

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Cities of Anaheim and Riverside, California)	Docket Nos. EL03-15 000
)	and EL03-20-000
)	

**ANSWER OF THE
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION
TO MOTION TO STRIKE**

TO: The Honorable Carmen Citron

1. Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, the California Independent System Operator Corporation ("ISO") hereby provides its Answer to the Motion to Strike of the California Department of Water Resources/State Water Project ("SWP"). SWP proposes to strike portions of the Cross-Answering Testimony of Ziad Alaywan, Ex. ISO-8 and of the Cross-Answering Testimony of Deborah A. Levine, Ex. ISO-6, both filed April 7, 2004. Mr. Alaywan's testimony was corrected on April 8, 2004. SWP's motion is entirely baseless, and should be denied.

I. Alaywan Testimony

A. Network Model

2. SWP moves to strike Mr. Alaywan's testimony regarding the ISO network model and branch groups as improper on the basis that it does not respond to prior testimony and constitutes direct testimony filed long past the due date for such testimony.¹ SWP contends that this is direct testimony on congestion zone pricing, the considerations underlying use of the branch group methodology, and the proposed California market redesign ("MD02"). SWP Motion at p. 3. It finds this problematic because SWP witness Mr. David Marcus did not have the opportunity to consider Mr. Alaywan's testimony on congestion and the branch group methodology and because Mr. Marcus did not address MD02. *Id.*

3. As evidenced by the Joint Motion for Summary Judgment in this proceeding, the ISO believes that under Commission precedent the only relevant issue is whether the STS and NTS are network facilities. Accordingly, there was absolutely no reason for the ISO to address the ISO's Congestion Management or branch group methodology in its Direct Testimony. The ISO cannot be accused of having "held back" testimony on

¹ The ISO hopes that SWP's suggestion that the erroneous caption on the initial submission of Mr. Alaywan's testimony "inadvertently showed the true nature" of his testimony was offered in jest. SWP is fully aware that, in the world of word processes, prior testimony is often used as a template for later testimony and that necessary changes are occasionally missed. It is to the advantage of all sides that typographical errors not become the tools of debate in this, or any other, proceeding.

an issue that it considered irrelevant and that had not yet been raised by any party.

4. Simultaneously with the ISO's Direct Testimony, however, Mr. Marcus devoted considerable attention in his Direct Testimony to this new issue, *i.e.*, to the restrictions the ISO has placed on the use of the STS and the NTS through its branch group model. Of particular import is the discussion beginning on page 44, at line 8 and continuing through page 48, line 11, *all of which* concerns and is critical of the branch group methodology and its relationship to Congestion Management. Mr. Marcus, not Mr. Alaywan, raised this subject. Although Mr. Alaywan does not cite the pages and lines, and the ISO is aware of no requirement that he do so, Mr. Alaywan is responding directly to Mr. Marcus' testimony.

5. SWP's suggestion that the testimony is improper because Mr. Marcus did not have the opportunity to "consider these matters and offer countervailing factual considerations, observations or opinions" fails on many counts.² First, if that were a basis to strike rebuttal testimony, one could never have rebuttal testimony. Rebuttal testimony by its nature must provide some new information or it would be useless.

6. Second, the judicial authorities cited by SWP to support Mr. Marcus right to respond in writing to every issue raised in rebuttal have nothing to do with rebuttal testimony, but concern whether the Commission

² As noted in the objection to DWR-ISO-87, attached to SWP's Motion to Strike, SWP deposed an ISO witness for almost a day about these issues.

has provided parties with adequate notice of changes in standards that it will apply in reaching a judgment. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n.4 (1974) (internal citation omitted) (quoted in *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 63 (D.C. Cir. 1999)).

7. Similarly, the citations of Commission authority are not on point. Judge McCartney's order concerned an effort by a party to introduce a new *issue*; as discussed above, the issue here is the same raised in Mr. Marcus' testimony. *Southern California Edison Co. and San Diego Gas & Electric Co.*, 50 FERC ¶ 63,012 (1990) is primarily concerned with an applicant's initial burden of coming forward with evidence to support its case. The ISO had no "case-in-chief" and no obligation to present any particular evidence or "anticipate" SWP's branch group analysis. Nonetheless, it should be noted that in most cases, Judge Lewnes simply provided for supplemental testimony. Judge Argerakis struck the testimony in *South Georgia Natural Gas Company*, 55 FERC ¶ 63, 012 (1991) because it was friendly, repetitive rebuttal, which Mr. Araywan's testimony surely is not. In short, none of SWP's authorities is apt.

8. Finally, SWP notes, "The alternative cure of affording other parties the opportunity to present further testimony is effectively precluded here due to the tight procedural schedule for the hearing and briefing." SWP Motion n.3. The ISO testimony was filed April 7, 2004. The hearing begins

May 4, 2004, 27 days after the filing of the testimony. In contrast, SWP prepared its Cross-Answering Testimony of Mr. Marcus 30 days after the ISO filed its testimony and nine days after Commission Staff filed its Cross-Answering Testimony. SWP's suggestion that the alternative is "precluded" by the schedule is thus hardly persuasive. Nonetheless, SWP waited over two weeks to file its Motion to Strike after the ISO filed its testimony.

B. MD02

9. SWP is correct that Mr. Marcus does not mention MD02. Starting at page 50, line 13, and continuing through page 53, line 20, however, Mr. Marcus discusses the *future* detrimental impact of the ISO's treatment of the STS and NTS on congestion and cost minimization. Mr. Alaywan's discussion of MD02 is directly responsive to Mr. Marcus' speculation about the future impact.

10. SWP is also correct that the ISO objected to providing information on MD02, but this objection does not support SWP's motion. Rather, it simply provides evidence of the excessive discovery in this proceeding:

This data request constitutes unduly repetitive discovery and seeks publicly available information. DWR deposed the author of the document in question for almost a full day, and discussed at length the nature of model option two. The details of the ISO's MD02 proposal, including the replacement of FTRs by CRRs and the implementation of point to point scheduling, have been filed with the Commission in Docket No. ER02-1656 and have been the subject of numerous Commission orders. DWR is a party to those proceedings. The ISO files monthly status reports with the Commission. Extensive information regarding MD02, including all filings and Commission

orders, is available on the ISO website.

Objection to DWR-ISO-87.³

11. As noted in the data response, information on MD02 is publicly available. Mr. Alaywan is simply making it available to the Presiding Judge. Moreover, although the Motion asserts Mr. Marcus needs the opportunity to consider the impact of MD02, he clearly has had such an opportunity, because he does address MD02 in his Cross-Answering Testimony. See Ex. SWP-49 at 20:2 – 21:9.

III. Le Vine Testimony

12. SWP seeks to strike a portion of Ms. Le Vine's testimony in which she corrects a data response on which Mr. Marcus relied on the basis that the ISO did not correct the response in a timely manner. Ms. Le Vine will be present when oral argument is heard on this motion and is prepared to testify that she did not confirm the error until the day her testimony was filed.

13. Even if the Presiding Judge were to conclude, however, that the ISO did not timely correct its response, the appropriate sanction would not be to strike the ISO testimony. First, the result of such a sanction would be to maintain incorrect information in the record. Such a result is certainly contrary to the interest in the development of a full, complete, and accurate record. Second, the party affected by the sanction would not be the ISO, but

³ It is further indicative of the discovery in this proceeding that the primary use of the mentioned deposition has not been in this proceeding, but as extrarecord evidence used to challenge the Initial Decision in SWP's Brief on Exceptions in ER00-2019. See Motion to Strike of the California Independent System Operator Corporation, Docket No. ER00-2019, filed April 22, 2004.

the Cities of Anaheim and Riverside, so the sanction would be unjust. Finally, as noted above, SWP had ample time to seek an opportunity to provide supplemental testimony, and chose not to do so.

14. SWP also asserts that the testimony should be stricken because Ms. Le Vine also does not state clearly whether the Four Corners Generating Station is subject to a Participating Generator Agreement and whether Mr. Marcus' conclusions regarding respective levels of ISO control are incorrect. SWP ignores the previous question, in which Ms. Le Vine specifically states that the impact of the Intermountain Generating Station cannot be differentiated from the impact of the Four Corners Generation Station. She then goes on to state that Mr. Marcus' basis for differentiating Four Corners is incorrect. Taken together, the two questions and answers directly and unambiguously contradict Mr. Marcus' testimony.

III. Conclusion

15. For the reasons stated above, the Motion to Strike should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Folsom, California, this 3rd day of May, 2004

/s/ Sidney L. Mannheim
Sidney L. Mannheim