.11 (0.0.0)).

²³ PJM Tariff, Attach. K-App., § 5.2.2(d) applies to these requests; *see also* Petition at 2-3, 32.

²⁴ *Ark. La. Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322 (*Arkla*), *reh'g denied*, 8 FERC ¶ 61,031 (1979).

²⁵ Petition at 41.

18. Shell argues that the three *Arkla* factors favor the Commission asserting primary jurisdiction over GreenHat's contract formation claim²⁶ because: (1) the Commission has special expertise to interpret the PJM Tariff and to determine how FTR Center is used under the PJM Tariff and Commission regulations; (2) uniformity is necessary because the Tariff interpretation affects numerous market participants and many trades recorded in the FTR Center; and (3) the PJM Tariff provisions at issue are regulated by the Commission.²⁷

19. First, Shell argues that interpreting the PJM Tariff is within the Commission's jurisdiction and that the technical nature of this topic may make it challenging for an entity other than the Commission to evaluate the facts accurately and resolve the legal issues. Shell states that GreenHat's counsel in the Texas state court proceeding made statements recognizing that the PJM Tariff governs the conduct of FTR participants and that the Commission has authority over PJM's Tariff and markets.²⁸

20. Second, Shell argues that a uniform interpretation is needed because numerous market participants reporting bilateral transfers in FTR Center will be affected, since all participants in bilateral transactions are required to report their bilateral transfers in FTR Center. Shell states that many other market participants who reported transactions within FTR Center could be affected if the Commission does not clarify that the FTR Center is only a reporting mechanism for bilateral trades. According to Shell, if the entry of non-zero values in the price field created new contracts, the parties to thousands of past transactions may have additional payment obligations. Shell states that depending on what value was entered into the price field when reporting bilateral FTR transfers, purchasers could argue that a seller gave away an FTR at a zero price, or sellers could claim that purchasers owe them more money.²⁹

21. Third, Shell argues that assertion of primary jurisdiction is important to the Commission's regulatory responsibilities because: (i) it has never authorized PJM to operate an online FTR exchange as alleged by GreenHat; and (ii) only the Commission can approve jurisdictional rates. Shell argues that the Commission should uphold the

²⁶ *Id.* at 42 (citing *Cent. N.Y. Oil & Gas Co., L.L.C.*, 152 FERC ¶ 61,097, at P 12 (2015); *Rockies Express Pipeline LLC*, 145 FERC ¶ 61,179, at P 30 (2013); *Arkla*, 7 FERC ¶ 61,175 at 61,322).

²⁷ *Id.* at 42-44, 46.

²⁸ *Id.* at 42.

²⁹ *Id.* at 31, 42-43.

filed rate doctrine in this case by prohibiting any changes to the jurisdictional rate without approval by the Commission.³⁰

22. Although both Shell and GreenHat have submitted certain confidential information as part of their filings, we do not find it necessary to rely on any of that information in this Order.

III. Notices of Filings and Responsive Pleadings

23. Notice of the petition was published in the *Federal Register*, 85 Fed. Reg. 34,620 (June 5, 2020) issued June 5, 2020, with interventions and protests due on or before June 29, 2020. GreenHat filed an expedited motion for extension of time on June 4, 2020. A notice extending the time was issued on June 11, 2020, with interventions and protests due on or before July 14, 2020.

24. Motions to intervene were filed by: GreenHat; Electric Power Supply Association (EPSA); Public Citizen, Inc.; Elliot Bay Energy Trading, LLC; Exelon Corporation; The FirstEnergy Utility Companies; Monitoring Analytics, LLC, as the independent market monitor of PJM Interconnection, L.L.C.; Financial Marketers Coalition; Southern Maryland Electric Cooperative, Inc.; American Municipal Power, Inc.; Dominion Energy Services, Inc.; Calpine Corporation; NRG Power Marketing LLC; Boston Energy Trading and Marketing LLC; NextEra Energy Marketing, LLC; American Electric Power Service Corporation; DC Energy, LLC (DC Energy); American Electric Power Service, Corp.; Old Dominion Electric Cooperative; and PJM.

25. Comments and/or protests were filed by: DC Energy; EPSA; Joint Parties;³¹ PJM; and GreenHat. Shell and GreenHat filed answers.

26. GreenHat also filed an unopposed motion to file a protest one day out of time and filed a corrected protest. GreenHat stated that a technical issue compounded by remote working prevented it from filing the corrected version by the July 14, 2020 deadline.³²

³⁰ *Id.* at 44 (citing 18 C.F.R. § 35.1 (2020)).

³¹ Substantive comments were filed by DC Energy, LLC and Electric Power Supply Association. Comments and a Limited Protest were filed by Joint Parties (comprised of American Electric Power Service Corporation, American Municipal Power, Inc., Dominion Energy Services, Inc., East Kentucky Power Cooperative, Inc., Exelon Corporation, and NextEra Energy Marketing, LLC).

³² GreenHat's Unopposed Motion to File One Day Out of Time, Docket No. EL20-49-000, at 1 (filed Jul. 15, 2020).

27. In addition, on June 4, 2020, GreenHat filed a motion to bar Enforcement staff and certain other staff from performing an advisory role in this proceeding.

IV. GreenHat's Protest

28. Though GreenHat argues that the Commission should reject Shell's Petition, it agrees that "it is reasonable for the Commission to resolve issues regarding the PJM Tariff and related PJM materials."³³

29. GreenHat requests that the Commission reject the position that it is impossible to form a contract on the FTR Center,³⁴ and instead hold that the PJM Tariff does not preclude parties from buying and selling FTRs on FTR Center.³⁵ GreenHat states that under Schedule 9-2(a) of the PJM Tariff, PJM is authorized to charge its members for "Financial Transmission Rights Administration Service," which includes "coordination of FTR bilateral trading," and that this coordination occurs through PJM's FTR Center. GreenHat argues that this shows that the PJM Tariff authorizes PJM to "use [the] FTR Center as an internet platform for the formation of bilateral contracts."³⁶

30. Citing two Commission Orders and a PJM compliance filing from 1999, GreenHat asserts that the Commission authorized PJM to operate the FTR Center as a bilateral trading system, and that nothing precludes parties from using the FTR Center as a bilateral contract-formation platform.³⁷ For example, GreenHat asserts that in its compliance filing to the 1999 Orders, PJM stated that the FTR Center is "a bilateral trading system that facilitates the trading of existing FTRs between PJM members through a web-based bulletin board system."³⁸ GreenHat argues that Shell is wrong to claim that the FTR Center cannot be a trading platform because PJM called it a "reporting mechanism only" in a 2010 filing.³⁹ GreenHat argues that if the Commission

³³ GreenHat Protest at 2.

³⁴ *Id.* at 9.

³⁵ *Id.* at 62.

³⁶ *Id.* at 4.

³⁷ *Id.* at 2-6, 14-26 (citing *Atl. City Elec. Co.*, 86 FERC ¶ 61,147, at 61,528 (1999) and *PJM Interconnection, L.L.C.*, 87 FERC ¶ 61,054, at 61,221 (1999) (1999 Orders)).

³⁸ *Id.* at 3 (citing *PJM Interconnection, L.L.C.*, Docket No. ER99-2028-000, PJM Tariff Submission at 10 (filed Mar. 2, 1999)).

³⁹ *Id.* at 34-35.

intended in 2010 to reverse what GreenHat contends the Commission's 1999 Orders stated, it would have done so expressly.⁴⁰ GreenHat also claims that certain PJM and Market Monitor documents show that PJM's FTR Center is a bilateral contract-formation platform.⁴¹

31. GreenHat contends that there are PJM Tariff provisions that can be read, on a stand-alone basis, to show that the entry of data into the FTR Center creates new payment obligations between the parties recording the transfer of an FTR. GreenHat argues that the PJM Tariff makes clear that transactions conducted on FTR Center are not transactions with PJM itself and that this clarification was necessary because parties could enter contracts on the FTR Center.⁴² GreenHat further asserts that the PJM Tariff provides that "[a]ll claims regarding a default of a buyer to a seller under such a bilateral contract shall be resolved solely between the buyer and the seller," which GreenHat contends would not be necessary if contracts could not be formed on the FTR Center.⁴³

32. GreenHat disputes Shell's assertion that there will be major adverse market effects if the Commission does not rule in favor of Shell. According to GreenHat, "Shell has not pointed to a single other contract dispute of this sort."⁴⁴

33. GreenHat objects, however, to the Commission taking primary jurisdiction of the merits of the Texas state court lawsuit. GreenHat describes the dispute in that lawsuit as about whether GreenHat and Shell intended to create bilateral contracts using the FTR Center.⁴⁵ GreenHat provides an extensive recitation of facts that it claims provide support for its position that the parties intended to create bilateral contracts using the FTR Center.⁴⁶ GreenHat contends that both it and Shell took actions, including offering, accepting, and confirming trades on the FTR Center, that show their intent to use the FTR

⁴⁰ *Id.* at 34.

⁴¹ *Id.* at 19-26.

⁴² *Id.* at 16 (citing PJM Tariff Attach. K-App., § 5.2.2(d)(ii)).

⁴³ *Id.* at 16-17 (citing PJM Tariff Attach. K-App., § 5.2.2(d)(vi) (emphasis omitted) and *PJM Interconnection, L.L.C.*, 87 FERC ¶ 61,054 at 61,220-21).

⁴⁴ *Id.* at 57.

⁴⁵ *Id.* at 27, 32, 36; Decl. of Shaun D. Ledgerwood at 3-4, 27 (Ledgerwood Decl.).

⁴⁶ *See, e.g.*, GreenHat Protest at 11-13, 27-28, 36-56; Ledgerwood Decl. at 17-25.

Center to create stand-alone agreements.⁴⁷ For example, GreenHat states that the parties changed the way in which they entered numerical data into the price field in the FTR Center between Agreements.⁴⁸ GreenHat requests that, after ruling that parties can agree to make payments based on entries in the FTR Center, the Commission “leave the rest of this dispute for the . . . court . . . to resolve.”⁴⁹ GreenHat states that this will allow it to pursue the lawsuit it has filed against Shell in Texas state court, in which it seeks approximately \$68 million. GreenHat states that because of its Pledge Agreement with PJM, the first \$62 million of any recovery from Shell would go to PJM, with the remaining six million dollars going to GreenHat.⁵⁰

34. Though GreenHat’s Protest contains language that could be read to support a position that parties automatically create new contracts by entering data into the FTR Center, GreenHat makes clear that it does not ask the Commission to make this determination.⁵¹ GreenHat seeks a ruling only that it is possible for the entry of numerical values to create additional payment obligations if the parties specifically so agree, and that the PJM Tariff does not prohibit this.⁵²

⁴⁷ GreenHat Protest at 26-27.

⁴⁸ *Id.* at 40-42.

⁴⁹ *Id.* at 13.

⁵⁰ *Id.* at 1. GreenHat asks the Commission to expedite a ruling on the Petition because, it asserts, PJM will receive \$62 million if GreenHat’s Texas lawsuit is successful.

⁵¹ *Id.* at 6, 9, 26.

⁵² *Id.* at 13 (asking for ruling “that parties *can* reach bilateral contractual agreement on [the] FTR Center” and to leave other disputes to the Texas court) (emphasis in original); *id.* at 62 (asking for holding that “PJM’s tariff *does not preclude* parties from buying and selling FTRs on FTR Center”) (emphasis added); *see id.* at 7, 9 (asking Commission to reject contention that it is impossible to form a contract on the FTR Center).

V. Other Comments and Protests

35. DC Energy states that the Commission should issue an order on the Petition interpreting the PJM Tariff language and finding that the FTR Center is only a reporting mechanism for bilateral FTR transfers.⁵³

36. According to DC Energy, GreenHat ignores the jurisdictional waiver by the Commodity Futures Trading Commission (CFTC) regarding FTRs. DC Energy states that the CFTC generally waived jurisdiction over FTRs in organized wholesale electricity markets. Shell's interpretation of the FTR Center as only a reporting mechanism for the bilateral FTR transfer, according to DC Energy, is consistent with the CFTC's waiver because no new transaction is occurring on the PJM platform. DC Energy asserts that GreenHat's interpretation of the FTR Center is inconsistent with both the Commission's and the CFTC's rulings about FTRs, because new contracts automatically created by use of the FTR Center would be akin to a type of swap over which the CFTC has not waived jurisdiction.⁵⁴

37. EPSA states that, though the PJM Tariff provides means for reporting transfers of FTRs between market participants, it does not purport to, and does not, provide a mechanism through which market participants agree on the terms and conditions of such transfers. Thus, EPSA states that it agrees with Shell that data entered into the PJM FTR Center should not be construed as creating new binding contracts or as superseding the terms and conditions of written bilateral contracts between the parties, and rejects GreenHat's contention to the contrary. According to EPSA, there is no basis for GreenHat's claims in the Texas case that PJM's reporting mechanism, the FTR Center, operates as an exchange for the trading of FTRs, in which parties create separate, stand-alone contracts, distinct from the parties' underlying bilateral agreements.⁵⁵

38. EPSA states that, consistent with PJM's characterization, it understands that the FTR Center is used only to report FTR transactions to PJM because, as the system operator, PJM needs information about bilateral transfers to perform important market functions, such as settling with the correct party. EPSA requests that the Commission confirm that data entered into the FTR Center about bilateral trades do not create

⁵³ DC Energy, LLC, Motion to Intervene and Comments in Support of Petition by DC Energy, LLC, Docket No. EL20-49, at 2, 4 (Jul. 14, 2020) (DC Energy Comments).

⁵⁴ DC Energy Comments at 2-4.

⁵⁵ Electric Power Supply Association, Comments of the Electric Power Supply Association, Docket No. EL20-49, at 1-3 (Jul. 14, 2020) (EPSA Comments).

additional or superseding contractual arrangements between the parties. EPSA states that it takes no position on specific factual issues relating to GreenHat and Shell.⁵⁶

39. Joint Parties assert that a bilateral FTR agreement cannot affect or dispense with the fundamental obligations that an FTR seller bears under the PJM Tariff. Joint Parties state that, when Shell accepted FTRs from GreenHat and recorded the bilateral transfers in the FTR Center, Shell became the owner of those FTRs; and that when Shell later transferred certain FTRs back to GreenHat, Shell became an FTR seller and, as such, took on the PJM Tariff obligations of an FTR seller, one of which is to indemnify PJM against non-performance by a subsequent buyer of those FTRs. Joint Parties state that bilateral contracts must not be allowed to vitiate the legal obligations imposed on an FTR seller under the PJM Tariff, such as indemnification to PJM in certain circumstances.⁵⁷

40. Joint Parties state that entry of information in the FTR Center does not create a contract and that the rights and obligations of the parties to a bilateral transaction, such as those related to price and payment, are specified in the bilateral contract between the parties. Joint Parties also state that the PJM Tariff and FTR Manual clearly establish that a party that offers FTRs for sale must also be the owner of the FTRs.⁵⁸

41. According to Joint Parties, if the Commission asserts jurisdiction and grants Shell's Petition, the Commission should avoid any suggestion that: (a) the terms of bilateral agreements control even if inconsistent with the rights and obligations set forth in the PJM Tariff; (b) the FTR Center does not play an important role in confirming title upon PJM's consent to a bilateral transfer; or (c) a seller is not required to own the FTRs that it offers in an auction.⁵⁹ Joint Parties explain that the PJM Tariff provides that an FTR seller under a bilateral agreement must guarantee and indemnify PJM and its

⁵⁶ *Id.* at 2-3.

⁵⁷ Joint Parties, Comments and Limited Protest of American Electric Power Service Corporation, American Municipal Power, Inc., Dominion Energy Services, Inc., East Kentucky Power Cooperative, Inc., Exelon Corporation, and NextEra Energy Marketing, LLC, Docket No. EL20-49, at 2-4 (Jul. 14, 2020) (Joint Parties' Comments).

⁵⁸ *Id.* at 5-8 and nn.15-18 (citing to PJM Tariff, Attach. K- App., § 7.1A.4, PJM Manual 06: Financial Transmission Rights, § 6.6, PJM Tariff, Attach. K-App., § 7.3.1, PJM Tariff, Attach. K-App., § 7.3.8, and PJM Tariff, Attach. K-App., § 5.2.2(d)(iv)).

⁵⁹ *Id.* at 8-10.

members for the buyer's failure to pay any charges associated with the transferred FTRs.⁶⁰

42. PJM states that, subject to the following caveats and one clarification to Shell's second requested Tariff interpretation, it does not object to Shell's three requested interpretations of its Tariff.⁶¹ PJM states that it reads Shell's requested interpretations as "limited to the FTR bilateral transaction rights and obligations as between Shell and GreenHat, and is not seeking interpretation of the significance of their FTR postings as between the FTR seller and PJM, PJM Settlement, or PJM members."⁶² PJM asks that, if the Commission issues an order on the Petition, it make clear that it is not addressing any other potentially related issues, particularly regarding application of an FTR seller's indemnity obligations under the PJM Tariff. PJM states that the Petition does not present for Commission resolution any dispute concerning whether Shell transferred title of FTRs to GreenHat and PJM. PJM asks that the Commission avoid characterizing the Shell-GreenHat bilateral FTR agreements in a way that might undermine application of the PJM Tariff's indemnity provision, or otherwise opine on the guarantee and indemnification issue, which is subject to ongoing informal dispute resolution procedures between Shell and PJM.⁶³

43. As to PJM's clarification regarding Shell's requested Tariff interpretation, PJM states that "Shell may have intended the preface 'in the context of bilateral FTR transfers' to confine" this interpretation to the PJM Tariff's impact on Shell's and GreenHat's rights and obligations as to one another. However, PJM states that it is concerned that, "because all of the governing provisions of Operating Agreement, Schedule 1, section 5.2.2(d)(iv) . . . could be viewed as '[i]n the context of bilateral FTR transfers,' that preface is not sufficiently limiting."⁶⁴ Therefore, PJM "requests that if the Commission adopts the interpretation that 'FTR Center is only a reporting mechanism for the transfers,'" it confine that interpretation by stating that its interpretation "concerns the FTR bilateral transaction rights and obligations between GreenHat and Shell, and no

⁶⁰ PJM Tariff, Attach. K-App., § 5.2.2(d)(iv).

⁶¹ PJM Interconnection, L.L.C., Comments of PJM Interconnection, L.L.C., Docket No. EL20-49, at 1, 4, 7-8 (Jul. 14, 2020) (PJM Comments).

⁶² *Id.* at 4-5 (emphasis omitted).

⁶³ *Id.* at 4-7.

⁶⁴ *Id.* at 7-8.

other parties, and is not dispositive as to the legal obligations of buyers and sellers of FTRs as evidenced by their bilateral agreements in general.”⁶⁵

VI. Shell's Answer

44. In its answer, Shell asserts that in the Texas lawsuit, GreenHat is pursuing only the theory that entry of data into FTR Center automatically creates new contracts, not that the parties entered into a separate agreement for Shell to make payments based on those entries.⁶⁶ Shell asserts that the PJM Tariff requires parties to written bilateral agreements for FTRs to report transfers in FTR Center and that fulfilling this PJM Tariff requirement cannot force the creation of a new contract or modify an existing one.⁶⁷ Shell claims that if parties automatically formed contracts by entering data into the FTR Center, PJM market participants would be bound to unwanted and non-negotiated contract terms.⁶⁸

45. Shell states that GreenHat wrongly asserts that a delegated letter order cannot reverse or clarify a prior Commission order and ignores PJM's right under FPA section 205 to amend its Tariff. According to Shell, PJM submitted the relevant Tariff language about the FTR Center serving only a reporting function in an April 1, 2010 filing, pursuant to FPA section 205, and that the language became effective June 1, 2010.⁶⁹

46. Further, Shell states that many of the materials cited by GreenHat to support its assertions (e.g., unfiled user materials) have not been updated to be consistent with the existing Tariff and that such sources cannot supersede the Commission-approved Tariff, which does not authorize the establishment of an online trading platform for bilateral FTR transactions. Shell adds that documentation of PJM's role in facilitating and coordinating bilateral transactions does not indicate that PJM has created and is operating an online exchange.⁷⁰

⁶⁵ *Id.* at 8. PJM also notes that it has not used the price field information input into FTR Center by the parties to FTR bilateral transactions for purposes of FTR settlements to date.

⁶⁶ Shell Answer at 2-3.

⁶⁷ *Id.* at 2.

⁶⁸ *Id.* at 4.

⁶⁹ *Id.* at 5-6.

⁷⁰ *Id.* at 6-7.

47. Shell denies that it must have agreed in FTR Center to give GreenHat \$68 million because the written bilateral Agreements did not always result in profits for Shell. Shell states the Agreement provisions were negotiated at arms' length by authorized representatives of each party, and were committed to writing in Agreements executed and performed by both parties. Shell states that the fact that the parties modified the price formula from the original agreement does not show that the written bilateral Agreements did not operate as factoring agreements; Shell states that it stood by its obligation to pay under the Agreements, and no one disputes that Shell has fully paid all amounts owed to GreenHat under the three Agreements. Shell adds that it made no agreement with GreenHat outside of the three Agreements, and that Shell does not owe GreenHat any more money as a result of their FTR transactions.⁷¹

48. Shell states that the Petition presents a narrow set of questions for resolution by the Commission, namely an interpretation of the PJM Tariff and assertion of primary jurisdiction to resolve a claim on the merits. According to Shell, the only questions at issue relate to whether the FTR Center functions pursuant to the existing PJM Tariff in the manner alleged by GreenHat in its Texas state court action. Shell asserts that many of the factual allegations and issues raised by GreenHat are unrelated to these questions and are beyond the scope of this proceeding. Shell agrees with PJM that the dispute over application of the guarantee and indemnification provision in the PJM Tariff is beyond the scope of this proceeding.⁷²

49. Shell states that its Petition made clear that GreenHat's entering data into FTR Center to report FTR transfers, and Shell's accepting the transfers cannot, on its own, form a contract pursuant to the PJM Tariff. Shell states that without the posting, accepting, and confirmation steps in the FTR transfer process, FTRs could be unilaterally transferred to or from market participants without their consent.⁷³

50. Shell states that it is not asking the Commission to override state contract law and dictate formal requirements for bilateral FTR contracts, as GreenHat alleges. Shell states that it and GreenHat negotiated, executed, and performed three Agreements, and that Shell has not asked the Commission to interject itself into these contracts. Shell states that whether parties assume contractual obligations simply by reporting their bilateral

⁷¹ *Id.* at 10-11.

⁷² *Id.* at 8, 12-13.

⁷³ *Id.* at 3-4.

trades to PJM is a Tariff question that is well within bounds for a declaratory order from the Commission.⁷⁴

51. Shell states that the intent of the parties has not been presented to the Commission for resolution in this proceeding and intent need not come into play when there is nothing to indicate a meeting of the minds between the parties. Shell contends that because of the transfer reporting requirement, the entry of transfer data cannot evidence a meeting of the minds, and states that GreenHat does not allege that any such meeting of the minds took place. According to Shell, GreenHat's witness, Dr. Ledgerwood, acknowledges that the mere entry of data into FTR Center is not enough and qualifies his views regarding whether the FTR Center can be used to form a contract by saying "if that is the parties' intent."⁷⁵ Shell argues that, to the extent GreenHat's witness purports to testify to the intent of the parties, such testimony is improper because he lacks firsthand knowledge and should be stricken from the record. Shell also argues that Dr. Ledgerwood's testimony is irrelevant to the primary issue before the Commission: whether entry of data into the FTR Center, on its own, establishes a stand-alone contract, or modifies an existing contract, pursuant to the PJM Tariff.⁷⁶

52. Shell states that GreenHat attempts to justify the \$68 million debt by alleging that the Final Purchase Price amounts were option fees, but that GreenHat fails to identify any provision for an option in the written bilateral agreements, and fails to provide any legal basis for such an option contract. According to Shell, as with any other contract, an option contract must meet the requirements for the formation of a contract so that there must be consideration for the option, even if the option is never exercised by the option holder. Shell states that GreenHat's witness, Dr. Ledgerwood, wrongly asserts that Shell paid an option fee for the ability to: (i) sell those FTRs in the auction; (ii) keep retained FTRs; or (iii) to return other FTRs to GreenHat. Shell states that Dr. Ledgerwood ignores that the Final Purchase Price was contingent on Shell Energy selling the FTRs in a PJM-administered auction (or retaining FTRs that did not clear the auction) and, if Shell Energy returned all FTRs to GreenHat, no payment would be due under the Agreements. Shell notes that GreenHat asserts that an option purchaser does not have to pay for the option unless it chooses to exercise it. Shell explains, if that were the case, there would be no consideration sufficient to form an option contract.⁷⁷

⁷⁴ *Id.* at 5.

⁷⁵ *Id.* at 8 (quoting Ledgerwood Dec. ¶ 6).

⁷⁶ *Id.* at 8-9.

⁷⁷ *Id.* at 9-10.

VII. GreenHat's Answer

53. GreenHat asserts that PJM does not support Shell's interpretation of the PJM Tariff, but rather that PJM does not oppose Shell's interpretation. GreenHat further states that PJM did not disagree with the arguments in GreenHat's protest.⁷⁸

54. GreenHat avers that Shell does not respond to Commission precedent in a 1999 Commission order, which GreenHat claims held that the FTR Center is a bilateral trading system. GreenHat contends that Shell states that a 2010 PJM filing and delegated letter order are consistent with the FTR Center being a bilateral trading system; that PJM characterized the changes as mere clarifications in this filing; and that PJM's guides, manuals, and trainings contradict Shell's view. GreenHat also argues that both PJM and Shell acknowledge that the FTR Center has uses other than as a reporting mechanism.⁷⁹

55. Similarly, GreenHat contends that Shell does not respond to evidence indicating that the FTR Center is a bilateral trading system, pointing to PJM's materials that it claims so describe the FTR Center and noting that the price field specifies the offer or bid price for an FTR. GreenHat argues that Shell's answer minimizes these materials by claiming they do not reflect the 2010 revisions. GreenHat states that these documents have been updated since 2010 and that they would have reflected the changed role of the FTR Center, if that were PJM's intent.⁸⁰

56. GreenHat also claims that Shell does not respond to evidence showing that the parties intended the price field to be binding. According to GreenHat, Shell's answer adopts contradictory positions on the relevance of intent. GreenHat states that Shell concedes that parties to a bilateral agreement can agree to incorporate data entered into FTR Center as part of the terms and conditions of a bilateral agreement.⁸¹

⁷⁸ GreenHat Energy, LLC, Motion for Leave to Answer and Answer, Docket No. EL20-49, at 2 (Aug. 13, 2020) (GreenHat Answer).

⁷⁹ *Id.* at 3-4.

⁸⁰ *Id.* at 5.

⁸¹ *Id.* at 7-8.

VIII. Discussion

A. Procedural Matters

1. General

57. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, timely, unopposed motions to intervene are granted. We grant GreenHat's unopposed motion to file a corrected protest one day out of time. We deny GreenHat's motion for expedited action.

58. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We accept the answers filed by Shell and GreenHat because they have provided information that assisted us in our decision-making process.

2. GreenHat's Motion to Bar Certain Staff

59. On June 4, 2020, GreenHat filed a motion to bar certain staff from participating in an advisory role in this proceeding.

60. As background to that motion, the Commission's Office of Enforcement currently is investigating whether GreenHat violated the Commission's Anti-Manipulation Rule or other regulations or statutes based on GreenHat's conduct leading up to its default, in June 2018, on its FTR obligations in PJM.⁸² In its motion to bar, GreenHat seeks to disqualify from an advisory role all Enforcement staff, as well as other staff who worked with Enforcement staff on the investigation of GreenHat initiated after it defaulted on its PJM FTR obligations in June 2018.⁸³ As grounds for its motion, GreenHat cites a meeting on or about March 15, 2019, that staff attended with PJM independent consultants who were evaluating PJM's handling of the GreenHat default and opportunities for improvement by PJM.⁸⁴ On April 8, 2019, GreenHat sent a letter to the Commissioners expressing concerns and seeking information about that meeting.⁸⁵

⁸² See *PJM Interconnection, L.L.C.*, 166 FERC ¶ 61,072, at P 36 (2019).

⁸³ GreenHat Energy, LLC, Motion to Bar the Office of Enforcement and Certain Other Staff From Any Advisory Role, Docket No. EL20-49, at 1-4 (Jun. 4, 2020) (Motion).

⁸⁴ *Id.*

⁸⁵ *Id.* at Exhibit A.

61. The Commission's Designated Agency Ethics Official referred this matter to the Department of Energy's Inspector General. In response to that referral, the Department of Energy's Inspector General investigated the matter and concluded there was no merit to GreenHat's allegations. In light of that investigation and conclusion, we deny GreenHat's request to bar any Enforcement or other staff from advisory roles in this proceeding.

B. Substantive Matters: Commission Determination

62. We grant, in part, and deny, in part, Shell's Petition, as discussed below. Specifically, we provide an interpretation of the PJM Tariff that is generally consistent with Shell's request; we find that entry of data about bilateral FTR trades into the FTR Center does not automatically establish stand-alone bilateral contracts at the stated price, absent a separate agreement by the parties to do so. We decline to assert primary jurisdiction to resolve the dispute under Texas law as to whether Shell and GreenHat entered into separate contracts in which Shell agreed to pay a purchase price based on entries in the FTR Center, in addition to paying the Final Purchase Price specified in their three Agreements.

1. Shell's Request for a Tariff Interpretation

63. Based on the PJM Tariff, we find, in summary, that: (1) the parties' bilateral agreements control the terms and conditions of their transactions; however, the parties to bilateral FTR agreements also are subject to compliance with the PJM Tariff; (2) in the context of bilateral FTR transfers, the FTR Center is only a reporting mechanism for the transfers; and (3) entering data into the FTR Center to report the transfer of FTRs does not, by itself, create a separate, stand-alone contract between the parties to the bilateral agreement, or modify the parties' bilateral agreement.⁸⁶ This interpretation applies to all market participants, not merely to GreenHat and Shell.

64. As an initial matter, none of the parties in the proceeding objects to the Commission's providing a Tariff interpretation in this proceeding.⁸⁷ The central issue

⁸⁶ PJM Tariff, Attach. K-App., § 5.2.2(d) applies to these requests; *see also* Petition at 2-3, 32.

⁸⁷ GreenHat Protest at 2; EPSA Comments at 1, 3-4; DC Energy Comments at 2-4; Joint Parties' Comments at 2-6. Providing this interpretation is important to the PJM market. Shell notes that PJM's FTR Center contains tens of thousands of entries with non-zero numbers in the price field, which, if the "automatic contract formation" theory were correct, would impose payment obligations on the parties beyond that to which they have separately agreed. Petition at 31. As EPSA points out, parties could be subject to

presented by Shell's first request is whether, merely by entering data into PJM's FTR Center concerning bilateral FTR trades, market participants automatically enter into new contracts with one another.⁸⁸ As discussed below, based on the language, structure, and purposes of the relevant Tariff provisions, we conclude that they do not.

65. The PJM Tariff sets forth two ways in which market participants can buy and sell FTRs. First, PJM conducts periodic auctions in which market participants submit bids and offers, PJM settles the auctions, and market participants buy or sell FTRs if their bids or offers clear. The clearing prices in these auctions, which determine the amounts that winning buyers and sellers are charged or credited, are determined by the values entered by buyers and sellers in the price field in the FTR Center. Second, market participants can agree to trade FTRs through bilateral trades outside of PJM auctions. For both types of transactions, PJM provides an online portal, called the FTR Center, in which market participants enter certain data. The significance of those data, however, differs between auctions and bilateral trades.

66. We interpret the PJM Tariff provisions concerning bilateral trades, which are at issue in this Petition, to: (a) allow parties to make bilateral trades;⁸⁹ (b) provide that the buyer assumes the seller's rights and obligations;⁹⁰ and (c) make clear that PJM is not a party to, and has no financial responsibility for, any bilateral transaction.⁹¹

67. The PJM Tariff provisions concerning bilateral trades do not contain the term "price." Instead, we find the PJM Tariff leaves the commercial terms of bilateral trades to the parties; for example, it provides that "[a]ll payments and related charges associated with such a bilateral contract shall be arranged between the parties to such bilateral

unforeseeable contractual arrangements or payments without this clarification. EPSC Comments at 4.

⁸⁸ Petition at 2-3.

⁸⁹ PJM Tariff, Attach. K-App., § 5.2.2(d)(i) ("Market Participants may enter into bilateral agreements to transfer to a third party a Financial Transmission Right . . .").

⁹⁰ *Id.* § 5.2.2(d)(ii) ("the rights and obligations . . . shall pass to the buyer under the bilateral contract subject to the provisions of this Schedule").

⁹¹ *Id.* § 5.2.2(d)(ii) ("In no event shall the purchase and sale of a Financial Transmission Right pursuant to a bilateral transaction constitute a transaction with PJMSettlement or a transaction in any auction under this Schedule."); *id.* § 5.2.2(d)(v) ("The LLC, PJMSettlement, and the Members will not assume financial responsibility for the failure of a party to perform obligations owed to the other party under such a bilateral contract reported to the Office of the Interconnection under this Schedule.").

contract”⁹² As to bilateral FTR sales, the PJM Tariff also provides that “[i]n no event shall the purchase and sale of a Financial Transmission Right pursuant to a bilateral transaction constitute a transaction with PJM Settlement or a transaction in any auction under this Schedule.”⁹³ The PJM Tariff contains no language suggesting that parties execute bilateral trades on PJM’s FTR portal; the lack of such language is consistent with the interpretation provided herein.

68. Though the PJM Tariff leaves to the parties commercial arrangements and prices for bilateral trades, we find that the PJM Tariff directs PJM to ensure that bilateral trades comply with certain Tariff provisions, including a requirement that “bilateral transactions . . . be reported to the Office of the Interconnection in accordance with this Schedule and pursuant to the LLC’s rules related to its FTR reporting tools.”⁹⁴ This reporting requirement enables PJM to keep its records up to date so it can pay or invoice the correct party at settlement.⁹⁵ Mandatory reporting also enables PJM to determine whether to consent to the trades being effective, based on PJM’s assessment of the buyers’ “ability to perform the [relevant] obligations, including meeting applicable creditworthiness requirements.”⁹⁶

69. Because of technical limitations, the FTR Center will not process a bilateral transfer of an FTR, which is an action completed outside of any auction, unless the parties enter a numerical value, which may be zero dollars, in a field called “price.” PJM has never used those values in connection with bilateral transactions.⁹⁷ In other words, the FTR Center does not differentiate between sales through auctions, where PJM uses bid and offer price entries in settling the market, and bilateral trades, where PJM does not use price entries.⁹⁸

70. In contrast to the provisions about bilateral sales of FTRs, the PJM Tariff provisions about FTR auctions expressly state that sellers may, but buyers must, enter a

⁹² *Id.* § 5.2.2(d)(v).

⁹³ *Id.* § 5.2.2(d)(ii).

⁹⁴ *Id.* § 5.2.2(d)(i).

⁹⁵ *Id.* § 5.2.2(d)(i)-(ii).

⁹⁶ *Id.* § 5.2.2(d)(iii).

⁹⁷ PJM Comments at 8 n.25.

⁹⁸ Petition at 43; PJM Tariff, Attach. K-App., § 7.3.5(b)-(c).

price into their bids and offers.⁹⁹ The FTR auction provisions state that PJM is to calculate the winning bids and clearing prices by taking into account both “the bids of buyers” and “the reservation prices of the sellers.”¹⁰⁰ They also state that PJM is to announce the “winning bidders” within a specified period of time, after which the relevant buyers and sellers have either bought or sold FTRs, with the binding financial consequences of doing so.¹⁰¹ These provisions are specific to auctions, and do not apply to bilateral sales.

71. The PJM Tariff provisions concerning FTR auctions administered by PJM use the term “price” 10 different times. This is consistent with the fact that entry of numerical values, including prices, into PJM’s auction portal has binding financial consequences for the bidder or offeror. Specifically, if a market participant’s bids or offers clear based on the data it has entered into the FTR Center, it will buy or sell FTRs at the market clearing price. If it is the buyer, it then will be entitled to collect payments from PJM, or be required to pay for charges invoiced by PJM, at settlement. Again, these provisions apply only to auctions, and not to bilateral sales.

72. Neither GreenHat nor any other commenter identifies evidence that any market participant has ever understood or treated the entry of data into the FTR Center to report bilateral trades as required by the PJM Tariff as, by itself, creating new contracts or payment obligations between the parties reporting their trades. To the contrary, EPSA, the Joint Parties, and DC Energy state that market participants have always understood that the FTR Center functions only as a reporting mechanism for bilateral FTR trades. They contend that the entry of non-zero numerical values in the FTR Center price field does not automatically create stand-alone contracts, absent a separate agreement to do so.¹⁰²

73. We agree. Based on the language, structure, and purposes of the PJM Tariff, we find that the PJM Tariff cannot be read reasonably to state that the entry of data into the FTR Center for purposes of reporting a bilateral FTR trade, by itself, creates new payment obligations between the parties recording the transfer of an FTR. We find that the PJM Tariff’s requirement that bilateral trades be reported to PJM is instead intended to enable PJM to perform essential market functions, not to create new contractual obligations. Though the PJM Tariff makes clear the consequences of entering price and

⁹⁹ PJM Tariff, Attach. K-App., § 7.3.5(b)-(c).

¹⁰⁰ *Id.* § 7.3.6(b).

¹⁰¹ *Id.* § 7.3.7.

¹⁰² EPSA Comments at 3-4; DC Energy Comments at 3; Joint Parties’ Comments at 5.

other data into the FTR Center with respect to the PJM auctions, it provides no notice to market participants that by entering data to comply with the PJM Tariff's reporting requirement for bilateral trades, they are entering into new contracts or taking on additional payment obligations between themselves. Rather, we agree with Shell that the parties' bilateral agreements control, as between the parties to those agreements, the terms and conditions of their transactions, subject to compliance with the relevant provisions of the PJM Tariff.

74. In its Protest, GreenHat states it does not seek a ruling that entry of data into the PJM FTR Center automatically creates new contractual obligations.¹⁰³ Instead, it asks only for a ruling that the PJM Tariff does not prohibit parties, if they wish, from agreeing that price and payments will be based on data entered into the FTR Center.¹⁰⁴ Neither Shell nor any commenter disputes that, in principle, parties could enter into a contract with price and payment terms based on entries in the FTR Center, or on any other basis chosen by the parties. We agree. For example, parties could choose to enter into a written bilateral agreement that a buyer will pay a seller for FTRs based on prices set in a recent auction, on current day-ahead price spreads, on numbers entered into the price field in the FTR Center, or, for that matter, on any other basis they may choose. But they would need to agree to such pricing explicitly.¹⁰⁵

75. Although, as just noted, GreenHat nominally requests a ruling only that parties can enter into separate agreements to make payments based on data entered into the FTR Center, certain portions of GreenHat's Protest could be read to suggest that entry of data into the FTR Center automatically creates new contractual obligations, which we find significant enough to address here. For example, GreenHat states that "when bilateral trading partners enter positive or negative values in the Price Field, they create additional

¹⁰³ By contrast, in its Amended Complaint in the Texas case, filed in January 2019, for example, GreenHat alleged that "[b]y conducting trades over the PJM bilateral trading system, GreenHat agreed to sell, and Shell Energy agreed to buy, each FTR at the price specified in the price box." Petition at 12 & n.64 (quoting Ex. AM (GreenHat Energy, L.L.C.'s First Amended Petition, No. 2018-69829-A, at ¶ 29 (Harris Cnty. Tex. Dist. Ct., 190th Judicial District)) (filed Jan. 8, 2019)) (emphasis added). GreenHat's allegation in its Amended Complaint appears to be based on the theory that entry of data into the FTR Center automatically creates contractual obligations, not merely that parties could enter into a separate agreement to make payments based on entries in the FTR Center.

¹⁰⁴ See, e.g., GreenHat Protest at 9, 62.

¹⁰⁵ Any such agreement would, of course, also be subject to the requirements of the FPA that the rates, terms, and conditions be just and reasonable and not unduly discriminatory or preferential. 16 U.S.C. §§ 824d, 824e.

contractual agreements among themselves”¹⁰⁶ To the extent this statement, or any other language, in GreenHat’s Protest could be read to support the idea that entry of data into the FTR Center automatically creates new payment obligations, we reject that contention for the reasons given above.¹⁰⁷

2. Shell’s Request for the Commission to Assert Primary Jurisdiction Over the Texas Lawsuit

76. In its second request, Shell asks the Commission to “assert primary jurisdiction over and resolve GreenHat’s claim [in the Texas lawsuit] on the merits,” enabling Shell to seek dismissal of that case. For the reasons discussed herein, we deny this request.

77. As set forth in *Arkla*, the Commission considers three factors in determining whether to assert primary jurisdiction relating to contractual disputes in court: (1) whether the Commission possesses some special expertise that makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.¹⁰⁸

78. Applying those *Arkla* factors, we are not persuaded by Shell’s arguments to claim jurisdiction here and we decline to assert primary jurisdiction over the dispute pending in Texas state court.

79. As to the first *Arkla* factor, while the Commission, in general, is no more expert than a court in deciding non-technical contract questions, interpretation of some types of contractual clauses may require the Commission’s special expertise. In this case, however, the Commission does not have such special expertise when it comes to deciding what claims GreenHat is actually making in the Texas lawsuit,¹⁰⁹ and whether Shell has,

¹⁰⁶ GreenHat Protest at 6.

¹⁰⁷ As is clear from this discussion, the Commission is not resolving any other issues raised by the parties in this proceeding.

¹⁰⁸ *Arkla*, 7 FERC ¶ 61,175 at 61,322.

¹⁰⁹ As discussed above (at P 44), Shell contends that GreenHat’s claims in the Texas lawsuit are “entirely dependent” on the theory that entry of data into the FTR Center automatically creates new contractual obligations. Shell Answer at 2-3. Shell asserts that GreenHat “does not allege” in the Texas lawsuit that the parties separately agreed that Shell would make payments based on those data entries. *Id.* at 2.

in fact, entered into separate agreements to pay a purchase price based on entries in the FTR Center.¹¹⁰

80. The second *Arkla* factor, need for uniformity of interpretation of the type of question raised by the dispute, is also not satisfied here. The contract formation dispute between GreenHat and Shell is based on their specific circumstances. Resolution of the contract formation dispute likely will have little effect beyond the parties involved.¹¹¹

81. Finally, the third *Arkla* factor does not support primary jurisdiction over the dispute, because a state court determination on a contract formation issue would not affect the Commission's application of its statutory authority. The Commission has the authority under the FPA and its regulations to determine whether market participants have engaged in conduct inconsistent with the FPA, and if so to take appropriate action.¹¹² The Commission's authority under the FPA is not ordinarily impaired by the pendency of private state court litigation on contract formation, and that is no less the case here.

The Commission orders:

(A) Shell's petition for a declaratory order is hereby granted in part, and denied in part, as discussed in the body of this order.

¹¹⁰ See *New England Ratepayers Ass'n*, 172 FERC ¶ 61,042, at PP 35-36 (2020) (“exercis[ing] our discretion to decline to address the issues set forth in the Petition” and finding the Petition did “not warrant a generic statement” and did “not identify a specific controversy or harm.”).

¹¹¹ See, e.g., *S. Md. Elec. Coop., Inc. v. J.P. Morgan Ventures Energy Corp.*, 155 FERC ¶ 61,164, at P 24 (2016) (finding that “[r]esolution of the contractual dispute therefore likely will have little impact beyond the parties involved and this particular issue involving PJM's Capacity Performance construct would also not be applicable to entities operating in other [Regional Transmission Organizations]”); *BG Energy Merchants, LLC v. Crosstex LIG, LLC*, 136 FERC ¶ 61,098, at P 37 (2011); *PPL Elec. Util. Corp.*, 92 FERC ¶ 61,057, at 61,147 (2000).

¹¹² As the Commission has publicly stated, its Office of Enforcement is investigating whether GreenHat violated the Commission's Anti-Manipulation Rule or other regulations or statutes. See *PJM Interconnection, L.L.C.*, 166 FERC ¶ 61,072 at P 36.

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(B) GreenHat's motion to bar certain staff from an advisory role in this proceeding is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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