

Reply. The CAISO respectfully moves the Commission to allow this Reply, and to consider its contents, because of the importance of the issues raised by the Motion for Clarification and the Answers, and the assistance the Reply will provide to the Commission in dealing with those issues.

I. ARGUMENT

In the Motion for Clarification, the CAISO sought specific clarifications of the Commission's Order on Rehearing dated October 16, 2003, 105 FERC ¶ 61,066 ("Order on Rehearing") in order to put an end to efforts by the California Power Exchange Corporation ("PX") and Public Utility District No. 2 of Grant County, Washington ("Grant County") to misuse the Commission's statements concerning the Commission's lack of jurisdiction over Grant County or its sales as the basis for an argument that the CAISO purchased from Grant County for the CAISO's own account and therefore the CAISO and not the PX was responsible for paying Grant County. The CAISO requested that the Commission clarify that the Commission's statements meant only that the Commission lacked jurisdiction to determine the justness and reasonableness of Grant County's sales and did not change the fundamental principle that the CAISO purchases Imbalance Energy not for its own account but "as agent for and on behalf of the relevant Scheduling Coordinator," which is clear from Section 2.2.1 of the ISO Tariff and Commission orders addressing that section. See Motion for Clarification, at 4-9. Several of the answers support the CAISO's

requests in whole or in part, either explicitly or implicitly.² Others oppose the CAISO's requests, in whole or in part. This Reply will address the oppositions.

A. The Commission Has Jurisdiction to Grant the Requested Clarification.

The PX and Grant County contend that the Commission lacks jurisdiction to grant the requested clarification. Both base that position on the very statements in the Order on Rehearing with respect to which the CAISO seeks clarification. See PX Answer, at 5; Grant County Answer, at 4. In other words, the PX and Grant County are seeking to impose their own interpretation on those statements, and on the basis of that interpretation, argue that the Commission cannot grant the clarification sought by the CAISO. Their argument is both circular *and* bootstrapping.

As explained in its Motion for Clarification, the CAISO believes that when the Commission referred to lacking "personal jurisdiction" over Grant County or "subject matter jurisdiction" over its sales, it was referring to its lack of "jurisdiction" (or authority) under the Federal Power Act to mitigate the prices of Grant County's sales because Grant County is not a "public utility" as defined in the Act and Grant County had not engaged in the activity – selling into the CAISO's single-price auction markets – on the basis of which the Commission

² Grant County, for example, supports the request for clarification that the PX is responsible for paying Grant County. See Grant County Answer, at 4-5. Powerex Corp. and IDACORP Energy L.P. take no issue with the CAISO's requests for clarification, asking only that the Commission require Grant County to await its turn in the PX bankruptcy to receive payment for its sales. See Powerex and IDACORP Answer, at 2-3. The California Parties support a clarification that nothing in the Order on Rehearing changed the PX's obligation as a Scheduling Coordinator to pay amounts invoiced to it by the CAISO. See California Parties' Supplemental Response, at 5.

had previously asserted jurisdiction to mitigate sales of non-public utilities.³

Since the issue of whether Grant County's sales were to be mitigated was the issue in this refund proceeding, it is reasonable to interpret the Commission's statements as addressing that issue and nothing more. It is certainly not reasonable to interpret the Commission's statements (as would the PX and Grant County) as indicating it lacks "jurisdiction" even to say what it did or did not mean by those very statements.⁴

B. The Requested Clarification Would Not Constitute an Assertion of Jurisdiction Over Grant County or its Sales.

Grant County contends that because it did not make sales "under" or "pursuant to" the ISO Tariff, and did not sign a Participating Generator Agreement, it cannot be "bound by" the ISO Tariff. Grant County Answer, at 3-4. The implication of Grant County's assertions appears to be that, although Scheduling Coordinators such as the PX are obligated as the contracting party under Section 2.2.1 of the ISO Tariff to pay Grant County for the energy it

³ In this regard, it is important to note that the PX, in contending the Commission lacks jurisdiction to grant the requested clarifications, states that the Commission in the Order on Rehearing noted that Grant County did not "make sales under the CAISO Tariff." PX Answer, at 7. In fact, the Commission noted that Grant County "did not make sales under the CAISO Tariff into the CAISO's centralized, single clearing price auction markets under which all sellers received the same price for a given sale." 105 FERC ¶ 61,066, at P. 177, citing 97 FERC at 62,181-83. The Commission's full statement, and its citation to its discussion in its December 19, 2001 Order on Clarification and Rehearing of the bases for its authority to mitigate sales of governmental entities, makes clear that the Commission was explaining *only* why it considered itself to lack authority to mitigate the prices for Grant County's sales.

⁴ The California Parties initially suggested that the Commission should not make the requested clarifications because the Motion for Clarification was "premature." California Parties Answer, at 3. The California Parties subsequently reversed that position, noting that the PX's answer had shown the need for early Commission intervention. California Parties' Supplemental Response, at 3. The CAISO would also note that a Motion for Clarification, like any other motion, may be filed "at any time" under the Commission's rules. See Rule 212(a)(1), 18 CFR §385.212(a)(1).

supplied, Grant County wishes to remain free to assert simultaneously the contrary position that the CAISO was the contracting party and, on that basis, seek payment directly from the CAISO. The PX likewise suggests that, since the Commission cannot “define Grant County’s rights and obligations,” Grant County could sue the CAISO in court for payment. PX Answer, at 6. Puget Sound Energy, Inc. goes so far as to contend that the CAISO was making the purchases from parties such as Grant County “outside” the ISO Tariff and pursuant to the Western Systems Power Pool (“WSPP”) Agreement, and therefore the CAISO is directly responsible for payment. Puget Answer, at 1-3.

The CAISO submits that all of these arguments are red herrings. First, it must be noted that if the sales by Grant County (or Puget) were made pursuant to the WSPP Agreement (as they have asserted), the principal to the transactions could not possibly be the CAISO under the very terms of the WSPP Agreement: the CAISO is not a signatory to that agreement.⁵ Moreover, it does not at bottom matter whether Grant County made sales “under” or “pursuant to” this or that tariff or whether the Commission can or cannot determine the reasonableness of the prices or other terms and conditions of those sales; what matters, for purpose of the clarification the CAISO seeks, is *who was Grant County’s counterparty*. In other words, Grant County could have had a published

⁵ The WSPP Agreement is found on the web at <http://www.wspp.org/Web%20Pages/WSPP%20Current%20Documents.htm>. It makes clear that the only transactions subject to its terms are those between entities that have become parties to that WSPP Agreement itself, by executing it. See, e.g., Section 1 (definition of Parties); Section 4.15 (definition of Purchaser); Section 4.17 (definition of Seller). The CAISO is *not a party* to that Agreement, as shown by the list at Original Sheets 91-93. Therefore, the CAISO could not be the principal to any transaction that may have been made by Grant County or Puget under the WSPP.

tariff saying that its sales were made at \$50/MWh, and under such-and-such other terms and conditions, but none of that would address the question raised by the CAISO's Motion for Clarification: to whom was Grant County selling?

The question of to whom Grant County was selling is answered by the ISO Tariff – a public document that clearly discloses and establishes the capacity in which the CAISO transacts for Imbalance Energy from any seller. The Commission has full authority (or “jurisdiction” in the terms used in the Order on Rehearing) over the CAISO and over the ISO Tariff, and it is the principle of that ISO Tariff that the CAISO asks the Commission to reaffirm.⁶

C. The ISO Tariff Makes Clear That the CAISO is Authorized to Act Only as Agent When Contracting for Imbalance Energy.

Grant County contends that because it never signed an agreement to be bound by the ISO Tariff, it is entitled to treat the CAISO as the principal that purchased Grant County's energy. Grant County Answer, at 3-4. Grant County cites no authority supporting its proposition that the ISO Tariff determines the CAISO's status in transacting for Imbalance Energy only when a third party has agreed in writing to be bound by that tariff, nor is there any such authority.⁷

⁶ Puget argues, strangely, that a seller should be held to know the CAISO acts on behalf of Scheduling Coordinators only when the seller bids into the CAISO's single-price auction markets. Puget Answer, at 4. There is no basis in the ISO Tariff to make the CAISO's status as agent depend on a seller selling into the auction markets. Section 2.2.1 is clear that the CAISO acts as agent when it purchases Imbalance Energy; it does not say the CAISO acts as agent only when purchasing Imbalance Energy through the auction markets. If a seller is held to know the CAISO acts as agent for purchases in the auction markets (and Puget acknowledges that is, in fact, the case), then the seller must be held to know the CAISO acts as agent outside those markets, so long as it is transacting for Imbalance Energy.

⁷ Whether Grant County expressly agreed to be bound by the ISO Tariff is not relevant to the issue of the CAISO's status in this context; the terms of the ISO Tariff are held out to the world as governing the capacity in which the CAISO transacts for Imbalance Energy, and thus are relevant to any claim by Grant County for that reason alone. See Restatement (Second) of

Contrary to Grant County's assertion, the ISO Tariff determines the CAISO's status *any time* the CAISO transacts for Imbalance Energy. The CAISO is a non-profit public benefit corporation under California law, whose authority to transact for energy derives from California Assembly Bill 1890 ("AB 1890"), the CAISO's Articles of Incorporation, and the ISO Tariff, and it is clear from these documents that the CAISO acts *only* as an agent, not as a principal, when transacting for Imbalance Energy.

The CAISO's Articles of Incorporation state that "the specific purpose of this corporation is to ensure efficient use and reliable operation of the electric transmission grid pursuant to the Statute [*i.e.*, AB 1890]."⁸ In AB 1890, the California legislature stated that the CAISO "shall ensure efficient use and reliable operation of the transmission grid consistent with achievement of [established] planning and operating reserve criteria," AB 1890, Article 3, Section 345, and that the CAISO "shall ensure that additional filings at the Federal Energy Regulatory Commission . . . seek the authority needed to give [the CAISO] the ability to secure generating . . . resources necessary to guarantee achievement of [established] planning and operating reserve criteria." *Id.*, Article 3, Section 346. See Cal. Pub. Util. Code §§ 345-346 (2004). The CAISO complied with the statutory mandate to seek the necessary authority from the

Agency § 320 (1958) ("Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to a contract"). The Restatement defines a "disclosed principal" as the situation in which, at the time of the transaction, the third party has "notice that the agent is acting for a principal and of the principal's identity." *Id.* at § 4. The Restatement provides that a person has notice of a fact when "he knows the fact, has reason to know it, should know it, or has been given notification of it." *Id.* at § 9.

⁸ The Articles of Incorporation are available on the CAISO's web site at <http://www.caiso.com/docs/1998/11/06/1998110614383910292.pdf>.

Commission when it filed the ISO Tariff. That tariff included Section 2.2.1, which provides that the CAISO when contracting for Imbalance Energy “will not act as principal but as agent for and on behalf of the relevant Scheduling Coordinators.” As noted in the CAISO’s Motion for Clarification, the Commission in a start-up order specifically rejected some parties’ request that the tariff be changed to provide that the CAISO transacted for Imbalance Energy as principal. See Motion for Clarification, at 4.

In sum, the CAISO is not a general purpose entity but a special purpose corporation whose purpose, insofar as relevant here, is to “ensure reliable operation” of the grid.⁹ The fundamental restructuring statute in California directed the CAISO to seek authority from the Commission to enable it to secure generating resources needed to ensure that reliable operation. The Commission, when approving the ISO Tariff to authorize the CAISO’s actions, specifically directed that the CAISO would act only as agent, and that status is memorialized in the ISO Tariff. All of these documents, from AB 1890 to the CAISO’s Articles of Incorporation to the ISO Tariff, are matters of public record, available to Grant County and any other seller of energy that deals with the CAISO. The CAISO is authorized to transact only as agent for the Scheduling Coordinators and it is in

⁹ Puget asserts, without any relevant authority, that the CAISO’s authority to purchase energy is derived from state corporation law. Puget Answer, at 4. As shown in the text, this tells only part of the story, as the CAISO is a special purpose corporation whose authority to transact for Imbalance Energy is tied to its statutory purpose of ensuring reliability and is defined by the ISO Tariff. Puget also asserts, based on a stipulation attached as Attachment B to its answer, that “the Commission already has approved CAISO’s promise to settle and pay in full those obligations.” Puget Answer, at 5-6. As is clear on its face, the stipulation resolved *only* that the prices of certain transactions by Puget should not be mitigated and, as the stipulation itself provided, it should not be used for any other purpose. See Attachment B to Puget Answer, at paragraph 4. The stipulation refers to “transactions” with the CAISO, which is consistent with the

that capacity that any seller deals with the CAISO.¹⁰ Thus, Grant County was on notice that the CAISO was acting as an agent for those entities serving load in its control area, and not as a principal, when it transacted with Grant County.¹¹

D. The Commission Should Act to Avert Unnecessary, Time-Consuming Litigation.

The PX rather nonchalantly suggests that Grant County may sue the CAISO for payment and if Grant County is successful the CAISO will eventually be reimbursed by the PX, *assuming there are sufficient funds in the PX settlement account*, or if not by the PX, then through some special appeal to the Commission. PX Answer, at 3, 6.¹² Of course, if it has to do so the CAISO will defend itself against any suit by Grant County. But the CAISO submits that the Commission has full jurisdiction and authority to make the clarifications the

requirement of Section 2.2.1 of the ISO Tariff that the CAISO “transact” for Imbalance Energy on behalf of Scheduling Coordinators.

¹⁰ Just so the point is clear, there is no question that in transacting with Grant County the CAISO was transacting for Imbalance Energy, so that Section 2.2.1 applies. The ISO Tariff defines Imbalance Energy to include “Energy from . . . System Resources,” and System Resource is defined as “[a] group of resources located outside of the ISO Control Area capable of providing Energy . . . to the ISO Controlled Grid.”

¹¹ The PX contends that Grant County should have no claim against it because the PX, too, is an agent for its participants. PX Answer, at 6-7. The PX, however, is a Scheduling Coordinator with the CAISO, and the CAISO transacts for Imbalance Energy as agent on behalf of its Scheduling Coordinators, including the PX. Moreover, the funds from the PX’s participants needed to pay Grant County are now at the PX (or soon will be) and subject to its bankruptcy proceeding. The PX also says that the CAISO, not the PX, had a “contractual relationship” with Grant County. *Id.*, at 7. In fact, as Section 2.2.1 of the ISO Tariff makes clear, the CAISO transacted with Grant County only as agent on behalf of the PX as Scheduling Coordinator, which means that the PX is the contractual principal vis-à-vis Grant County.

¹² It must also be noted that the PX erroneously contends the CAISO has “represented to the PX that its purchases from Grant County are included in the total claim submitted by the CAISO in the CalPX bankruptcy case.” PX Answer, at n. 1. Although amounts owed to Grant County (and all other sellers) are reflected on one line of the CAISO’s claim against the PX (which shows the then-current total due from the PX), they are not included within amounts claimed by the CAISO from the PX. At present, the CAISO believes that the only claimant against the PX for the amounts due Grant County is Grant County.

CAISO has sought concerning the PX's obligation to pay Grant County and the absence of recourse against the CAISO, and that the Commission should promptly do so in order to avoid unnecessary, costly, and time-consuming litigation. The PX asserts the Commission, as an agency of limited jurisdiction, cannot make the clarifications the CAISO has sought, see PX Answer, at 5, but as the CAISO has noted earlier, the PX's position depends on the gloss it seeks to put on the very sentences in the Order on Rehearing as to which the CAISO seeks clarification. As the CAISO has shown in this Reply (and as the California Parties explain in their Supplemental Response, at 3-5), the Commission *can* grant these clarifications, and the CAISO again requests that the Commission do so.

In effect, what Grant County and the PX are suggesting is that during the height of the energy crisis the CAISO bought electricity on its own account from entities in the Northwest on a frolic and detour, and totally divorced from any grounding in the ISO Tariff, and that now the CAISO should pay for the energy instead of the entities that obtained the use of that energy. The position, born of understandable frustration on the part of entities that have waited years for payment, is fundamentally at odds with the role of the CAISO – indeed, the role the Commission has articulated for all ISOs and RTOs, that of an independent administrator of the market that runs none of the risks and enjoys none of the rewards of participating in the market as a buyer or seller. This position is also asserted years out of time (the PX was required to dispute any charges on its daily settlement statements within 8 days of receipt). In any event, the frustration

of sellers is no reason to subject the CAISO to baseless litigation.¹³ The CAISO transacted for Imbalance Energy under emergency conditions, as authorized by the ISO Tariff, and it did so as agent and not as principal, as made clear by the ISO Tariff.

II. CONCLUSION

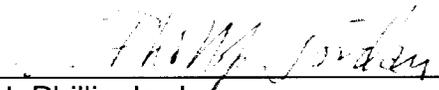
For the reasons stated herein and in the Motion for Clarification, the Commission should grant that Motion and make the clarifications of the Order on Rehearing requested by the CAISO. Those clarifications, set out more fully at pages 8-9 of the Motion for Clarification, are, in short summary, that the Commission's statements in the Order on Rehearing concerning Grant County and its sales (i) were intended only to establish that the Commission lacked authority under the Federal Power Act to mitigate the prices charged by Grant

¹³ The CAISO also would note that such frustration is no reason to allow one seller to step ahead of others in claiming the funds residing at the PX. To this extent, the CAISO agrees with the PX's position in Part V of its Answer, that Grant County should await its turn for payment from the PX's settlement clearing account. PX Answer, at 9-10. Contrary to the PX's suggestion, see PX Answer, at 2-3, it was never the "intended effect" of the CAISO's Motion for Clarification that Grant County be enabled to "step ahead" of other claimants to that clearing account.

County, and (ii) did not alter the fundamental principle, as set forth in Section 2.2.1 of the ISO Tariff, that the CAISO always transacts for Imbalance Energy only as agent for its Scheduling Coordinators, regardless of the seller.

Respectfully submitted,

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Dated: April 12, 2004

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 the above-captioned proceedings, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Folsom, CA, on this 12th day of April, 2004.

/s/ Dan Shonkwiler
Dan Shonkwiler

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