UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company,	)	
	)	
Complainant,	)	
	)	
v.	)	**Docket No. EL00-95-045**
	)	
Sellers of Energy and Ancillary Service Into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange,	)	
	)	
Respondents.	)	
	)	
	)	
Investigation of Practices of the California Independent System Operator and the California Power Exchange	)	**Docket No. EL00-98-042**

INITIAL BRIEF OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION AS TO SECTION 202(C) TRANSACTIONS

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I. INTRODUCTION

Pursuant to the procedural schedule adopted in this proceeding, the California Independent System Operator Corporation ("ISO") submits its Initial Brief on the issue of which transactions were entered into pursuant to two orders issued by the Secretary of Energy pursuant to Section 202(c) of the FPA ("FPA"), on December 14, 2000 and January 11, 2001 ("DOE Orders"). The ISO's positions will be presented as proposed findings of fact under each of the headings and sub-headings in the Joint Narrative Stipulation of Issues ("Joint Narrative") adopted in this proceeding.

The ISO's fundamental position in this phase of the proceeding has been, and continues to be that the only transactions that qualify for designation as sales

made pursuant to Section 202(c) of the FPA are those for which there exists contemporaneous evidence that demonstrates that an understanding had been reached that a seller was supplying energy pursuant to the DOE Orders, either because the ISO had contacted that supplier specifically requesting amounts identified by that supplier as "excess" energy, or because the ISO had agreed to purchase that energy from a seller with the express reservation by the seller that it was only being made available under the DOE Orders.

While the ISO agrees that the four criteria proposed by Commission Trial Staff are a reasonable starting point for determining which transactions are *eligible* for designation as transactions made pursuant to Section 202(c),[1] the ISO maintains that sales should not necessarily be considered as made pursuant to 202(c) solely by virtue of meeting these criteria. Ex No. ISO-21 at 5:1-21:9. Instead, the ISO believes, given the language in the DOE Orders, and for the reasons explained below, that the existence of contemporaneous evidence demonstrating that a sale was being made pursuant to the DOE Orders is the most appropriate method for determining whether particular transactions were entered into pursuant to Section 202(c).

II. BACKGROUND

In the second half of calendar year 2000 and the first few months of 2001, due to a variety of factors, the ISO found it increasingly difficult to obtain adequate

[1] The four criteria enunciated by Staff are: (1) the selling entity must be listed on Attachment A to the DOE Orders; (2) the transaction had to have occurred on a day covered by a certification filed by the ISO with the DOE; (3) the transaction had to have been a "non-market" transaction, i.e., a transaction entered into outside the ISO's formal markets for energy and capacity; and (4) for certification day January 9, 2001, the price demanded must have been at or below $64/MWh. Ex No. S-1 at 12:17-13:6.

energy to meet demand. During this period, the ISO declared numerous system emergencies and was forced to involuntarily curtail firm load (in the form of "rotating blackouts") for the first time in its operational history. Ultimately, the ISO had no alternative but to seek relief from the Secretary of Energy pursuant to Section 202(c). The Secretary of Energy at the time, William Richardson, responded on December 14, 2000, issuing an order pursuant to Section 202(c) of the FPA ("December 14 DOE Order"). In that order, Secretary Richardson found that an emergency existed in California, as defined in Section 202(c), due to a shortage of electric energy, and ordered certain entities listed in Attachment A to that order to "make arrangements to generate, deliver, interchange, and transmit electric energy when, as, and in such amounts as may be requested by the [California ISO] . . . consistent with the terms of [the] order." Ex. No. ISO-11 at 1. In all instances, prior to availing itself of the relief provided, the ISO certified the continuation of crisis conditions. Relief under Section 202(c) was made available between December 14, 2000 and February 6, 2001, in the form of two orders and multiple amendments to those orders.[2]

In the DOE Orders, the Secretary of Energy outlined several limitations to the requirement that the listed suppliers deliver energy when requested by the ISO. First, the entities listed in Attachment A were only required to deliver energy to the ISO that was "available in excess of electricity needed by each entity to render service to its firm customers." Additionally, the Secretary specified that entities in

[2] The Secretary of Energy issued Amendments to the December 14 DOE Order on December 20, 2000, Ex No. S-4, December 27, 2000, Ex No. S-5, and January 5, 2001, Ex No. S-6. The Secretary of Energy issued a new order pursuant to section 202(c) on January 7, 2001 ("January 11 DOE Order"), Ex No. ISO-12, and issued amendments to that Order on January 17, 2001, Ex No. S-7, and January 23, 2001, Ex No. S-8.

Attachment A were "not required to deliver energy or services under the terms of this order" until some number of hours had passed after the ISO filed with the Department of Energy ("DOE") "a signed certification that it has been unable to acquire in the market adequate supplies of electricity to meet system demand . . . ." Ex. No. ISO-12 at 4.[3] Also, on a going-forward basis, the Secretary specified that "in order to continue to avail itself of [these Orders] the California ISO is required to submit to DOE a further certification as set forth in the preceding sentence every twenty-four hours until the expiration of the order." *Id*. With respect to the arrangements made pursuant to these Orders between the ISO and the entities subject to the Orders, the Secretary stated that the terms were to be "as agreed to by the parties," but that if no agreement as to terms could be reached, the Secretary would "immediately prescribe the conditions of service and refer the rate issue to the Federal Energy Regulatory Commission for a determination at a later date by that agency . . . ." *Id*. Finally, in an amendment to the first Order dated December 20, 2000, the Secretary of Energy mandated an important additional procedure: the ISO was required to seek information concerning the amount of energy anticipated to be available from entities subject to the terms of these Orders at the time it filed its certifications with the DOE, and those entities were required to respond to the ISO within six hours. Ex No. S-4 at 1.

In its order issued in this docket on July 25, 2001,[4] the Commission agreed

[3] In the original December 14 DOE Order, the Secretary stated that entities were not required to provide energy until *twelve* hours after the ISO filed the required certification with the DOE. In the December 20, 2000 amendment to that Order, the Secretary revised this requirement, stating that entities were not required to deliver energy until *eight* hours after the ISO filed the required certification. Ex No. S-4. The Secretary maintained the eight hour requirement until the expiration of the DOE Orders. See Exs. S-5, S-6, ISO-12, S-7, S-8.

[4] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, et al., 96 FERC ¶ 61,120 (2001) ("July 25 Order").

with the argument that transactions entered into pursuant to the DOE Orders should not be subject to refund because they were made under Section 202(c) of the FPA rather than Section 205. *Id*. at 61,516. The Commission concluded that "rates for transactions entered into under Section 202(c) in compliance with the Secretary [of Energy's] orders are outside the scope of this proceeding." *Id*.

Since that Order, sixteen individual entities[5] have come forward claiming that they made sales of energy or ancillary services to the ISO during the period December 14, 2000 through February 7, 2001 ("DOE Period") pursuant to these Orders.

III. ARGUMENT - WHAT TRANSACTIONS WERE CONDUCTED PURSUANT TO SECTION 202(C) OF THE FEDERAL POWER ACT?

- **Proposed Finding – The burden of proving that transactions were made pursuant to Section 202(c) rests with those entities claiming such sales.**

As an initial matter, the ISO submits that any suppliers claiming that certain transactions were entered into pursuant to Section 202(c) should bear the burden of proving those claims. The generally applicable statutory scheme that applies to rates for sales in the ISO's markets is Section 205 of the FPA, under which the Commission has the obligation to ensure that all rates and charges are "just and reasonable." 16 U.S.C. 824d. It is pursuant to that obligation that the Commission has imposed refund liabilities on sellers in the ISO's markets for the period October

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[5] These entities are: City of Anaheim ("Anaheim"), Bonneville Power Administration ("Bonneville"), City of Burbank ("Burbank"), Coral Power, LLC ("Coral"), City of Glendale ("Glendale"), Los Angeles Department of Water and Power ("LADWP"), Modesto Irrigation District ("Modesto"), Northern California Power Agency ("NCPA"), City of Pasadena ("Pasadena"), Pinnacle West Companies/Arizona Public Service Company ("Pinnacle/APS"), Portland General Electric Company ("Portland"), PPL Montana, Public Service Company of Colorado ("PS

2, 2000 through June 20, 2001. *See* July 25 Order at 61,513-14. However, during the period from December 14, 2000 through February 6, 2001, the Secretary of Energy authorized the transacting of energy, under certain circumstances and conditions, pursuant to Section 202(c) of the FPA, rather than under Section 205. In the July 25 Order, the Commission concluded that rates for transactions made pursuant to Section 202(c) were not subject to refund because Section 202(c) contained a different process for the fixing of rates than did Section 205. *Id*. at 61,516. Therefore, because sellers claiming 202(c) sales seek to remove those sales from the generally applicable rate scheme established by the Commission pursuant to Section 205, the burden should be on sellers to justify that they qualify for this exception.

It is also logical that sellers bear the burden of proving that their own transactions fit under the auspices of Section 202(c), rather than placing the onus on the ISO to actively disprove that sales were not made pursuant to Section 202(c). This is the case because it is the sellers that will ultimately benefit from any determination that their sales were made pursuant to Section 202(c), not the ISO. Given this fact, it is unreasonable for a seller claiming 202(c) sales after-the-fact to insist that the buyer, in this case the ISO, bear the burden of disproving those claims. *See* Ex No. SOC-8(R) at 7:1-3; Tr. at 2697:23-2798:21.

Additionally, the Presiding Judge has indicated several times on the record in this proceeding that this finding is warranted. For instance, in response to a supplier's argument concerning the admission of certain evidence, the Presiding Judge indicated that "The burden of going forward and the ultimate burden of

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Colorado"), City of Riverside ("Riverside"), Sacramento Municipal Utility District ("SMUD"), and State Water Contractors/Metropolitan Water District ("SWC/MWD").

persuasion that these claims were 202(c)" rested with that supplier. Tr. at 2824:24-25; *see also* Tr. at 2652:7-9.

A. HOW, IF AT ALL, SHOULD THE FOLLOWING FACTORS APPLY TO DETERMINE WHETHER A TRANSACTION WAS CONDUCTED PURSUANT TO SECTION 202(C)?

1. Context of Transactions

- **Proposed Finding – There were many reasons that suppliers might have been providing power to the ISO during this time period other than the existence of the DOE Orders. Thus, it is unreasonable, as suppliers suggest, to simply assume that sales during this period were made pursuant to the DOE Orders. Instead, the only sales that should be considered as being made pursuant to Section 202(c) are those for which there is a clear and contemporaneous record either that the ISO was requesting the energy or the supplier was providing the energy pursuant to the DOE Orders.**

A common theme throughout much of the testimony provided by witnesses for suppliers is that *all* transactions made by these entities during the period that the DOE Orders were in effect should be assumed to have been made pursuant to the DOE Order. The primary rationale advanced by suppliers as to why they believe this assumption is merited is the fact that there existed, during this period, concerns as to the creditworthiness of buyers in the ISO's markets, as well as the ISO itself. *See, e.g.*, Ex No. Nos. JBG-1 at 19:12-20:12; JBG-9 at 11:1-12; DWP-1 (Reformulated) at 3:14-4:2, 8:11-14; PAS-1A at 13:1-21; PAS-4 at 3:20-23, 5:15-19; PSC-1 at 5:7-6:15; SMD-1 at 14:11-15, 17:13-18, 18:17-19:13. For example, the witness for PS Colorado alleges that "the financially volatile conditions during the refund period warrant the assumption that all transactions during the periods when the DOE orders were in effect were made pursuant to Section 202(c) of the FPA." PSC-1 at 6:4-6. This assumption should be rejected for several reasons.

It is undisputed that the ISO was facing mounting difficulties with respect to its own ability to guarantee payment to suppliers, and that suppliers considered these difficulties in deciding whether or not to make *voluntary* [6] sales to the ISO. Nevertheless, the simplistic notion that creditworthiness was the *only* factor that suppliers would have considered during this time period in deciding whether or not to provide energy to the ISO is not supported by the record. Instead, the record demonstrates that numerous other motivations existed for suppliers to provide energy to the ISO during the DOE Period. *See* Ex No. ISO-21 at 7:10-15. Thus, there was no reason for the ISO to assume that every transaction that it entered into with suppliers during the DOE Period was being made pursuant to the DOE Order, *see id.*, or for the Commission to make that assumption now.

One reason suppliers may have been making sales to the ISO during this period is because they were able to command high prices, both in the ISO's formal markets for Energy and Ancillary Services, as well through bilateral, Out-of-Market ("OOM") arrangements. *See* Ex No. ISO-10 at 13:1-10. The Commission-mandated breakpoint methodology that was in effect during the DOE Period guaranteed suppliers in the ISO's markets at least the ample $150 or $250 clearing price.[7] Moreover, the structure of the Commission's "soft cap" only prevented the ISO's markets from clearing above the specified breakpoint; suppliers that bid into the ISO's markets above that breakpoint, and whose bids were accepted, were paid

[6] This distinction is important, because some suppliers claiming section 202(c) sales were not voluntary participants in the ISO markets, but were instead legally committed, pursuant to contractual arrangements with the ISO, to provide energy to the ISO when called upon to do so. This point is discussed in further detail below under Section III.A.8.

[7] *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, et al., 93 FERC ¶ 61,294 (2000) at 61,991, 61,983.

their full bid price. *Id*. at 61,983. The ability to command high prices was especially pronounced in the case of OOM transactions. In its explanation of why OOM transactions would be subject to price mitigation, the Commission, in the July 25 Order, noted that the mere fact that the ISO was entering into these transactions served to indicate to suppliers that the ISO was in a "must-buy" situation, which, in turn, provided an even greater opportunity for suppliers to exercise market power and charge unjust and unreasonably high prices. *See* July 25 Order at 61,515.

Moreover, there is ample evidence in the record demonstrating that many of the suppliers claiming 202(c) transactions were obtaining favorable prices for energy sold to the ISO. Numerous sales made by the entities claiming 202(c) sales in this proceeding were made for prices well above the soft cap amount. While documenting every such instance would be unnecessary and repetitive, a few examples will prove instructive. Exhibit DWP-4R, which contains a portion of the sales that LADWP claims were made pursuant to Section 202(c), shows, for instance, prices of $245/MWh on January 2, 2001, over $300/MWh on January 16, 2001, and over $400/MWh for January 17, 2001.[8] Another example is Portland General, which, for instance, charged $500/MWh for energy sold to the ISO on December 24, 2000. Ex No. PGE-2 (Revised). Examples such as this are hardly unique among the entities claiming 202(c) transactions, and these lucrative opportunities for sellers to profit by participating in the ISO's markets during this period should not be overlooked in addressing the question of why sellers provided power to the ISO.

[8] In order to see the entire price for a certain transaction displayed in DWP-4R, the 401 (up to price cap) charge for that transaction must be added to the associated 481 (above-cap) charge, if any. These prices are also displayed on the ISO's OOM Sheets for the relevant dates, which are included in the record as part of Exhibit JE-3.

Another likely reason that many suppliers may have been selling to the ISO during this time period, even absent the existence of the DOE Order, was because their systems were part of the ISO Control Area, and therefore, threats to the reliability of the ISO Control Area constituted threats to the integrity of their systems as well.[9] *See* Ex No. ISO-21 at 19:10-19; *see also* Ex No. MID-2 at 9:6-9 (noting that MID participated in rolling blackouts imposed by the ISO); Ex No. SMD-1 at 17:5-8 (explaining that SMUD "was subject to the and at risk of curtailment of its own firm native load, as the ISO instituted rolling blackouts"); Ex No. PAS-1A at 5:2-3, 15-18. In fact, several of the witnesses' suppliers frankly admit that it was in their own best interests to supply power to the ISO during this period. Mr. Tracy, for instance, testifying on behalf of SMUD, states that "it was in [SMUD's] best interest as a [load serving entity] to cooperate fully with the ISO's Certifications and associated measures to keep the lights on in the Path 15 area and minimize both the frequency and severity of blackouts on SMUD's native load customers." Ex No. SMD-1 at 16:21-17:2. Mr. Tracy explains that because rolling blackouts in the ISO Control Area would affect SMUD customers, "it was in SMUD's own interest" to do all that it could to prevent conditions from reaching the point at which the ISO would be required to curtail firm load. *Id*. at 17:5-11.

The witnesses for Anaheim and Riverside, Mr. Sciortino and Mr. Nolff, respectively, provided similar testimony. Specifically, both Mr. Sciortino and Mr. Nolff confirmed that Anaheim and Riverside are within the ISO Control Area, and that "threats to the reliability of the ISO control area also threaten [their] . . . reliability." Ex No. SOC-2 at 5:9-14; Ex No. SOC-5 at 3:5-6. In the Joint Rebuttal

Testimony provided by Anaheim and Riverside, their witnesses stated that they had "determined that, because they are within the ISO control area, providing excess energy was a necessary means of assisting in the effort to maintain grid reliability and thereby safeguarding their own reliability." SOC-8(R) at 3:17-19. Moreover, when asked by counsel for Commission Staff as to Anaheim's "primary motivation" in providing excess power to the ISO, Mr. Sciortino admitted that "one of the reasons was to be able to *help out with the system* in terms of providing whatever surplus power we had available." Tr. at 2669:19-2670:1 (emphasis added).

The witness for SWP/MWD, Mr. Jones, is even clearer on this point. In his rebuttal testimony, Mr. Jones states that "[w]ith declarations from the ISO and State officials of impending blackouts, CDWR was aware of the severity of the situation and understood that it was obligated to make available to the ISO all uncommitted capacity and available energy" and that "its inclusion on the Appendix A list only heightened the *already significant commitment* it made to meet, to the extent of its ability, the needs of the ISO." Ex No. SWC-8 at 6:7-12 (emphasis added). On cross-examination, Mr. Jones echoed these conclusions, stating that CDWR "was doing everything it could to assist the state in the energy crisis." And, when asked directly as to whether it was his position that CDWR would have not supplied to the state absent the DOE Order, Mr. Jones responded with a clear "no," explaining that CDWR was "doing everything before the order" and "everything [it] . . . could after the order." Tr. at 2707:14-20. Given the fact that CDWR is a state agency, Tr. at 2700:3-8, it is certainly logical that CDWR felt a sense of obligation to support the state, regardless of whether the DOE Orders were in place. Nevertheless, Mr.

[9] The entities claiming DOE sales whose systems are within the ISO's Control Area consist of: Anaheim, Riverside, Pasadena, SMUD, MID, SWP/MWD.

Jones' acknowledgment of that sense of obligation further demonstrates that the ISO was reasonable in not simply assuming that sales made by CDWR were made pursuant to the DOE Orders – and that the Commission should not do so now.

Although LADWP is not a part of the ISO's Control Area, the record also demonstrates that LADWP felt an obligation to assist the ISO in meeting the challenges that it was facing during this period, independent of the DOE Order authority. In fact, Mr. Ward, the witness for LADWP, agreed that LADWP "felt a responsibility to try to help keep the lights on." Tr. at 2580:13-14. Upon further exploration of this subject on cross-examination, Mr. Ward admitted that LADWP's general manager, David Freeman, was focused during this time on how the LADWP could help the ISO, and that Mr. Freeman had decided, as of December 30, 2000, that LADWP would "support the state under any circumstances," irrespective of concerns as to the creditworthiness of the ISO or the buyers of energy. Tr. (Ward) at 2586:25-2587:9, 2587:20-23. Again, this demonstrates it is was quite reasonable for the ISO not to simply assume, and that it is essential for the Commission now not to assume, that energy being sold by LADWP during this period was being sold because of the authority available to the ISO under the DOE Order.

With respect to Bonneville, a federal entity within the Department of Energy, there existed, at this time, a separate mandate from the Secretary of Energy to make excess power available to the ISO. A DOE press release dated December 11, 2000, and entitled "Energy Department Assists Western United States to Prevent Electricity Crisis," reports that "Secretary Richardson and the Department of Energy have already . . . ordered . . . [Bonneville] . . . to provide as much power for California as possible during supply shortages." Ex No. ISO-33 at 1. This demonstrates two things. First, the DOE, through Bonneville, was publicly

committed to assisting California during this period of crisis even before the Secretary of Energy issued his first order under Section 202(c). The prior existence of that commitment is inconsistent with the claim that Bonneville was transacting under the DOE Orders, which established a compulsory process for the ISO to obtain energy that it *would not otherwise* have been able to procure. *See* Tr. at 2446:5-11. Also, Bonneville itself was, at the time the first DOE Order was issued, already under an obligation from the Secretary of Energy independent of the Section 202(c) order to make as much power available to the ISO as possible.

The record in this case also shows a pattern of sales on the part of many sellers that is starkly inconsistent with their contentions that they would have refrained from selling to the ISO but for the compulsion to do so pursuant to the DOE Orders. Several suppliers sold to the ISO both immediately before and after the DOE Orders were in effect, Ex No. ISO-21 at 15:1-8, 15-19, and many suppliers also sold to the ISO on dates when the orders were in effect but for which the ISO did not invoke the authority available under those Orders. Ex No. ISO-21 at 14:12-16:9; *see also* Ex Nos. S-79; S-81; BPA-55; BPA-56; SMD-11; MID-4; MID-6; PSC-2; PAS-5; S-33 at 29:20-22. None of these sellers has been able to reconcile their claims that they would have been unwilling to sell to the ISO absent the DOE Orders' requirement that they do so, with the fact that, in many cases, they did exactly that. This pattern of behavior also supports the contention that high prices were likely motivating suppliers to make sales to the ISO during this time period. Ex No. ISO-21 at 15:20-16:3.

Another indicator that it was reasonable for the ISO not to simply assume that sales were being made pursuant to the DOE Orders is the fact that many entities, on many days, did not provide the ISO with a forecast of their amounts of excess

energy, as required by the DOE Orders after the December 20th Amendment, or forecasted "zero" amounts of available excess energy throughout the day. *See* Ex No. ISO-23. When the ISO then contacted these suppliers seeking energy, and the entities then sold the energy, it seems particularly reasonable that the ISO would not have assumed that those suppliers were providing energy pursuant to the DOE Orders, absent some indication to the contrary by the supplier.

In addition to the behavior of suppliers, the ISO's own behavior and representations during this period sent a clear signal to suppliers that the ISO was *not* considering all purchases of energy that it made during this period as made pursuant to the DOE Orders. For instance, in the ISO's December 20, 2000 letter to the Secretary of Energy requesting that the Secretary extend the authority made available in the December 14 DOE Order, the ISO stated that "Until yesterday, the mere issuance of the Order resulted in enough supply such *that the ISO did not have to make use of the authority contained in the Order*." The ISO went on to describe the fact that, in its view, the very existence of the Order resulted in the ISO obtaining total resources on the interties of over 2500 MWs during one hour on December 18, 2000, without the necessity of *actually compelling sales* under the authority provided in the Order. Ex. No. JE-3 at Tab "ISO Request 12/20/00." Moreover, in this letter and others requesting extensions of the DOE Orders, the ISO reiterated its commitment to rely on existing market mechanisms so as to be "judicious in the use" of the DOE authority. *Id*. at Tabs "ISO Request 12/20/00," "ISO Request 1/5/00," "ISO Request 1/9/01." These statements indicate that the ISO was not assuming that all energy being provided to it during this period was being provided pursuant to the DOE Orders. To the contrary, they demonstrate that the ISO was, in fact,

viewing the DOE Orders as an absolute last resort mechanism, to be used only in the event that all other means of obtaining energy had failed.

To conclude, the Presiding Judge should find that there were numerous reasons in addition to the existence of the DOE Orders why various of the entities claiming 202(c) sales might have been making sales to the ISO during this time period, and that the behavior of both suppliers and the ISO indicated that the ISO should not have been and was not operating under the assumption that energy being provided during this period was being made available pursuant to the DOE Orders. These other reasons, as well as the behavior of suppliers during this period, and the ISO's own representations, indicate that it would have been unreasonable for the ISO to simply have assumed, without confirmation of some sort, that energy being sold to it from these entities was being sold pursuant to the DOE Orders. The Presiding Judge also should find that it would be similarly unreasonable for the Commission now to assume – without some contemporaneous confirmation in the record – that sales during this period were made pursuant to the DOE orders.

2. Attachment "A" Entity

- **Proposed Finding – Only sales from those entities listed on Attachment A to the DOE Orders should be eligible for designation as transactions made pursuant to Section 202(c).**

A literal examination of both DOE Orders demonstrates that only those entities listed in Attachment A to those Orders are covered by the provisions of those Orders. *See* Ex No. No. ISO-11 at 1; Ex No. No. ISO-12 at 1. Thus, only Attachment A entities were obligated to "make arrangements to generate, deliver, interchange, and transmit electric energy when, as, and in such amounts as may be

requested by the [California ISO]." *Id*; *see also* Ex No. S-1 at 13:4-14:12. All of the entities claiming 202(c) sales in this proceeding were listed on Attachment A, and none of these entities, or any other parties to this proceeding, has claimed that sales from suppliers other than those on Attachment A are eligible for designation as being made pursuant to the DOE Orders. Therefore, the Presiding Judge should find that only sales from those entities listed on Attachment A to the DOE Orders are eligible for designation as transactions made pursuant to Section 202(c) of the FPA.

3. ISO Certification Day

- **Proposed Finding - Only those sales made on days for which the ISO certified to DOE that it anticipated an inadequate supply of electricity should be eligible for designation as transactions made pursuant to Section 202(c).**

Under the December 14 DOE Order, Attachment A entities were "not required to deliver energy or services under the terms of this order until 12 hours after the California ISO . . . filed with the Department of Energy . . . a signed certification that it has been unable to acquire in the market adequate supplies of electricity to meet system demand" Ex No. No. ISO-11 at 1. Additionally, in order for the ISO to "continue to avail itself" of the December 14 Order, it was required "to submit to DOE a further certification . . . every twenty-four hours until the expiration of [that] order." *Id*. The January 11 DOE Order contains the same limiting language, with the exception that the ISO could request energy pursuant to that order within 8 hours of filing the necessary certification with the DOE, rather than 12. Ex No. ISO-12 at 1. The ISO filed certifications on 34 days during the DOE Period. Specifically, certification was *not* made for December 15 through December 19, 2000, December 29, 2000, through January 1, 2001, January 3, 2001 through January 8, 2001,

January 10, 2001, January 11, 2001 and January 13, 2001 through January 15, 2001. See Ex No. JE-3 at 4-6.

Nevertheless, nine of the sixteen entities claim that sales they made to the ISO on days for which the ISO did not file a certification with the DOE were made pursuant to the DOE Orders.[10] These claims are without merit for one simple yet compelling reason: the Orders, by their own terms, were not effective on days for which the ISO did not file the necessary signed certification with the Department of Energy. The Orders make clear that the ISO could not demand energy, nor were suppliers under any legal obligation to make excess energy available to the ISO, on days for which the ISO had not filed the appropriate certification. Ex Nos. ISO-11 at 1; ISO-12 at 1; *see also* Ex Nos. ISO-21 at 8:10-9:7; S-1 at 14:15-15:7.

Several of the witnesses for suppliers claiming DOE transactions on non-certification dates base these claims on the "fact" that the *ISO* did not, itself, provide any guidance to market participants on how it would administer the DOE Orders. *See* Ex Nos. JBG-9 at 12:1-20; MID-12 at 9:13-22. For instance, Mr. Scheuerman, the witness for Burbank and Glendale, states that limiting 202(c) sales to certification days would be inappropriate, as it would "try to impose this criteria after the fact, when the suppliers were not informed of it during the time that the DOE Orders were in effect." Ex. No. JBG-9 at 12:2-3, 18-20; *see also* Ex. No. MID-12 at 5:15-20. This argument ignores the basic reality of the situation: the *ISO* did not impose this criteria; instead, this criteria was imposed by the *Secretary of Energy*, as expressed in the DOE Orders themselves, and none of the sellers has denied awareness of the terms of the Orders. *See, e.g.*, Tr. (Scheuerman) at 2685:13-15; Tr. (Endo) at

2689:9-10. Those Orders set up a straightforward and unambiguous procedure which the ISO meticulously followed: when it felt that it was necessary to invoke the authority granted by the DOE Orders and enter into sales pursuant to those Orders, the ISO provided a written certification to the Department of Energy, as required by the Orders, and provided a copy of that certification to all affected market participants, as also required by the Orders. Tr. at 2389:20-24. For this reason alone, suppliers' contention that this constitutes a post-hoc criteria imposed by the ISO without their awareness is patently absurd, and should be rejected.

In any event, suppliers' witnesses are incorrect in their contention that they received no notification from the ISO that only sales made on certification days would be considered as made pursuant to the DOE Orders. The ISO, in its certifications to the Department of Energy, made clear that those certifications were being submitted for the express purpose of invoking the authority granted by the Orders. For example, in each certification letter, the ISO's CEO, Terry Winter, noted that the "Analysis of Load Forecast, Resource Availability Forecast, and Transmission System Conditions that Call for Certification" that accompanied that letter described "the ISO's assessment of the conditions *requiring the use of the authority under the Order*." Ex No. ISO-13 at 2 (emphasis added). In those Analyses, the ISO made clear that it viewed the certifications as necessary prerequisites to the use of the authority provided under the DOE Orders, and explained that resource deficiencies, and the conditions causing these deficiencies, were what "motivates this certification *in order to obtain* the necessary resources." *Id*. at 3. (emphasis added). The ISO then faxed and emailed copies of each

[10] The following entities claim 202(c) sales on non-certification days: Burbank, Coral, Glendale, PS Colorado, Modesto, SMUD, Riverside, and Pasadena. *See* Ex Nos. S-79; COR-16; S-81;

certification to every entity on Attachment A. Tr. at 2389:20-24. Suppliers' contention that they were somehow ignorant of both the plain language of the Orders and of the ISO's certifications in which it re-stated what was already obvious from the Orders themselves is simply ludicrous.

As for the context in which these sales were made, it is entirely irrelevant to this issue, despite several suppliers' testimony to the contrary. Several DOE claimants cite to the creditworthiness concerns surrounding the ISO and the Investor-Owned Utilities, and suggest that these concerns merit a finding that sales made on non-certification dates be considered as 202(c) transactions. *See* Ex Nos. PSC-1 at 6:4-15; MID-12 at 4:10-5:3, 9:14-16; COR-1 at 9:11-10:23. What is perhaps most astonishing is that entities so reluctant to sell to the ISO would take such an unimaginably broad view of their obligation to do so. Nevertheless, the fact that these entities continued to supply energy to the ISO during this period does not change the basic legal rights and duties as set forth in the DOE Orders. *See* Ex No. ISO-21 at 8:18-9:7. Nowhere do any of the entities claiming 202(c) sales on non-certification dates explain how the language of the order does not mean what is clearly states.

For these reasons, the ISO urges the Presiding Judge to find that only those sales made on days for which the ISO filed the requisite signed certification to the Department of Energy are eligible for designation as being made pursuant to the DOE Orders.

PSC-2; MID-4; MID-6; SMD-11; S-33 at 29:20-22; PAS-5.

4. "DOE Order" Reference

- **Proposed Finding – It was necessary for the ISO to distinguish sales made pursuant to the DOE Orders from those made for other reasons. The best test is whether there exists contemporaneous evidence that demonstrates that an understanding had been reached that energy being provided was being provided pursuant to Section 202(c).**

As explained in Section III.A.1 above, because there were many possible reasons that suppliers may have been selling to the ISO during this period, other than because of the DOE Orders, it would have been unreasonable for the ISO to simply assume that all transactions during this period were made pursuant to the DOE Orders, and it would be unreasonable for the Commission to do so now. Thus, the crucial inquiry is what set of criteria best identify which transactions were actually entered into pursuant to 202(c) under the DOE Orders? The logical focus is on the DOE Orders themselves. These pronouncements constituted specific invocations by the Secretary of Energy of the authority granted under Section 202(c), and set forth the conditions and procedures with respect to how that authority was to be used. Thus, it is these Orders that provide the best indication as to how to determine which sales were entered into pursuant to 202(c).

From the DOE Orders, it is clear that entities listed in Attachment A were required to provide energy to the ISO only when requested by the ISO, and in the amounts requested by the ISO. Ex No. ISO-11 at 1. The most logical reading of this language is that an actual, specific request by the ISO was necessary in order to trigger a supplier's obligation to provide energy during this period, either in the form of a direct request to the supplier, or the ISO's acceptance of energy from a supplier with the clear understanding that the energy was being offered because of the authority contained in the DOE Orders. *See* Ex Nos. ISO-10 at 10:9-18, 11:10-17;

ISO-21 at 7:4-10. To argue that no request by the ISO for energy was necessary in order to trigger suppliers' obligation to provide under the DOE Orders would inevitably lead to the illogical conclusion that *all* energy supplied to the ISO during this period was being made available pursuant to the DOE Orders, because the ISO was always encouraging suppliers, generally, to provide energy through various mechanisms. Tr. at 2328:8-15. If this is, indeed, the correct result, then the Commission's mandate to separate 202(c) from non-202(c) transactions would be rendered meaningless, as no practical mechanism would exist to distinguish between them. This interpretation would also mean that the ISO had no option to transact under any mechanism but 202(c) during this period, a bizarre result, and one that is plainly inconsistent with the ISO's expressed desire to limit the use of the DOE authority to the most dire of emergencies. Tr. at 2289:7-17.

Moreover, the DOE Orders also contemplated that the ISO and supplier would reach some agreement as to the "terms of any arrangement subject to" these Orders. *See* Ex No. ISO-21 (O'Neill) at 7:1-4 (quoting December 14 DOE Order). As Ms. O'Neill explained in her Rebuttal Testimony, the ISO could hardly even attempt to come to terms subject to these Orders with suppliers if it didn't even understand that the energy that it was procuring was being made available because of the DOE Orders. *Id*. at 7:7-10. Therefore, based on the language of the DOE Orders and the procedures contemplated therein, only transactions with respect to which it was clear that suppliers were providing power pursuant to Section 202(c), either because the ISO contacted a supplier requesting energy identified as excess, or because a supplier explicitly stated that the energy was being offered because of the DOE Order and the ISO then requested it , should be classified as transactions made pursuant to 202(c). *Id*. at 7:3-7.

As Ms. O'Neill explained in her Direct Testimony, in order to document which transactions were entered into pursuant to the DOE Orders, as opposed to those entered into for any of the myriad of other reasons discussed above, the ISO developed a logging procedure that required ISO real-time operators to note, on the daily OOM Sheets prepared during the normal course of business, that a transaction was being made pursuant to the DOE Order under either of two circumstances: (1) when a supplier explicitly indicated that the Energy being provided was being provided pursuant to the DOE Orders, Ex No. ISO-10 at 9:19-10:3, 10:9-18; and (2) when the ISO contacted a supplier requesting they deliver the energy that they indicated was available as "excess" pursuant to the DOE Order in a facsimile delivered to the ISO the night prior to the operating day. *Id*. at 11:10-17.

Additionally, it is important to understand that the ISO had a good reason for preparing these sheets. They were prepared in direct response to the DOE's requirement that the ISO provide to it some indication of what energy it was obtaining pursuant to the DOE Orders. As Ms. O'Neill explained at hearing:

> As one of the requirements that was made by Paul Carrier of the Department of Energy to the ISO, there were three documents within 48 hours of every certification that the ISO had to provide after the fact to the Department of Energy. I was the person who did it, so I'm very clear on this. The three pieces of documents were, it was a QF trend graph which showed the operating day and two days prior to that. The second one was the forecasted excess energy sheets, and then the third one was the OOM sheet.
>
> On the OOM sheet, what [DOE] wanted to see was the universe of OOM transactions. In the header I specifically put down that it was OOM DOE excess and out-of-market deliveries, because they wanted to see the universe of what data was being provided to the ISO as OOM transactions, out of control area OOM transactions. What they wanted us to do was to make any notations that we knew were being provided per the DOE order . . . ."

Tr. at 2208:23-2209:15.

In response to DOE's requirement that the ISO provide data on the sales being made under the DOE Orders, Ms. O'Neill and an ISO Manager, Bob Sullivan, devised the procedure of having ISO real-time operators note transactions made pursuant to the DOE Orders on the OOM Sheets, Tr. at 2210:15-21, and both of them personally gave instructions concerning the implementation of this procedure to the real-time operators. *Id*. at 2218:13-14. Moreover, in order to verify compliance with this requirement, Ms. O'Neill, prior to sending these sheets to the DOE, would show the real-time operator that was on duty the sheet that had been prepared and ask if anything had been missed. Tr. at 2220:24-2221:4. Additionally, in preparing her testimony in this proceeding, Ms. O'Neill reviewed portions of the tapes that the ISO had retained of these conversations to re-verify whether this procedure had been followed by ISO real-time operators. Tr. at 2219:15-19.

Unfortunately, there seems to be a great deal of confusion concerning the significance of the ISO's OOM Sheet notations. In point of fact, the ISO has never claimed that a notation on its OOM Sheet was a necessary predicate, in and of itself, to a transaction being designated as made pursuant to Section 202(c). In her Direct Testimony, Ms. O'Neill explained that the ISO had relied upon these notations to identify the universe of sales made pursuant to the DOE Orders, because, at that time, these notations represented the best information that the ISO possessed as to which transactions it had entered into with suppliers pursuant to the DOE Orders. Ex No. ISO-10 at 12:7-17. Additionally, in her Rebuttal Testimony, Ms. O'Neill, in response to the question as to whether a transaction should qualify as a 202(c) transaction by virtue of meeting the four criteria proposed by Commission Staff, explained that it was the ISO's position that the universe of transactions made pursuant to Section 202(c) was best defined as "those transactions with respect to

which it was clear to the ISO that suppliers were providing energy based on the ISO's request for excess energy pursuant to the terms of the DOE Order." Ex No. ISO-21 at 7:4-6. Thus, it is not the OOM Sheets, in and of themselves, that is significant; rather, it is the arrangements that they reflect: namely, that an understanding had been reached that energy was being provided pursuant to the DOE Orders, either because the ISO had contacted that supplier specifically requesting amounts identified by that supplier as "excess" energy, or because the ISO had requested energy from a seller who had offered it to the ISO with the reservation that it was only being made available under the DOE Orders. *Id*.

Therefore, the ISO does not claim that its OOM Sheets are necessarily the only relevant evidence of what was transacted pursuant to the DOE Orders during this period. Other entities had the choice as to whether or not they wished to put in place procedures to document which transactions were made pursuant to 202(c). It is simply unreasonable to charge the ISO with the sole responsibility of record-keeping with respect to these transactions. It bears emphasizing the obvious: the ISO is not the decision-maker in this proceeding, but a participant. Admittedly, the ISO occupies a unique role in California as the operator of the grid. However, this role does not absolve other entities, especially corporate and public entities such as suppliers claiming 202(c) transactions here, of engaging in responsible business practices. *See* Tr. (O'Neill) at 2211:1-5.

It is especially telling that one entity in particular, PPL Montana, was able to easily establish, through a combination of both *its own records* and the ISO's records, that its sales made during this period were made pursuant to the DOE Orders. PPL Montana was able to do so because it adopted a straightforward procedure of clearly informing the ISO real-time operators that its energy was only

available under the DOE Orders. *See* Ex No. PPL-9 (Bradshaw) at 3:10-16. Not surprisingly, given PPL Montana's clear representation as to the status of its sales when it made those sales to the ISO, the ISO's OOM Sheets reflected the vast majority of PPL's transactions as being made pursuant to the DOE Orders.[11] In fact, PPL Montana's procedure stood out to the degree that Ms. O'Neill even noted in her Direct Testimony that "[o]ne supplier, upon contacting the ISO to arrange OOM sales, read a prepared statement to the ISO real-time operations personnel explaining that the Energy was being supplied pursuant to the DOE Order under Section 202(c)." Ex No. ISO-10 at 10:9-12. With respect to other entities with less rigorous procedures or compliance, such as Portland,[12] or Pinnacle West, *see* Ex No. PNW-4, Tr. 2484:25-2486:4, the ISO's own records were admittedly, and understandably, less accurate.

[11] Of 38 transactions entered into between PPL Montana and the ISO during the DOE Period, all but two were reflected on the ISO's OOM Sheets as being made pursuant to the DOE Orders, indicating an accuracy of approximately 95% with respect to recording 202(c) sales made by PPL Montana. *See* Ex No. ISO-15; JE-3 (OOM Sheet attachment). Moreover, Ms. O'Neill, upon reviewing PPL Montana's testimony, was able to confirm that the two additional sales were made and that PPL Montana had made those sales pursuant to the DOE Order. *See* Ex No. PPL-14 at 2:3-11.

[12] Portland claims numerous DOE transactions, but has only provided contemporaneous evidence, in the form of transcripts of telephone calls between ISO and Portland operators, demonstrating that certain of them were made pursuant to the DOE Orders. *See* Ex. Nos. PGE-6; PGE-7; PGE-8, PGE-9; PGE-13; PGE-16.

5. Market or Non-Market Transactions

- **Proposed Finding – Sales into the ISO's markets for Energy and Ancillary Services should Not be Found to Have Been Made Pursuant to the DOE Orders for several reasons. First, Day-Ahead market transactions are ineligible because those markets closed prior to the time at which the ISO certified for the upcoming day. Additionally, the ISO relied on information on what had been bid and what was forecasted to be bid into its markets to determine whether it was even necessary to invoke the DOE Orders. Finally, there is no indication that the ISO ever directed an entity to bid into its markets.**

Numerous parties have claimed that sales they made into the ISO's formal markets for Energy and Ancillary Services were made pursuant to Section 202(c).[13] These markets consist of the ISO's Day-Ahead and Hour-Ahead markets for Ancillary Services, as well as its real-time Supplemental Energy market. For the reasons detailed below, the Presiding Judge should find that none of these market transactions were made pursuant to Section 202(c).

First is the fact that the process established by the DOE Orders does not match the process by which suppliers bid into the ISO's market and, if their bids are chosen, are dispatched. Under the DOE Orders Attachment A entities were ordered to "make arrangements to generate, deliver, interchange, and transmit electric energy when, and in such amounts, as may be requested by the [ISO]." Ex No. ISO-11 at 1. Additionally, the DOE Orders stated that the "terms of any arrangement made between the entities subject to this order and the [ISO] . . . pursuant to [these orders] are to be as agreed by the parties." Ex No. ISO-11 at 2. These phrases clearly contemplate a bilateral process through which the ISO would specifically request energy from individual Attachment A entities, rather than the automated

process by which bids are submitted and awarded in the ISO's markets. *See* Ex No. S-1 at 17:4-14; Ex No. ISO-21 (O'Neill) at 5:14-16; *see also* Tr. at 2338:20-2339:7. Tellingly, when the Department of Energy requested information from the ISO during the DOE Period as to what supplies were being made available pursuant to the DOE Orders, it asked for information on OOM transactions, but not for market transactions. Tr. at 2332:13-19, 2353:22-2354:3.

It is even more apparent that Ancillary Services transactions are not eligible for designation as being made pursuant to Section 202(c), especially those bid into the ISO's Day-ahead markets. The DOE Orders themselves only obligate entities included in Attachment A to "generate, deliver, interchange, and transmit *electric energy*." Ex No. ISO-11 at 1. Nowhere do the Orders state that suppliers are required to provide Ancillary Services capacity to the ISO. *Id*. Moreover, the ISO itself only requested information from entities as to their excess energy. *See* Ex No. S-1 at 9:12-16; S-10.

Moreover, Ancillary Services that are specifically bid into the ISO's Day-ahead markets are ineligible for designation as 202(c) transactions due to the relationship between the time that the ISO's Day-Ahead markets close and the time at which the ISO submitted its certifications to DOE in order to continue invoking the DOE authority. Specifically, the Day-Ahead markets close at 1:00 p.m. on the operating day prior to the one in which any bids awarded in that market would actually be called on. In comparison, each and every one of the ISO's certifications was filed after this time. Therefore, the ISO would have had no authority to even request bids into these markets pursuant to the DOE Orders, since it had yet to file a

[13] Parties claiming market transactions as 202(c) sales consist of: MID, Ex No. MID-4; Ex No. MID-6, Anaheim, Ex No. SOC-9, Pasadena, Ex No. PAS-5, BPA, Ex No. BPA-2, Pinnacle, Ex No.

certification invoking the authority to compel any sales for that day pursuant to the DOE Orders. Ex Nos. S-33 at 64:17-65:9; SWC-8 at 7:8-19; Tr. at 2630:1-18, 2633:12-2634:2. This point was highlighted by the ISO's first request to the DOE for an emergency order pursuant to Section 202(c) on December 14, 2000. In that letter, Terry Winter explained that the ISO "would exercise its authority under the emergency order only if suppliers had not bid into the ISO markets." JE-3 at Tab "ISO Request 12/14/00."

Practically speaking, the ISO's markets represented the mechanism on which the ISO was relying in order to *avoid* the need to use the authority granted to it under the DOE Orders. Tr. (O'Neill) at 2328:10-12, 2353:12-19. Throughout the DOE Order period, the ISO continued to encourage entities to bid into the ISO's markets. Tr. (O'Neill) at 2353:16-19. Indeed, Terry Winter, in his December 20, 2000 letter requesting an extension of the DOE authority, specifically stated that the ISO had "endeavored to obtain needed supplies, to the maximum extent possible, through *existing market mechanisms*." Ex No. J-3 at Tab "ISO Request 12/20/00" p. 3 (emphasis added). The ISO consistently viewed its DOE authority as a last resort mechanism, to be used when all other means of obtaining energy had failed, or in the event of an unforeseen occurrence that might very well have a disproportionate impact on the reliability of the ISO Controlled Grid due to the tight supply situation (i.e., an unplanned generator outage). Tr. (O'Neill) at 2375:19-21, 2437:10-11; 2445:1-3 ("The ISO, prior to [the DOE Orders] had a number of mechanisms . . . at its disposal, so the purpose of the DOE order was to be used as a last resort."); Ex No. JE-3 at Tab "ISO Request 1/5/01" (noting, as reasons warranting continued DOE authority, the conditions that could suddenly force the ISO into an emergency

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S-33 at 49:18-21, Burbank, Ex No. S-79, Glendale, Ex No. S-81, and SWC/MWD, Ex No. SWC-4.

situation).

The ISO relied on data as to the amount of energy and capacity already scheduled with it or already bid into its Day-ahead markets, or forecasted to be bid into its markets, in determining whether or not to file the certification with the Department of Energy necessary to invoke the authority granted by the DOE Orders. In the document entitled "Analysis of Load Forecast, Resource Availability Forecast, and Transmission System Conditions that Call for Certification," which accompanied every certification filed by the ISO with the Department of Energy, and was provided to all market participants, the ISO set forth its forecasted load and resources for the next day. *See, e.g.,* Ex No. ISO-13 at 3.[14] Under the heading entitled "Forecast of Resource Availability," the ISO included both "Scheduled Resources," i.e., "those submitted by Scheduling Coordinators through schedules in the CAISO's Day-ahead and Hour-ahead markets," and "Real-time Resources," which included "forecasted capacity expected to the bid into the supplemental and replacement reserve markets." *Id*. at 4, ¶ 2. It was these resources that the ISO compared to its forecasted load for the subsequent day to determine whether or not it would *even be necessary* for the ISO to invoke the provisions of the DOE Order. *Id*., ¶ 3 ("Resource Deficiency"); Tr. at 2200:1-8, 2261:13-21; 2288:1-12, 2935:17-19. Additionally, under the section entitled "Summary and Primary Reasons for Continued Certification" the ISO noted that it had been narrowly avoiding firm load curtailment by "*arranging* adequate deliveries of electricity." In discussing those arrangements, the ISO referred specifically to the amount of *imports* that it was able to arrange

[14] All of the ISO's certifications and accompanying "Analysis of Load Forecast, Resource Availability Forecast, and Transmission System Conditions that Call for Certification" are included in the record as part of Joint Exhibit 3.

because of its previous certification, with no discussion whatsoever of any amounts procured through market transactions. Ex No. ISO-13 at 3. Again, market participants were aware of this information by virtue of the fact that they were provided with these certifications at the time the ISO filed them with the Commission. Tr. at 2389:20-24.

In practice, the ISO limited its use of its DOE authority to OOM transactions, and suppliers have provided no evidence to contradict this fact; no one has provided evidence that the ISO actually used the authority available to it under the DOE Orders to require that an entity submit a bid into it's markets. While it is admirable that some entities did, in fact, choose to continue to participate in the ISO's markets, the mere fact that they did so voluntarily cannot be the basis for classifying their transactions as made pursuant to Section 202(c). To even potentially qualify market transactions as DOE transactions, an entity would have to provide some sort of evidence of a specific instruction from the ISO, expressly exercising the authority of the DOE order, that the entity bid into the market. The fallacy of suppliers' assumption is aptly illustrated in the Rebuttal Testimony of Mr. Endo on behalf of Pasadena. Therein, Mr. Endo states that:

> Pasadena understood that, if it did not make excess energy and capacity available to the ISO, the ISO *could* compel such a sale or could request a sanction against Pasadena because of the DOE Orders. Pasadena assumed that, by bidding its capacity and energy into the ISO's markets, it would not have to worry about any compliance issues or threats against it.

PAS-4 at 5:15-19 (emphasis added). Thus, Pasadena made a choice based on its desire to avoid any issues with respect to the DOE Orders to voluntarily sell to the ISO. Again, this may reflect commendable behavior on the part of Pasadena, but certainly does not qualify as transacting pursuant to Section 202(c) under the

framework set forth in the DOE Orders.

Finally, several suppliers claiming market transactions as DOE sales were not even transacting directly with the ISO itself. For instance, Burbank and Glendale both interacted with the ISO through third-party Scheduling Coordinators; Sempra Energy, in the case of Burbank, and Coral Power, in the case of Glendale.[15] Ex No. BUR-1 at 3:11-13; Ex No. GLN-1 at 2:20-3:3. Therefore, any financial liabilities incurred with respect to transactions in the ISO's markets would be incurred by Sempra and Coral Power, respectively, rather than Burbank and Glendale. *See* Tr. (Scheuerman) at 2682:19-2683:7. Furthermore, when asked as to whether Sempra or Coral Power had claimed as 202(c) transactions any of the sales that they had made from Burbank or Glendale resources into the ISO's markets, Mr. Scheuerman, the witness on behalf of Burbank and Glendale, admitted that he was unaware of any such claims. *Id*. at 2683:10-13. However, upon further examination by the Presiding Judge, Mr. Scheuerman explained that while Burbank and Glendale had attempted to obtain affidavits from Sempra and Coral as to these transactions being made pursuant to 202(c), they were unsuccessful in doing so. *Id*. at 2687:1-13.

[15] While Glendale is its own Scheduling Coordinator, it lacks the necessary infrastructure to perform those duties on its own behalf, and therefore, has contracted those duties out to Coral Power. Tr. (Scheuerman) at 2682:4-9.

6. E-516, Emergency Service Agreement, or Interconnected Control Area Operating Agreement

- **Proposed Finding – ISO Operating Procedure E-516 and Schedule 13 of the Interconnected Control Area Operating Agreement between the ISO and LADWP constituted mechanisms, in place during the DOE Order Period, through which the ISO had historically obtained energy from certain municipal/governmental entities and LADWP, respectively. Because these pre-existing mechanisms were in place during the DOE period, the ISO was justified in not assuming that energy provided by these entities was being provided pursuant to the DOE Orders, and the Commission should not now make that assumption.**

E-516 is an ISO Operating Procedure that details the process and conditions under which the ISO can request Energy produced by the unused reserves and generation capacity of certain municipal/public entities, including entities that have claimed transactions in this proceeding as being made pursuant to Section 202(c).[16] *See* Ex. Nos. S-41; S-20 at 4. Because of limitations on the manner in which the ISO can interact directly with the these entities, the ISO created Operating Procedure E-516, with input from the entities covered by that procedure. Ex. No. ISO-21 at 18:5-7. E-516 was in effect during the DOE Period, having been implemented by the ISO in the Summer of 2000. *See* Tr. (O'Neill) at 2276:5-8. E-516 is effective during ISO declared emergencies of Stage 1 or greater. Ex. No. S-20 at 8-9.

The Interconnected Control Area Operating Agreement ("ICAOA") between the ISO and LADWP is an agreement whose purpose is "to establish the rights and obligations of the ISO and LADWP with respect to the operation,

[16] Three entities covered under E-516 have claimed 202(c) sales in this proceeding: MID, SMUD, and NCPA. With respect to NCPA, the ISO concurs that the three sales still claimed as 202(c)

maintenance, and control" of transmission facilities connecting the ISO and LADWP Control Areas. Ex. No. DWP-19 at 2 (ICAA 1.2.1). Service Schedule 13 to the ICAOA ("Schedule 13") provides that the ISO and LADWP will assist each other "to the extent possible" during emergencies by providing energy and/or capacity, although such assistance is discretionary. *Id*. at 25. Schedule 13 specifies that payment to LADWP for any emergency assistance that it renders will be "at a price agreed upon by the Parties or a price established by LADWP for such emergency assistance in advance." *Id*.

Although both of these mechanisms are non-obligatory in nature, the fact remains that the ISO had used both E-516 and Schedule 13 in the past to obtain excess energy during system emergencies from the municipal entities claiming 202(c) sales in this proceeding and from LADWP, respectively. Tr. at 2445:15-24, 2445:25-2446:3. Moreover, both these mechanisms were in effect during the DOE Order Period. Therefore, the fact that these entities provided energy to the ISO during this period does not suggest, in and of itself, that this energy was provided because of the DOE Orders. Additionally, except for NCPA, there is no contemporaneous evidence in the record suggesting that these suppliers were making this energy available pursuant to the DOE Orders. For reasons discussed above in Section III.A.4, absent such contemporaneous evidence, the Presiding Judge should decline to find that these transactions were entered into pursuant to Section 202(c).

With respect to SMUD, the totality of its exhibits and testimony make it difficult to understand exactly what mechanism their claimed 202(c) sales to the ISO

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sales by NCPA were, in fact, made pursuant to the DOE Orders, and has entered into a

were made under. Originally, SMUD stated that its claimed 202(c) sales were made to the ISO via PG&E. In his affidavit, Mr. Calvert states that "SMUD worked through Pacific Gas and Electric Company as the Scheduling Coordinator to provide electricity in excess of SMUD's native load requirements to the ISO." Ex. No. SMD-3 (Calvert) at 4, ¶ 7. SMUD also produced log entries showing conversations between PG&E and SMUD, apparently to demonstrate the process by which SMUD made excess energy available to the ISO during the DOE Period. *See* Ex No. SMD-4. Then, in his Rebuttal Testimony, Mr. Tracy took the position that SMUD was, in fact, making sales directly to the ISO during this period pursuant to Section 202(c) under a three-party agreement between PG&E, the ISO, and SMUD known as the Restated Interim Agreement ("RIA"). Ex No. SMD-9 at 3:21-4:12. At hearing, Mr. Tracy added that it was his understanding that PG&E was not SMUD's Scheduling Coordinator for the transactions it is claiming as made pursuant to Section 202(c), but that the PX is its Scheduling Coordinator for these sales. Tr. at 2795:21-2796:1. Based on additional review undertaken by the ISO, it appears that Mr. Tracy is correct that the PX was Scheduling Coordinator with respect to these sales, but that many, if not all, of these sales were still arranged through PG&E. *See* Ex No. ISO-36 at ¶ 5. In the end, however, these confusing shifts in position are irrelevant to the question of whether SMUD was selling pursuant to the DOE Orders. Even if SMUD was providing under the RIA, as it claims, or under E-516, the fact remains that there was a pre-existing mechanism through which the ISO could obtain energy from SMUD, and that SMUD did not provide notification that the energy it was providing was being provided pursuant to the DOE Orders.

With respect to MID, all of the alleged 202(c) sales specifically identified by

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stipulation with NCPA to that effect.

MID in Exhibits MID-3, MID-4, MID-5 and MID-6 either represent sales made into the ISO's markets for Energy or Ancillary Services, or constitute Uninstructed deviations, *see* Ex No. S-33 at 13:17-14:9; Ex No. S-45. Therefore, these sales were not made pursuant to E-516, which contemplates Out-of-Market purchases. *See* Ex No. S-20 at 8.

However, Mr. Van Hoy, testifying on behalf of Modesto, indicated in his Responsive Testimony that during the DOE Period "MID also made spot market sales of energy to PG&E" that were not included in MID's spreadsheets and that MID considers these sales to have also been made pursuant to the DOE Orders as well. Ex Nos. MID-2 at 4:5-11; S-33 at 15:1-19; S-48 at 1-2. MID did provide Commission Staff with data as to these sales, which is contained in Exhibit S-48. The evidence in the record strongly suggests that this energy was made available to the ISO pursuant to E-516. First, the data for the transactions contained in Exhibit S-48 matches the data provided by PG&E, found in Exhibit S-49. As noted above, PG&E indicated that it considered this energy to have been provided to the ISO pursuant to E-516. *See* Ex No. S-20 at 2. Additionally, MID's own Exhibit MID-9, an internal MID memo dated January 12, 2001, indicates that MID had been "following [the E-516] process, generally, and on a voluntary basis . . . to the present," and that that process involved "requests from the ISO, via PG&E." Ex No. MID-9.

To summarize, the existence and terms of E-516 and Schedule 13 demonstrate that there were pre-existing mechanisms in place at the time the DOE Orders were issued for the ISO to obtain energy from the above-referenced entities. Therefore, the ISO was justified in not assuming that excess energy provided by those entities was being made available pursuant to the DOE Order, and the Commission should not assume so now, absent some contemporaneous record of

an expression by these entities that they were making the energy available because of the DOE Orders. Because the record is devoid of any such evidence, except for transactions entered into by NCPA, and for the other reasons described in other sections of this Brief, the Presiding Judge should find that these entities have not met their burden in establishing that their sales were made pursuant to Section 202(c).

7. PGA

- **Proposed Finding – Entities that have signed a Participating Generator Agreement with the ISO have an obligation, pursuant to that Agreement, and as set forth in the ISO Tariff, to provide energy in cases of imminent or threatened emergencies, in response to ISO dispatch instructions. Therefore, the ISO had no need to exercise the DOE authority to compel these entities to provide excess energy to the ISO.**

The Participating Generator Agreement ("PGA") is a *pro forma* agreement entered into between the ISO and generators in the ISO Control Area that governs the relationship between the generator and the ISO. *See* Ex No. SWC-8 at 10:18-21. One of the obligations contained in the PGA is that generators will comply with the applicable provisions of the ISO Tariff, including sections of the ISO Tariff relating to system emergencies, including Section 5.6.1. Ex No. ISO-21 (O'Neill) at 20:10-13. Specifically, Section 5.6.1 provides that:

> All Generating Units, System Units and System Resources that are owned or controlled by a Participating Generator are . . . subject to control by the ISO during a System Emergency and in circumstances in which the ISO considers that a System Emergency is imminent or threatened. The ISO shall, subject to Section 5.6.2, have the authority to instruct a Participating Generator to bring its Generating Unit on-line, off-line, or increase or curtail the output of the Generating Unit and to alter scheduled deliveries of Energy and Ancillary Services into or out of the ISO Controlled Grid, if such an instruction is reasonably necessary to prevent an imminent or threatened System Emergency.

Id. at 20:15-21:4.

Three suppliers in this proceeding have claimed DOE sales from units for which they have executed a Participating Generator Agreement ("PGA") with the ISO: Pasadena, Anaheim, and SWC/MWD. Ex No. ISO-21 at 20:7-9. Because of the contractual obligation of Participating Generators to make energy available when a System Emergency is even *imminent or threatened*, the ISO simply had no need of

the authority available under the DOE Orders to require these entities to make power available to the ISO from these sources. *Id*. at 21:5-11; *see also* Tr. (O'Neill) at 2222:24-2223:10.

With respect to Anaheim, all of transactions that it claims as being made pursuant to 202(c) constitute sales of uninstructed energy resulting from the practice of "overscheduling." *See infra* Section III.A.8. In the case of Pasadena, it claims as 202(c) transactions sales made through ISO's Ancillary Services or Real-time Energy markets. *See* Ex No. PAS-5. While both of these suppliers voluntarily chose to make energy and/or capacity available to the ISO, without the ISO actually making a request that they do so, it is nevertheless apparent that in the event that the ISO did require energy from these entities' Participating Generators, it could have obtained that energy without the need to invoke the authority provided by the DOE Orders. Doing so would also have been consistent with the ISO's commitment to use the DOE Order only when necessary, and is yet another convincing explanation for why these entities' transactions should not be considered to have been made pursuant to Section 202(c).

With respect to the third entity, SWC/MWD, however, this argument is more than hypothetical in nature. In his Responsive Testimony, Mr. Jones described the two types of transactions entered into by SWC/MWD with the ISO during the DOE Period: (1) bids into the ISO's Hour-Ahead Ancillary Services Market dispatched via the ISO's Automated Dispatch System ("ADS"), Ex No. SWC-1 at 12:11-14; and (2) dispatches "pursuant to orders of the ISO generation dispatcher." *Id*. at 12:19-20; *see also id*. at 13:18-20. The record demonstrates that this second category of transactions was, in fact, entered into directly pursuant to the ISO's authority with respect to Participating Generators under Section 5.6.1, as described above. Mr.

Jones essentially admitted as much when he described, through information obtained from the ISO's testimony and data responses, how the ISO can issue an out-of-market dispatch instruction directing a Participating Generator to generate in the event that that unit has not bid into the ISO's markets. *Id*. at 14:3-20. Mr. Jones also provided a file containing numerous such transactions entered into between the ISO and CDWR, including transactions on certification days. Ex No. SWC-4, Schedule L. It is exactly these transactions described by Mr. Jones that the ISO entered into pursuant to its authority under Section 5.6.1 of the ISO Tariff to issue an out-of-market dispatch instruction requiring a Participating Generator to operate. *See* Ex No. SWC-6 at 13 (subpart (b)). Mr. Jones is quite correct that the ISO did not even consider these transactions as being eligible for designation as DOE transactions, *see* SWC-1 at 14:17-20, for the very good reason that the ISO *actually dispatched* CDWR units pursuant to their contractual obligation under the PGA, and therefore, the authority available to the ISO under the DOE Orders was simply irrelevant as to these transactions.

8. Other Sellers in Control Area

- **Proposed Finding – Sales of Uninstructed Energy to the ISO should not be considered to have been made pursuant to Section 202(c) because the ISO did not request that entities provide it with uninstructed energy.**

Several sellers located in the ISO's Control Area, most notably Anaheim and Riverside, claim as DOE sales those sales of uninstructed energy to the ISO provided through the process known as "overscheduling." Ex No. SOC-8(R) at 3:22-23. What this means, practically speaking, is that more energy would appear on the

ISO's grid from Anaheim and Riverside than the ISO was anticipating, based on the schedules provided to it by Anaheim and Riverside. *See* Tr. at 2660:18-25.

Even assuming, arguendo, that the ISO had endorsed the practice of overscheduling, generally, as a legitimate method for Anaheim and Riverside to provide the ISO with energy (which has not been established), it does not automatically follow, contrary to the assertions of Mr. McCann and Mr. Sciortino, that such energy was provided pursuant to the DOE Order. To reiterate, the DOE Order process was a compulsory one that obligated suppliers to deliver energy "when and in such amounts as may be requested by the ISO." Uninstructed Energy does not fit the paradigm of energy "requested" by the ISO, as the ISO is not even aware, based on the schedules provided by Anaheim and Riverside, when and if such energy will be provided. Moreover, the ISO cannot request specific amounts of Uninstructed Energy, as contemplated by the DOE Orders, because the ISO simply does not know how much energy was provided until *after* the hour.

There is no evidence suggesting that the ISO ever actually requested that Anaheim and Riverside over-generate during the DOE Order Period. In fact, Anaheim and Riverside's own testimony is replete with references to the fact that they were acting "pro-actively" rather than pursuant to a request from the ISO that their energy was actually needed. *See* Ex Nos. SOC-8(R) at 3:7-17; SOC-5 at 3:2-11; SOC-2(I) at 5:6-18. Again, while the efforts of these entities to do what they felt they could to support the grid is admirable, as well as being in their own best interests, it clearly was not pursuant to the process contemplated by the DOE Orders and followed by the ISO.

9. $64 or Less on January 9, 2001

- **Proposed Finding – Only those sales on January 9, 2001, for which the ISO agreed to a price at or below $64/MWh should be considered made pursuant to the DOE Orders.**

The ISO agrees with Staff that, pursuant to the January 5 Amendment to the December 14 DOE Order, only those transactions on January 9, 2001 for which the ISO agreed to a price of $64/MWh or less were made pursuant to Section 202(c). *See* Ex No. ISO-21 at 5:17-18. However, as noted in Ms. O'Neill's Direct Testimony, the ISO contacted several suppliers on this date and asked them to supply excess energy, and at that time the ISO informed those entities that it could not agree to a price higher than $64/MWh. Ex No. ISO-10 at 11:19-12:2. Because the suppliers supplied the excess energy and the ISO noted the price as $64/MWh on its OOM Sheet, the ISO recorded these transactions as having been provided pursuant to the DOE Orders. *Id*. at 12:2-5. Therefore, while the ISO agrees with Staff in the abstract, it does not believe that any transactions on January 9, 2001 were made pursuant to the DOE Orders other than those for which it recorded the price as $64/MWh. *See* Ex No. ISO-15 at 5.

B. WHICH SPECIFIC SALES WERE CONDUCTED PURSUANT TO SECTION 202(C) OF THE FEDERAL POWER ACT?

- **Bonneville Power Agency Proposed Finding – No sales were made pursuant to Section 202(c).**

BPA claims both OOM sales and sales made through the ISO's real-time Energy market as having been made pursuant to Section 202(c). The ISO should not have assumed that the sales made by BPA were made pursuant to the DOE Orders since there were other reasons that BPA might have been selling energy to the ISO,

including high prices, which is demonstrated by the fact that BPA made sales to the ISO both immediately before the DOE Period, and during the DOE Period on non-certification days. *See supra* Section III.A.1. Moreover, BPA was under an independent obligation imposed by the Secretary of Energy to assist the State of California during this time period. *Id*. Therefore, because there is no evidence that demonstrates a contemporaneous understanding that the energy BPA sold to the ISO was being made available pursuant to the DOE Orders, its transactions should not be found to have been made pursuant to Section 202(c). *See supra* Section III.A.4.

- **Coral Power Proposed Finding – No sales were made pursuant to Section 202(c)**

All of the sales that Coral Power claims were made pursuant to Section 202(c) were OOM sales made to the ISO on December 14, 2000. Ex Nos. COR-1 at 3:7-11; COR-16. Because December 14, 2000 was a non-certification day, these sales should not be found to have been made pursuant to the DOE Orders. *See supra* Section III.A.3.

- **City of Burbank Proposed Finding – No sales were made pursuant to Section 202(c).**

Burbank claims numerous market transactions as having been made pursuant to the DOE Orders. Most of these transactions were made through the ISO's Day-ahead markets for Ancillary Services, while others were made through the Hour-ahead Ancillary Services markets, and some appear to have been bids taken through the ISO's Supplemental Energy markets. *See* Ex No. S-79. All of these transactions were made through Sempra Energy, Burbank's Scheduling Coordinator. Ex No. BUR-1 at 3:6-15. These transactions should not be considered as having

been made pursuant to Section 202(c) for the reasons set forth in Section III.A.5. Additionally, a number of Burbank's sales were made on non-certification days, which should not be considered as 202(c) sales. *See supra* Section III.A.3. Finally, Burbank never provided the ISO with any estimates of available excess energy. Ex No. ISO-23.

- **City of Glendale Proposed Finding – No sales were made pursuant to Section 202(c).**

Glendale claims numerous transactions made through the ISO's formal markets as having been made pursuant to the DOE Orders. Most of these transactions were made through the ISO's Day-ahead and Hour-ahead markets for Ancillary Services, although some were made through the ISO's real-time energy market. *See* Ex No. S-81. All of these transactions were made through Coral Power, which functioned as Glendale's SC during the DOE period. Ex No. GLN-1 at 3:1-9. These transactions should not be found to have been made pursuant to the DOE Orders for the reasons articulated in Section III.A.5. Additionally, a number of Glendale's sales were made on non-certification days, which should not be considered as 202(c) sales. Ex No. S-81; *see supra* Section III.A.3. Finally, Glendale rarely provided the ISO with any estimates of available excess energy, and estimated "zero" MW available when it did. Ex No. ISO-23.

- **Los Angeles Department of Water and Power Proposed Finding – No sales were made pursuant to Section 202(c).**

LADWP claims numerous OOM sales made to the ISO during the DOE period as having been made pursuant to Section 202(c). There were, however, reasons other than the DOE Orders that LADWP might have been selling energy to the ISO, including high prices, which is demonstrated by the fact that LADWP made

significant sales to the ISO immediately before and after the DOE Period, and during the DOE Period on non-certification days. *See supra* Section III.A.1. Also, the witness for LADWP admitted that LADWP felt an independent obligation to assist the State of California in "keeping the lights on." *Id*. Additionally, the ISO and LADWP had in place Schedule 13 of the ICAOA, which constituted a pre-existing mechanism by which LADWP could provide energy to the ISO during emergency situations. *See supra* Section III.A.6. Therefore, because there is no evidence that demonstrates a contemporaneous understanding that the energy LADWP sold to the ISO was being provided pursuant to the DOE Orders, its transactions should not be found to have been made pursuant to Section 202(c). *See supra* Section III.A.4.

- **Modesto Irrigation District Proposed Finding – No sales were made pursuant to Section 202(c).**

MID claims sales that were made in the ISO's markets for Ancillary Services as having been made pursuant to Section 202(c). *See* Ex No. MID-4; MID-6. For the reasons stated in Section III.A.5, these sales should not be considered as having been made pursuant to Section 202(c). MID also claims unspecified spot sales of energy made to PG&E, which MID believes PG&E subsequently made available to the ISO, as being made pursuant to the DOE. Ex. No. MID-2 at 4:5-11. To the extent that such sales took place, the ISO should not have assumed that such sales were made pursuant to 202(c) because there was a pre-existing mechanism in place by which the ISO could obtain excess energy from MID – namely, E-516. Also, because MID is in the ISO's Control Area, it is in MID's own best interest to supply energy during periods of supply deficiency so as to prevent the curtailment of its own customers' load. *See supra* Section III.A.1. Therefore, because MID has provided no evidence that demonstrates a contemporaneous understanding that the energy

that it provided was being provided pursuant to the DOE Orders, its claims should be rejected. *See supra* Sections III.A.6, III.A.4. Finally, MID also claims as 202(c) a number of sales made to the ISO on non-certification dates. *See supra* Sections III.A.1, III.A.3.

- **Northern California Power Agency Proposed Finding – All claimed sales were made pursuant to Section 202(c).**

NCPA has provided convincing contemporaneous evidence that its three claimed transactions were made pursuant to the DOE Orders. This evidence consists of a transcript of a phone conversation with respect to the December 20, 2000 transaction in which the NCPA operators specifically states that nothing is available under the "old" muni excess procedure, but that they would provide energy pursuant to the DOE Orders. Ex. NCP-6. With respect to the December 22 and 23, 2000 transactions, contemporaneous operator logs demonstrate that NCPA was making energy available pursuant to the DOE Orders. See Ex. NCP-2 at 6.

- **City of Pasadena Proposed Finding – No sales were made pursuant to Section 202(c)**

All of the sales that Pasadena claims as 202(c) sales were made to the ISO through the ISO's formal markets for Energy and Ancillary Services. See Ex No. PAS-5. These transactions should not be considered to have been made pursuant to the DOE Orders for the reasons articulated in Section III.A.5. Also, the ISO had no need to compel Pasadena to supply energy pursuant to the DOE Orders because Pasadena had entered into a PGA with the ISO. See supra Section III.A.7. Pasadena's system is located within the ISO Control Area, and therefore, it was in Pasadena's best interest to supply energy to the ISO during this crisis period. See

supra Section III.A.1. Additionally, Pasadena claims a number of transactions as 202(c) sales on non-certification days. Ex No. PAS-5; *see supra* Section III.A.3. Finally, Pasadena only provided the ISO with an estimate of excess energy for approximately one half of the certification days, and estimated "zero" MW of available excess energy on the others. Ex No. ISO-23.

- **Pinnacle West Proposed Finding – No sales were made pursuant to the DOE Orders**

The sales claimed by Pinnacle as being made pursuant to Section 202(c) consist of 34 OOM sales and one sale of Supplemental Energy to the ISO. *See* Ex No. Revised PNW-2. The transaction claimed by Pinnacle on January 16, 2001 was made before the ISO's certification for that date became effective. With respect to the other transactions, the fact that Pinnacle made significant sales to the ISO on non-certification dates suggests that there is no reason to assume that its sales on certification days were made pursuant to the DOE Orders. *See supra* Section III.A.1. Pinnacle did not provide the ISO with its estimate of excess energy for any of the days on which it has claimed 202(c) sales. *Id*. Also, Pinnacle did not even follow its own procedures with respect to documenting these transactions. *Compare* Ex. No. PNW-4 *with* Ex. No. PNW-2. None of Pinnacle's transactions were noted on the ISO's OOM Sheets as having been made pursuant to the DOE Orders, and Pinnacle West has not provided any evidence that demonstrates a contemporaneous understanding had been reached between the ISO and a seller that energy being provided was being provided pursuant to the DOE Orders. *See supra* Section III.A.4. For these reasons, none of Pinnacle's sales should be found to have been made pursuant to the DOE Orders.

- **PPL Montana Proposed Finding – All sales were made pursuant to the DOE Orders.**

PPL Montana made 38 OOM sales to the ISO that it claims as Section 202(c) sales. PPL Montana established a clear and unambiguous procedure to ensure that the ISO understood which sales it was making pursuant to Section 202(c) that involved making an oral statement to the ISO real-time operator at the beginning of each call and sending the ISO a confirmation sheet afterwards. *See supra* Section III.A.4. The ISO's OOM Sheets noted 36 out of 38 of these transactions as having been made pursuant to the DOE Orders, and the ISO easily confirmed that the remaining two transactions had been made pursuant to the DOE Orders as well. *Id*. Therefore, all of PPL Montana's transactions should be treated as having been made pursuant to the DOE Orders.

- **Portland General Electric Company Proposed Finding – Only those sales noted on the ISO's OOM Sheets, as well as those for which Portland provided transcripts indicating that the DOE Order was explicitly mentioned should be considered as having been made pursuant to the DOE Orders.**

Portland claims numerous OOM sales made to the ISO during the DOE period as 202(c) sales. A number of sales made by Portland were noted on the ISO's OOM Sheets as having been made pursuant to the DOE Orders. Also, Portland provided a number of transcripts which showed that an explicit reference to the DOE Orders had been made during the conversation between ISO and Portland operators. Therefore, these transactions should be considered as having been made pursuant to the DOE Orders.[17] However, those sales for which there had been submitted no evidence demonstrating that a contemporaneous understanding had been reached

[17] For ease of understanding, the ISO has prepared Attachment A to this brief, which displays all of the sales made by Portland as to which the ISO concurs were made pursuant to Section 202(c).

between the Portland and the ISO that Portland was selling under the DOE Orders should not be considered as having been made pursuant to Section 202(c) because Portland may have made these sales to obtain the benefits of the high prices being commanded by sellers during this period, which is supported by the fact that Portland made numerous sales to the ISO directly before the DOE Orders were in effect, and on non-certification days during the DOE period. *See supra* Section III.A.1; Ex No. ISO-21 at 15:1-14. Also, for many of the days that it made sales to the ISO, Portland provided the ISO with an estimate of "zero" available MW of excess energy. Ex Nos. ISO-23; PGE-4.

- **PS Colorado Proposed Finding – No sales were made pursuant to Section 202(c)**

PS Colorado's claimed 202(c) sales consist of 17 OOM sales that it made to the ISO on January 15-17, 2001. Ex No. PSC-2. The sales made on January 15 and 16 were not covered by an ISO certification invoking the DOE Order authority, and should therefore not be considered as having been made pursuant to Section 202(c). *See supra* Section III.A.3. With respect to the sales made on January 17, 2001, because there is no evidence that demonstrates a contemporaneous understanding that the energy that PS Colorado sold to the ISO was being made available pursuant to the DOE Orders, PS Colorado's claims with respect to these sales should be denied as well. *See supra* Section III.A.4.

- **Sacramento Municipal Utility District Proposed Finding – No sales were made pursuant to Section 202(c)**

It is difficult to understand the nature of the sales that SMUD is claiming were made pursuant to Section 202(c), which it sets forth in Exhibit SMD-11. *See supra* Section III.A.6. However, it appears that most, if not all, were made through PG&E

pursuant to the ISO's request for excess or reserve energy, pursuant to E-516. *Id*. Regardless of the mechanism that SMUD used to provide this energy, SMUD has provided no evidence that demonstrates a contemporaneous understanding that the energy that it provided was being provided pursuant to the DOE Orders, its claims should be rejected. *Id.*; *see supra* Section III.A.4.

- **Southern Cities (Cities of Anaheim and Riverside) Proposed Finding – No sales were made pursuant to Section 202(c).**

All of the sales claimed by Anaheim and Riverside as having been made pursuant to Section 202(c) were sales of uninstructed energy to the ISO resulting from the practice of "overscheduling." These transactions should not be considered as made pursuant to Section 202(c) for the reasons explained in Section III.A.8. Additionally, Anaheim had a PGA with respect to its Generating Units, and as such, the ISO had no need of the authority granted by the DOE Orders in order to compel Anaheim to provide energy in cases of imminent or threatened system emergencies. *See supra* Section III.A.7. Both Anaheim and Riverside are within the ISO's Control Area, and so it is in the best interest of both to make energy available to the ISO in times of crisis. *See supra* Section III.A.1. Finally, Anaheim and Riverside frequently failed to provide the ISO with estimates of excess energy, or forecasted "zero" MW of available excess energy. Ex No. ISO-23.

- **State Water Contractors/Metropolitan Water District Proposed Finding– No sales were made pursuant to Section 202(c)**

SWC/MWD claims that sales made by CDWR through the ISO's markets for Ancillary Services, as well as sales made pursuant to ISO-ordered OOM dispatches, were made pursuant to Section 202(c). Sales made through the ISO's markets should not be eligible for designation as 202(c) sales for the reasons set forth in

Section III.A.5. Additionally, CDWR has a PGA with the ISO, and therefore, the ISO had no need for the DOE Order to compel CDWR units. *See supra* Section III.A.7. In fact, SCW/MWD erroneously claims as 202(c) a number of dispatches that the ISO made pursuant to its authority under the ISO Tariff to order PGA units to generate. *Id*. CDWR, as a state agency, also had an obligation independent of DOE Order to assist California in this time of crisis. *See supra* Section III.A.1.

IV. CONCLUSION

For the reasons set forth above, the ISO respectfully requests that the Presiding Judge issue proposed findings of fact adopting the positions set forth herein.

Respectfully submitted,

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