

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FAX (202) 424-7647
WWW.SWIDLAW.COM

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
(212) 973-0111 FAX (212) 891-9598

January 12, 2001

The Honorable David P. Boergers
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

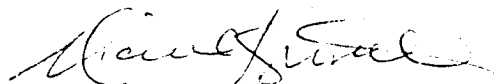
FILED
THE SECRETARY
01 JAN 12 PM 1:38
FEDERAL ENERGY
REGULATORY COMMISSION

**Re: California Independent System Operator Corporation
Docket Nos. ER98-997-000 and ER98-1309-000.**

Dear Secretary Boergers:

Enclosed is an original and fourteen copies of the Answer of the California Independent System Operator Corporation to the Cogeneration Association of California and Arco CQC Kiln's Motion for Subpoena of WCC Witness or in the Alternative Motion to Strike Exhibit No. ISO-12 and Exhibit No. ISO-13 Sponsored by Trent Carlson. Two copies have been provided to the Presiding Judge. Also enclosed is an extra copy of the filing to be time/date stamped and returned to us by the messenger. Thank you for your assistance.

Respectfully submitted,



Michael Kunselman
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W.
Washington D.C. 20007

Counsel for the California
Independent System Operator Corporation

Enclosures

cc: Service List
The Honorable Jacob Leventhal

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

California Independent System Operator Corporation))	Docket Nos. ER98-997-000 ER98-1309-000
---	--------	---

**ANSWER OF THE
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION
TO COGENERATION ASSOCIATION OF CALIFORNIA AND ARCO CQC
KILN'S MOTION FOR SUBPOENA OF WSCC WITNESS
OR IN THE ALTERNATIVE MOTION TO STRIKE EXHIBIT NO. ISO-12 AND
EXHIBIT NO. ISO-13 SPONSORED BY TRENT CARLSON**

To: The Honorable Jacob Leventhal
Presiding Administrative Law Judge

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"), 18 C.F.R. § 385.213, the California Independent System Operator Corporation ("ISO") hereby answers the Cogeneration Association of California ("CAC") and Arco CQC Kiln's ("Arco's") Motion for Subpoena of WSCC Witnesses or in the Alternative Motion to Strike Exhibit No. ISO-12 and Exhibit No. ISO-13 Sponsored by Trent Carlson. Although CAC has moved for a postponement of the hearing in this proceeding, a motion with which the ISO concurs, the ISO nonetheless believes it necessary to respond to CAC and Arco's Motion for Subpoena in a timely manner. The ISO agrees with CAC and Arco that it would be in the best interest of the parties to this proceeding to arrange to obtain the testimony of an appropriate WSCC witness. However, in the event that the

Presiding Judge declines to grant the Motion to Subpoena such a witness, the ISO asks that the alternative Motion to Strike Exhibits ISO-12 and ISO-13 be denied.

I. Factual Background

This proceeding involves the ISO's Participating Generator Agreements ("PGAs") with three Qualifying Facilities ("QFs"): Midway Sunset Cogeneration Company ("Midway Sunset"), Texaco Exploration and Production Inc. ("Texaco"),¹ both of which are members of the Cogeneration Association of California ("CAC"), and the ARCO CQC Kiln ("Arco").² These dockets were originally a part of consolidated proceedings concerning the ISO's PGAs, Docket Nos. ER98-992, et al. (the "pro forma PGA proceeding"), but were severed on November 19, 1998. All other matters in the consolidated dockets were the subject of a settlement certified by the Commission.

As part of the effort made by the parties to achieve a settlement in the instant proceeding, the previous Presiding Judge, William J. Cowan, sent a letter on January 27, 2000, to the WSCC requesting guidance on whether load being served by a QF should be considered as part of a control area's firm load responsibility. The ISO, through its Vice President of Operations, Kellan Fluckiger, also sent a letter to the WSCC, detailing the specific situations at issue

¹ The Texaco facility at issue here is identified in the PGA and has been referred to in various pleadings and testimony in this proceeding as the Texaco North Midway Cogeneration Project.

² PGAs facilitate the relationship between the ISO and Generating Units within the ISO Control Area scheduling Energy deliveries over the ISO Controlled Grid.

in this proceeding. In response, WSCC Executive Director Dennis E. Eyre submitted a letter dated March 10, 2000, to Judge Cowan in which he provided answers to the questions posed by Judge Cowan and the ISO. This letter was later submitted along with the Prepared Direct Rebuttal Testimony of Trent Carlson as Exhibit No. ISO-12.

On December 15, 2000, Ed Riley, the ISO's WSCC Operations Committee Representative, sent an email to Bill Cornish of the WSCC, requesting clarification of a portion of the WSCC's March 10, 2000 letter. Several days later, Mr. Cornish responded via email essentially confirming the interpretation suggested by Mr. Riley. These emails were included with the Prepared Direct Rebuttal Testimony of Trent Carlson as Exhibit No. ISO-13.

II. Discussion

A. Request for Subpoena

The ISO agrees with CAC and Arco that the testimony of a relevant WSCC witness as to the issue of "control area firm load" would be helpful to the parties and to the Presiding Judge in reaching a fair and reasonable resolution concerning many of the issues present in this proceeding. Therefore, the ISO has no objection to the Presiding Judge issuing a subpoena to compel the testimony of such a witness. In an effort to avoid needlessly repetitious testimony, as well as inconvenience to the WSCC, however, the ISO hopes that the active participants in this proceeding, in consultation with the WSCC, can agree to the sponsorship of a single WSCC witness.

B. Exclusion of Exhibits ISO-12 and ISO-13

While the ISO concurs that the testimony of a WSCC witness as to the definition of “control area firm load” would be helpful in resolving many of the issues that divide the parties in this proceeding, it strongly disagrees that Exhibits ISO-12 and ISO-13 should be stricken in the event that such a witness is not compelled to appear. CAC and Arco’s sole justification for striking these exhibits under such circumstances is that they would constitute hearsay. It is, however, a well-settled principle of administrative law, supported by both federal court and Commission precedent, that the existence of hearsay is not a legitimate basis for excluding otherwise admissible evidence.³ The sole standard is whether the proffered evidence is relevant, material, and not unduly repetitious, and is “of the kind that would affect reasonable and fair-minded persons in the conduct of their daily affairs.” See 18 C.F.R. § 385.509(a). Both exhibits satisfy this test. They contain the opinions of WSCC personnel as to the definition of “control area firm load” which, as CAC and Arco fully admit in their motion, is highly relevant as to a critical issue in this proceeding. Thus, these exhibits will be useful to the Presiding Judge in reaching a decision in this proceeding. The fact that they are

³ See, e.g., *Hoska v. United States Department of the Army*, 677 F.2d 131, 138 (D.C. Cir. 1982) (“Provided it is relevant and material, hearsay is admissible in administrative proceedings generally and in adverse action proceedings in particular.”); *Johnson v. United States*, 628 F.2d 187, 190 (D.C. Cir. 1980) (“It has long been settled that the factfinder in an administrative adjudication may consider relevant and material hearsay.”); *Trans Alaska Pipeline System*, 22 FERC ¶ 61,095 at 61,146 (1983) (holding that even if testimony was ultimately found to be hearsay, it can still constitute evidence otherwise properly before the Commission);

hearsay should only effect the weight that they are accorded, not their ultimate admissibility.⁴

Moreover, even if the hearsay rule were applicable, it would not be appropriate to strike the exhibits. Exhibits ISO-12 and ISO-13 have relevance independent of the truth of the statements contained therein. Among the issues in this proceeding is the reasonableness of the ISO's procurement of Ancillary Services based on forecasts that include behind-the-meter and over-the-fence Load. The ISO's policy is, in part, based upon the opinions of the WSCC as conveyed to the ISO. Exhibits ISO-12 and ISO-13 are evidence of the basis of the ISO's policy and necessary to evaluating the ISO's interpretation of those communications. For this purpose, the exhibits are not hearsay.

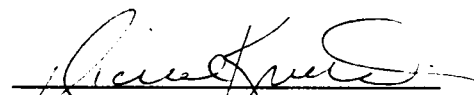
⁴ See, e.g., *Trans Alaska Pipeline System*, 22 FERC ¶ 61,095 at 61,146 (1983) (noting that because it was hearsay, "the probative value probative force of [a witness's] testimony may be questionable," but that it was nevertheless admissible); *City of Centralla, Washington*, 27 FERC ¶ 63,058 at 65,223 (1984) (Grossman, J.) (noting that in administrative proceedings, the existence of hearsay is an element of probative weight, not a ground for exclusion).

III. Conclusion

For the foregoing reasons, the ISO respectfully requests that the Presiding Judge grant CAC and Arco's Motion for Subpoena of WSCC Witnesses, subject to the conditions set forth in the text of this Answer, and, in the event the Presiding Judge denies the Motion for Subpoena, deny CAC and Arco's Alternative Motion to Strike Exhibit No. ISO-12 and Exhibit No. ISO-13 Sponsored by Trent Carlson.

Respectfully submitted,

Charles F. Robinson, General Counsel
Roger E. Smith, Sr. Regulatory Counsel
Jeanne Sole, Regulatory Counsel
California Independent System
Operator Corporation
151 Blue Ravine Road
Folsom, CA 95630


Kenneth G. Jaffe
Michael E. Ward
David B. Rubin
Michael Kunselman
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W.
Washington, D.C. 20007
Tel: (202) 424-7500
Fax: (202) 424-7643

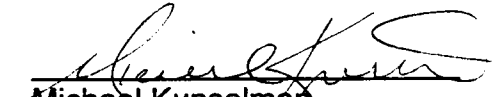
Counsel for the
California Independent
System Operator Corporation

Dated: January 12, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 12th day of January, 2001.


Michael Kunselman