UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corporation	)	Docket No. ER99-473-000
	)	--not consolidated with --
California Independent System Operator Corporation	)	Docket No. ER98-211-000
California Power Exchange Corporation	)	Docket Nos ER98-210-000 and ER98-1729-000
Southern California Edison Company	)	Docket No. ER98-462-000
Pacific Gas & Electric Company	)	Docket Nos. ER98-556-000 and ER98-557-000

REPLY COMMENTS OF THE
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION

Pursuant to Rule 602(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(f) (1998), the California Independent System Operator Corporation (ISO) hereby files its Reply Comments in response to the Initial Comments filed by Enron Power Marketing, Inc (Enron) on November 17, 1998. Enron is the only party that has opposed the GMC extension.[1]

On October 28, 1998, the ISO filed an Offer of Settlement to extend the current Grid Management Charge (GMC) for six months. The current GMC was part of the April 7, 1998 Settlement, which the Commission approved on June 1, 1998. According to the terms of the April 7, 1998 Settlement, the ISO agreed to file a new GMC to be effective January 1, 1999.

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[1] Enron was the only party to file settlement comments, which were due on November 17, 1998. Motions to intervene in Docket No. ER98-473-000 indicating support for the proposed GMC extension were filed by the Public Utilities Commission of the State of California, Pacific Gas and Electric Company, the California Electricity Oversight Board, Modesto Irrigation District, Cities of Redding and Santa Clara, M-S-R Public Power Agency, the Metropolitan Water District of Southern California, the Transmission Agency of Northern California, and Southern California Edison Company. Public Service Resources Corporation, Duke Energy Trading and Marketing, and the California Power Exchange Corporation filed motions to intervene without stating a position on the settlement.

The October 28, 1998 Offer of Settlement seeks to extend that provision to require the ISO to file the new GMC with an effective date of July 1, 1998. The Offer of Settlement seeks to maintain the status quo and balance competing interests while the ISO continues explore various allocation methodologies for the unbundled GMC rate filing. The ISO Board approved a motion to extend the current GMC settlement until there was further stakeholder support for an unbundled rate. A large majority of stakeholders supported a six-month extension. Enron is the only entity opposing this action. Enron alone should not be allowed to dictate the filing of a GMC with an effective date of January 1, 1998. Such a filing is premature. The ISO and stakeholders have not developed a well-supported unbundled rate methodology and any such filing would disrupt the ongoing stakeholder process and certainly result in a needless evidentiary hearing and a waste of stakeholder resources because most stakeholders would oppose the filing.

Enron opposes the extension of the GMC for three reasons: 1) the filing has a procedural defect because Docket Nos. ER98-211-000, *et al.*, dockets were terminated; 2) the filing contains no cost support; and 3) the filing constitutes a violation of the ISO's obligation under the April 7, 1998 Settlement to file a new GMC with rates to be effective January 1, 1999. Enron's arguments have no merit and do not prevent the Commission from accepting the ISO's October 28, 1998 Offer of Settlement. In addition, Enron has not complied with Rule 602(f)(4), which requires that any comments contesting an offer of settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing that genuine issue of material fact. 18 C.F.R. § 385.602(f)(4) (1998).

DISCUSSION

1. The ISO's Offer of Settlement is Not Procedurally Defective.

Enron claims that the ISO's October 28, 1998 Offer of Settlement is "a nullity as a matter of law," deficient and unsupported. Enron Comments at 5. Enron argues that Docket Nos. ER98-211-000, *et al*., were terminated by the Commission in the June 1, 1998 order approving the April 7, 1998 Settlement and thus the ISO cannot file a settlement in those dockets. Enron also argues that because the docket was terminated, the ISO's filing is tantamount to a new, superseding rate filing under Section 205. As such, according to Enron, the ISO's filing is deficient and unsupported because it did not file the cost support required under Section 35.13 of the Commission's regulations. Finally, Enron implies that the filing may be prohibited by the *Mobile Sierra* doctrine. Enron Comments at 10 n.9.

Enron arguments are incorrect. First, the ISO's filing in the Docket Nos. ER98-211-000, *et al*., does not make it a "nullity as a matter of law." The ISO filed under Docket Nos. ER98-211-000, et al., because it is seeking to extend the April 7, 1998 settlement that was approved in those dockets. All the parties to Docket Nos. ER98-211-000, *et al*., are affected by the GMC extension and filing in those dockets would ensure that all parties were notified.[2] Enron cites no authority for its argument that simply making a filing in a terminated docket makes the filing a "nullity." In any event, the question is now moot because the Commission created a new docket for the filing, Docket No. ER99-473-000, and issued a notice of filing for publication in the Federal Register.[3] Thus, the Commission did not treat the filing as a nullity.

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[2] In addition, prior to making the October 28, 1998 filing, the ISO contacted all parties on the service list in Docket Nos. ER98-211-000, *et al.*, to determine if there was any opposition to the GMC extension.

[3] As indicated in footnote 1, only Enron has opposed the October 28, 1998 Offer of Settlement.

Second, the ISO's filing is not tantamount to a superseding rate filing under Section 205 filing. The ISO is not seeking to place a new rate schedule into effect. Moreover, the ISO's filing is not prohibited under *Mobile-Sierra* because it is not a unilateral rate increase inconsistent with private contracts.[4] The ISO is seeking to extend the Commission-approved rate that is already on file with the Commission. The proposed extension is supported or not opposed by the large majority of stakeholders. Cost support required under Section 35.13 is thus not necessary nor is it appropriate in this circumstance.

2. Extending the Current GMC to July 1, 1999 is a Fair and Reasonable Way to Balance Competing Stakeholder Interests.

Enron states that it agreed to the April 7, 1998 Settlement because it understood that the GMC rates would govern during 1998 only. Enron claims that the ISO is backing out of its responsibilities under the April 7, 1998 Settlement and depriving Enron of its *quid pro quo.* Enron Comments at 10. Enron, however, is the only stakeholder that opposed the GMC extension. The ISO's stakeholder Governing Board votes by majority rule.[5] There inevitably will a minority (in this case, Enron) that does not agree with the majority's actions. Here, the Board voted to extend the GMC for six months rather than require the ISO to make a GMC filing that had no support from stakeholders.

During the unbundling study process (which began last spring and will continue until the new GMC filing), stakeholder positions on this issue were widespread. While Enron has

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[4] The *Mobile-Sierra* doctrine prohibits the filing of unilateral rate increases that are inconsistent with private contractual arrangements with customers. *See New England Power Co.*, 72 FERC ¶ 61,147, at 61,751 (1995) (utility may not unilaterally depart from settlement terms); *see also MidLouisiana Gas Co. v. FERC*, 780 F.2d 1238, 1242 n.8 (5th Cir. 1986); *Cities of Campbell and Thayer v. FERC*, 770 F.2d 1180, 1185-86 (D.C. Cir. 1985); *New York State Elec. & Gas Corp. v. FERC*, 712 F.2d 762, 767 (2d Cir. 1983).

[5] Enron holds a seat on the ISO's Governing Board.

indicated that it opposes any extension of the GMC, other parties called for the extension period to be longer than six months. In addition, most stakeholders agreed that making the unbundling filing without sufficient operating data and without sufficient stakeholder support would end up wasting the time and resources of the ISO, stakeholders, and the Commission. In the end, the ISO Governing Board determined that six months would balance the competing interests while ensuring that the ISO's unbundled GMC filing had sufficient stakeholder support and that the filing was based on sufficient operating data.

The Offer of Settlement seeks to maintain the status quo while the ISO continues to collect operating data and develop cost evidence for the allocation methodologies that will be included in the unbundled GMC rate filing. The ISO is exploring a new unbundled GMC rate without the benefit of prior historical cost allocations among ISO users or cost history for various ISO functions that could be unbundled. Moreover, with the stakeholder process, the unbundling study group has been making every effort to process input and comments from all stakeholder groups.

Enron is the only entity opposing this action and should not be allowed to dictate the filing of a GMC with an effective date of January 1, 1998, when such a filing would not have the support of the majority of stakeholders. Enron should not be allowed to interrupt the ongoing stakeholder process that the large majority of stakeholders endorse. If the ISO were to make an unbundled filing with rates to be effective on January 1, 1999, it would inevitably be set for an evidentiary hearing because of widespread opposition to the filing and because it would more than likely contain insufficient data for a just and reasonable allocation of costs among ISO users. On balance, the Offer of Settlement represents the most efficient solution for the competing stakeholder interests.

Finally, as discussed above, under Rules 602(g)(3) and 602(h), the Commission can approve a settlement even if some parties oppose it. *See also, Michigan Wis. Pipe Line Co.*, 20 FERC ¶ 61,423, at 61,856 (1982); *Allegheny Power Sys.*, 20 FERC ¶ 61,336, at 61,699 (1982). Because of the majority stakeholder support for the extension, approving the Offer of Settlement is a reasonable resolution of the issues in this proceeding. The Commission should approve the Offer of Settlement extending the GMC filing for six months

3. Enron has Not Complied with the Commission's Rules for Raising a Genuine Issue of Material Fact.

In its Comments, Enron challenges the reasonableness of the current GMC. Enron asserts that the current GMC rate is "presumptively unjust and unreasonable in light of its highly excessive level." Enron Comments at 2. Enron also states that the current 50% assessment provision for Existing Contract holders constitutes a subsidy for incumbent ISO users. These allegations essentially raise factual questions as to whether the ISO's current GMC is just and reasonable.

Rule 602(f)(4) of the Commission's Rules of Practice and Procedure states:

> Any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact ***must include an affidavit detailing any genuine issue of material fact*** by specific reference to documents, testimony, or other items included in the offer of settlement, or items not included in the settlement that are relevant to support the claim.

18 C.F.R. § 385.602(f)(4) (1998) (emphasis added). Enron has not complied with this requirement for raising a genuine issue of material fact.[6] Although Enron has essentially

[6] And, "the familiar principle that the Commission must carefully follow its regulations" (to quote Enron at 7, n.5) equally applies to Rule 602(f)(4). Enron Comments at 7, n.5 (accusing the ISO of being "fast and loose" with the Commission's Section 35.13 regulations).

alleged factual issues, *i.e.*, that the current rates are not just and reasonable as applied to Enron, Enron has not submitted any evidence in support of these allegations. Because Enron has not met the Rule 602 (f)(4) requirements for raising a genuine issue of material fact contesting comments, the Commission could approve the Offer of Settlement as uncontested. *See New England Power Co.*, 80 FERC ¶ 63,003, at 65,040 (1997) (finding no basis to withhold certification of a settlement where required affidavits were not filed); *Wisconsin Power & Light Co.*, 72 FERC ¶ 63,010, at 65,141 (1995) (finding that there were no genuine issues of material fact because parties did not file an affidavit and, as a result, their comments may not serve as the basis for withholding the certification of the settlement.); *Questar Pipeline Co.*, 75 FERC ¶ 63,005, at 65,017-18 (1996) (certifying to the Commission a settlement as uncontested where intervenors did not include the requisite affidavit under Rule 602(f) or otherwise demonstrate that a genuine issue of material fact was present.)

Enron claims that the GMC rates included in the October 1998 Settlement *may* be unjust and unreasonable. Enron Comments at 8 (emphasis added). In support of this contention, Enron compares the ISO's GMC charge to charges by the other four operating ISO's (PJM, New England, New York, and ERCOT) as reported in an article that it attached to its pleading. Based on this comparison alone, Enron concludes that because the ISO's rates are higher, they may not be just and reasonable.

Enron has not attempted to authenticate the charges of the other four ISOs nor has it shown that the rates being compared are comparable. In fact, Enron admits that it "does not claim that the rates are directly comparable in all particulars." Enron Comments at 8. There is no way to ensure that Enron's analysis is not a meaningless apples and oranges comparison.

Enron has failed to support their contention that the proposed settlement rates are "highly excessive."

Enron also claims that the April 7, 1998 Settlement was adverse to Enron's interest because it assesses a GMC rate at 50% to Existing Contract holders. Enron Comments at 3. Because of the 50% assessment to Existing Contract holders, Enron argues that it and other new participants are subsidizing the incumbents' ISO service. Enron Comments at 3. According to Enron, the proposed extension of the April 7, 1998 Settlement's 50% GMC assessment is thus not just and reasonable.

Enron, however, offers no evidence whatsoever that the 50% clause is an unreasonable assessment provision. Enron makes no attempt to show that the 50% provision has any substantial effect on the rate that Enron and other new participants pay. Moreover, Enron does not discuss the risk that it and other new participants face with respect to arguments raised by Existing Contract holders. In response to the ISO's October 17, 1997 rate filing (the filing that led to the April 7, 1998 Settlement), Existing Contract holders argued that they should not have to pay any GMC. If Existing Contract holders should ever be successful in their arguments, the current 50% assessment provision would arguably be a subsidy for Enron and other new participants.[7] The 50% assessment provision was a fair compromise. Enron's unsupported contentions that the 50% assessment provision is unjust and unreasonable are insufficient to establish that the proposed settlement rates are excessive.[8] Because Enron did not comply with

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[7] Moreover, a settlement need not treat all parties identically. *Williams Natural Gas Co.*, 54 FERC ¶ 61,134, at 61,448 (1991); *United Muni. Distribs. Group v. FERC*, 732 F.2d 202, 212-213 (D.C. Cir. 1984); *Cities of Newark, New Castle & Seaford*, 763 F.2d 533, 550 (3rd Cir. 1985).

[8] Indeed, Enron could not produce evidence that the 50% provision was unreasonable without conducting an unbundling study similar to the unbundling study currently being conducted.

Rule 602(f), it has not demonstrated that there is a genuine issue of material fact. As noted above, the Commission could, in these circumstances, approve the Offer of Settlement as uncontested.

While Enron does not have to raise a genuine issue of material fact to contest the Offer of Settlement, the Commission may approve the Offer of Settlement so long as there is substantial evidence on which to make a reasoned decision. Rule 602(h) states:

> If the Commission determines that any offer of settlement is contested in whole or in part, by any party, the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.

18 C.F.R. § 385.602(h)(1)(i) (1998). The information in the ISO's Offer of Settlement contains the requisite information on which the Commission may make a reasoned decision. Under Rule 602(h)(1)(i), the Commission can accept the Offer of Settlement as a reasonable resolution of the issues in this proceeding. *See, e.g., Allegheny Power Sys.*, 20 FERC ¶ 61,336, at 61,699 (1982) (determining that objections to the settlement did not warrant rejection and finding that proposed settlement represented a reasonable resolution of the issues in the proceeding and was in the public interest).

CONCLUSION

The ISO's Offer of Settlement represents a reasonable resolution of the issues in this proceeding, balances competing stakeholder interests, and is not procedurally defective as Enron claims. Moreover, there is ample evidence on which the Commission may approve the Offer of Settlement. Consequently, the Commission should approve the ISO's Offer of Settlement as fair and reasonable and in the public interest under Rule 602, 18 C.F.R. § 385.602 (1998).

Respectfully submitted,

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Dated: November 27, 1998