

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corporation)	Docket Nos. ER00-2019-006, ER01-819-002 and ER03-608-001
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**ANSWER OF THE
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION
TO MOTION TO REOPEN RECORD OF THE CALIFORNIA
DEPARTMENT OF WATER RESOURCES**

1. Pursuant to Rule 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2003), the California Independent System Operator Corporation (“ISO”)¹ respectfully submits this Answer to the Motion to Reopen the Record filed in the above-identified dockets. The ISO respectfully requests that the Commission deny the motion as groundless.

I. BACKGROUND

2. These consolidated dockets concern amendments to the ISO’s Tariff that affect the ISO’s Transmission Access Charge. After extensive litigation, an Initial Decision was issued on March 11, 2004, and is pending Commission action. See *California Indep. Sys. Oper. Corp.*, 106 FERC ¶ 63,026 (2004). On October 21, 2003, the Presiding Judge issued a Partial Initial Decision in these dockets. *California Indep. Sys. Oper. Corp.*, 105 FERC ¶

¹ Capitalized terms not otherwise defined herein are used in the sense given in the Master Definitions Supplement, Appendix A to the ISO Tariff.

63,008 (2003) (“Partial I.D.”). The Partial I.D. followed an oral and written Order Granting Partial Summary Disposition.

3. The relevant procedural and legal background is set forth in the Partial I.D. and may be summarized as follows. In its filing, the ISO amended the Tariff definition of Transmission Revenue Requirement to clarify that the costs of any transmission facility turned over to the Operational Control of the ISO would be fully included in the Participating Transmission Owner’s (“TO’s”) Transmission Revenue Requirement. The ISO also amended Section 3.1 of the ISO Tariff to state that a New Participating TO must turn over to the ISO’s Operational Control all facilities that satisfy the Commission’s and the ISO’s criteria for placement under ISO Operational Control. The ISO Tariff does not contain a general standard for what facilities may be turned over to ISO Operational Control. Partial I.D. at PP 2-4.

4. The standard for which facilities may be turned over to ISO Operational Control is found in the Transmission Control Agreement (TCA) among the ISO and all Participating Transmission Owners (“TOs”). The Commission has ruled that the TCA controls what facilities are placed under ISO Operational Control. *Pacific Gas and Elec. Co., et al.* 81 FERC ¶ 61,122 at 61,559 (1997). The TCA contains a requirement that the facilities and Entitlements being turned over are integrated, network transmission facilities and excludes directly-assignable radial lines and all distribution facilities, neither of which, in any case, are network transmission facilities. Partial I.D. at P 3.

5. SWP filed testimony arguing that the ISO Tariff should contain standards and criteria to determine whether facilities will be accepted for ISO Control or in ISO Transmission Access Charge rates. “SWP also proposed new standards for determining what facilities should be accepted for ISO Operational Control and thus included in ISO Transmission Access Charge rates.” Specifically, SWP sought to exclude certain facilities as generation-ties, rather than as network transmission, under a standard similar to the primary-use test adopted by Administrative Law Judge Peter Young in Docket No. ER99-2326² and the standard applied to certain PG&E facilities in wholesale transmission rates prior to PG&E’s filing of an open access tariff pursuant to Order No. 888. Partial I.D. at P 5.

6. SCE moved on July 3, 2003 to exclude the issue of what facilities are appropriately placed under ISO Operational Control and how that process works on the grounds that this issue was not determined by the ISO Tariff, but was determined by the TCA. The Presiding ALJ, citing Judge Young’s decision, denied SCE’s Motion to Limit the Scope of the Proceeding without prejudice at Oral Argument on July 16, 2003. The Presiding Judge indicated that SCE could refile its motion if the Commission provided further guidance supporting SCE’s position on this issue. Partial I.D. at PP 6-7.

7. On August 27, 2003, SCE filed a Motion for Partial Summary Disposition contending that the costs of facilities under ISO Operational Control can be included in a Participating TO’s TRR and that the ISO’s policy as to what facilities can be turned over to ISO Operational Control is clearly set forth in the

² Pacific Gas and Elec. Co., 97 FERC ¶ 63,014 (2001).

TCA and mirrors FERC policy; thus the policy cannot be found to be unclear or unjust and unreasonable as a matter of law. Partial I.D. at P 8. On August 28, 2003, the Commission issued Opinion No. 466, in which it concluded that all facilities under the ISO's Operational Control should be included in a Participating TO's Transmission Revenue Requirement. *Pacific Gas and Elec. Co.*, 104 FERC ¶ 61,226 at P 13 (2003).

8. Following filings by other parties and oral argument, the Presiding Judge granted SCE's Motion and issued an Order Granting Motion for Partial Summary Judgment on October 9, 2003, confirming the ruling at Oral Argument. Partial I.D. at PP 9-11. Subsequently, the Presiding Judge issued the Partial I.D. in accordance with the Order Granting Motion for Summary Judgment. The relevant rulings are as follows:

15. *Relying on the clear language of the TCA, the ISO Tariff, and the guidance provided by the Commission in Opinion No. 466, the undersigned Presiding ALJ has determined that there are no genuine issues of fact regarding the issues which are the subject of SCE's Motion.*

16. As the undersigned Presiding ALJ indicated at Oral Argument and in her Order Granting Partial Summary Judgment, while it is strongly recommended that the ISO also include in its Tariff the relevant language currently contained in its TCA regarding the standard for facilities that could be turned over to ISO Operational Control, failure to have done so does not render the TCA language any less clear or per se unjust and unreasonable. With the additional guidance provided by the recent Commission decision in Opinion No. 466, the TCA was sufficient under the facts of this case to provide the parties with notice of the applicable ISO standard regarding the criteria and policy which guide the ISO's determinations of facilities over which it will exercise operational control, and correspondingly which facilities will be included in the ISO's transmission rates.

17. There are no material facts in dispute regarding what costs should be included within the ISO's Tariff because Opinion No. 466 clarifies that the cost of any facilities turned over to the ISO's Operational Control

should be included in the ISO's Tariff. *As for what facilities fall within the ISO's Operational Control, the clear language of the TCA, which mirrors Commission policy on this point, is controlling. Further, because SWP has declined to identify any specific facility over which a current dispute exists regarding the applicability of the ISO's criteria and policy, it is difficult to identify a current "case and controversy" regarding this issue. While PG&E may have found it difficult to figure out which of its facilities fall within the ISO's Operational Control in Docket No. ER99-2326, no such difficulty has been identified regarding SWP facilities in this case.*

(Emphasis added.)

9. On February 17, 2004, the Commission issued Opinion No. 466-A. *Pacific Gas and Elec. Co.* 106 FERC ¶ 61,144 (2004). In Opinion No. 466-A, the Commission reversed in part Opinion No. 466. It stated that whether a facility had been transferred to the ISO's Operational Control was not determinative of ratemaking. *Id.* at P 10. Rather, rates would be determined in utility-specific rate cases. *Id.*

10. On July 27, 2004, SWP filed its Motion to Reopen the Record in this Proceeding. SWP asserts that reopening the record is justified because the Partial I.D. was "based entirely" on Opinion No. 466, which was reversed in relevant part by Opinion No. 466-A. SWP also asserts that changes in condition of fact have "dramatically" come to light regarding ISO Operational Control of facilities transferred to it. As discussed below, once one gets beyond the hyperbole, it is apparent that SWP has demonstrated no basis, let alone extraordinary circumstances, for reopening the record.

II. ARGUMENT

11. The Commission's well established standard for considering a motion to reopen is "whether or not the movant has demonstrated the existence

of *extraordinary circumstances* that outweigh the need for finality in the administrative process.” *E.g., United States Department of Energy-Western Area Power Administration, Colorado River Storage Project Management Center, et al.*, 100 FERC ¶ 61,194 at P 17 (2002); *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, 94 FERC ¶ 61,218 at 61,801 (2001). The Commission explained this precedent:

To persuade the Commission to exercise its discretion to reopen the record, the requesting party must demonstrate the existence of ‘extraordinary circumstances.’ The party must demonstrate a change in circumstances that is more than just material—it must be a change that goes to the very heart of the case. This policy against reopening the record except in extraordinary circumstances is based on the need for finality in the administrative process.³

12. As shown below, SWP has demonstrated no change in law and actions by the ISO that would justify reopening the record in this proceeding. The abject failure of SWP’s showing is best seen by examining separately the two issues on which it proffers new evidence: whether the ISO Tariff should provide guidance governing the types of facilities to be transferred to the ISO’s Operational Control and whether the ISO Tariff should include criteria governing the types of facilities that may be included in Participating TO’s Transmission Revenue Requirement.

³ *East Texas Electric Cooperative* at 61,800 (citing *CMS Midland, Inc., et al.*, 56 FERC ¶ 61,177, at 61,624, *reh’g denied*, 56 FERC ¶ 61,361 (1991). See also, *e.g., Southern Company Services, Inc.*, 43 FERC ¶ 61,003, at 61,024, *reh’g denied*, 43 FERC ¶ 61,394 (1988), *aff’d mem. sub nom. Gulf States Utilities Co. v. FERC*, 886 F.2d 442 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); *NE Hub Partners, L.P.*, 90 FERC ¶ 61,142, at 61,456 (2000); *Transwestern Pipeline Co.*, Opinion No. 238, 32 FERC ¶ 61,009 (1985), *reh’g denied*, Opinion No. 238-A, 36 FERC ¶ 61,175, at 61,453 (1986)).

A. Criteria for Operational Control

13. As noted in the Partial I.D., the Presiding Judge's reasoning regarding the standard for facilities to be turned over to the ISO is set forth in part in her ruling at oral argument. Partial I.D. at P 16. In that ruling, the Presiding Judge explained the relevance of Opinion No. 466 with regard to the issue of whether the ISO Tariff should set forth criteria "to guide the ISO's determination of which facilities are appropriate for ISO control":

The second issue with respect to clarity as to what facilities would be transferred to the ISO operational control is a bit more problematic but I think that opinion no. 466 provides guidance on that as well.

It makes relatively short shrift of a primary use test and gets straight to the sole function test. If its not a sole function, it's in. This is how I'm reading opinion 466. I don't see any requirement by the Commission that the guidelines for determining which facilities are to be included for purposes of ISO operational control being included in the tariff.

Tr. 241:25 – 242:10. (October 7, 2003).

14. The Presiding Judge concluded in the Partial I.D.,

[F]ailure [to include the criteria in the tariff] does not render the TCA language any less clear or per se unjust and unreasonable. With the additional guidance provided by the recent Commission decision in Opinion No. 466, the TCA was sufficient... to provide the parties with notice of the applicable ISO standard regarding eh criteria and policy which guide the ISO's determinations of facilities over which it will exercise operational control. . . .

Partial I.D. at P 16.

15. Nothing in the Commission's partial reversal of Opinion No. 466 in Opinion 466-A alters the validity of those conclusions. Rather, the Commission noted that it had previously stated *in proceedings regarding the transfer of*

facilities to ISO Control that issue regarding rate treatment would be addressed in separate dockets. Opinion No. 466-A at P 10. It then reversed its previous conclusion that all facilities under the ISO's Operational Control would automatically be in rate base. *Id.* Fundamental to Opinion No. 466-A was the conclusion that the transfer of operational control and rate treatment were two different issues,⁴ and Opinion No. 466-A reversed Opinion No. 466 only as to the latter. Opinion No. 466-A cannot therefore provide any basis to reopen the record on the issue of whether the ISO Tariff should set forth criteria "to guide the ISO's determination of which facilities are appropriate for ISO control."

16. SWP has also failed to demonstrate any reasonable relationship between the discovery and evidence it cites from Docket Nos. EL00-105-000 and EL03-15-000, et al., and the need for criteria concerning the transfer of facilities to the ISO's operational control. Not only does nothing in the evidence cited suggest that the facilities in question are not appropriately under the ISO's Operational Control, but the evidence does not even address that issue. Indeed, the Commission approved the transfer of each of the facilities to the ISO's Operational Control. See *California Indep. Sys. Oper. Corp.*, 94 FERC ¶ 62,016 (2001); *California Indep. Sys. Oper. Corp.* 102 FERC ¶ 61,058 (2003), *reh'g denied*, 107 FERC ¶ 61,150 (2004).

17. In particular, the evidence regarding the ISO's scheduling and modeling of the transmission facilities and rights in question (Attachments 2-5, 7-

⁴ The vitality of this distinction was reinforced by the Commission's decision denying rehearing in *California Indep. Sys. Oper. Corp.*, 107 FERC ¶ 61,150, in which the Commission rejected SWP's challenges to the transfer of operational control of the facilities of the Cities of

11) pertains solely to the manner in which the ISO exercised its Operational Control over the facilities transferred to it, not to the issue of whether there were any impediments to the ISO's acceptance of the facilities. To the extent that SWP is asserting that the potential for restrictions on the use of facilities and Entitlements due to ISO's modeling limitations should preclude the transfer of operational control, the Commission has already considered and rejected these contentions as being irrelevant to the transfer of Operational Control. 102 FERC at P 15; *see also California Indep. Sys. Oper. Corp.*, 102 FERC ¶ 61,061 at P 27 (2003).

18. The fact that the Los Angeles Department of Water and Power ("LADWP") remains the operating agent for certain lines on which Entitlements have been placed under the ISO's Operational Control (Attachment 6) is similarly irrelevant. As described in Attachment No. 5, the ISO exercises its Operational Control by scheduling transactions for Scheduling Coordinators on the Entitlements and by coordinating with LADWP, the Control Area Operator and operating agent of the lines, to ensure that the schedules are implemented to the maximum feasible degree. It is naïve to suggest that the holder of an Entitlement can dictate ultimate schedules and outages to the majority owner of a line and to the Control Area Operator in another Control Area. The Commission has specifically authorized the ISO to accept Operational Control of Entitlements and

Azusa, Banning, Anaheim, and Riverside, noting that rate issues were being litigated in a different docket.

facilities outside the ISO Control Area. *Pacific Gas and Elec. Co.*, 81 FERC ¶ 61,122 at 61,568 (1997). Thus, SWP's arguments are merely a collateral attack on the previous Commission's orders.

19. In sum, SWP has not provided any evidence or arguments that even remotely approach the standard for reopening the record to receive evidence on the issue of whether the ISO Tariff should set forth criteria "to guide the ISO's determination of which facilities are appropriate for ISO control."

B. Inclusion in Rates

20. In ruling on the issue of whether the ISO Tariff should include specific criteria regarding the inclusion of the facilities in a Participating TO's Transmission Revenue Requirement, the Presiding Judge did rely upon that portion of Opinion No. 466 that was reversed by Opinion No. 466-A, *i.e.*, the proposition that everything under the ISO's Operational Control should be included in rates. Nonetheless, the Commission's partial reversal of Opinion No. 466-A provides no basis to reopen the record because the reversal does not affect the fact that SWP has failed to make a *prima facie* case that failure of the ISO Tariff to include specific criteria regarding the inclusion of the facilities in a Participating TO's Transmission Revenue Requirement rendered ISO's proposal unjust or unreasonable.⁵

21. As the Partial I.D. concluded, there were no material facts in dispute on this issue, Partial I.D. at 15, and, as discussed further below, there

⁵ It is worth noting that the criteria advocated by SWP for determining Operational Control and inclusion in rates – including the primary use test – were firmly rejected by the Commission in Opinion No. 466-A.

remain none. The only “facts” are the language of the ISO Tariff. The ISO definition of Transmission Revenue Requirement provides:

The TRR is the total annual *authorized* revenue requirements associated with transmission facilities and Entitlements turned over to the Operational Control of the ISO by a Participating TO. The costs of any transmission facility turned over to the Operational Control of the ISO shall be fully included in the Participating TO's TRR.

(Emphasis added.) In Opinion No. 466-A , the Commission restated how it would determine the authorized revenue requirement: in *utility-specific* rate proceedings and according to established *Commission* criteria. Opinion No. 466-A at PP 3, 12, 20-22. The Commission has reiterated this policy in the context of approving new Participating TOs. See *California Indep. Sys. Oper. Corp.* 102 FERC ¶ 61,058 (2003), *reh'g denied*, 107 FERC ¶ 61,150 (2004). Opinion No. 466-A and these subsequent decisions leave no room for the ISO Tariff to set forth the criteria for the inclusion of facilities in rates.

22. The discovery and evidence SWP cites from Docket Nos. EL00-105-000 and EL03-15-000, et al., concerns precisely the type of utility-specific rate cases to which the Commission referred in Opinion No. 466-A. None of this evidence should have any bearing on the cost recovery of the Participating TOs in question. Those issues will be determined in those proceedings. In light of the Commission's clear direction in Opinion No. 466-A that rate matters are to be decided in utility-specific proceedings, the evidence cited by SWP simply is not relevant to the ISO's transmission Access Charge proceeding.

23. Although the ISO relies herein on Commission precedent as set forth in Opinion No. 466-A, the ISO believes that there should not be any

practical consequence resulting from the partial reversal of Opinion No. 466. The Commission's policy set forth in Opinion No. 466-A is that rolled-in pricing for high voltage facilities that constitute the integrated transmission grid is appropriate. *Id.* at P 22. Under the TCA, the following types of lines are excluded from a Participating TOs transmission network:

- i. directly assignable radial lines and associated facilities interconnecting generation (other than those facilities which may be identified from time to time interconnecting ISO Controlled Grid Critical Protective Systems or Generators contracted to provide Black Start or Voltage Support) and
- ii. lines and associated facilities classified as "local distribution" facilities in accordance with FERC's applicable technical and functional test and other facilities excluded consistent with FERC established criteria for determining facilities subject to ISO Operational Control.

In addition, the ISO can refuse to accept facilities that cannot be integrated into the ISO Controlled Grid. Thus, the TCA criteria for the transfer of Operational Control are consistent with and reflect the Commission's criteria for the inclusion of facilities in rates, and issues regarding network integration properly can be resolved when the ISO submits an amendment to the TCA to provide for a new Participating TO. As a result, only those facilities that meet the Commission's criteria for inclusion in rates should be under ISO Operational Control. In other words, as a practical matter, the same result should be reached under both Opinion No. 466 and Opinion No. 466-A: because only integrated network facilities are accepted under the ISO's Operational Control, a utility-specific examination will result in the inclusion in rates of all facilities under the ISO's Operational Control. The ISO believes, however, that the approach embodied in

Opinion No. 466, – i.e., a recognition that facilities under the ISO’s Operational Control must be shown to be integrated network facilities – is more consistent with the approach contemplated in and the intent of the ISO Tariff and better encourages the participation of new Participating TOs. Of course, if the Commission were to accept this approach, SWP’s evidence would still be irrelevant.

III. CONCLUSION

24. For the above stated reasons, the ISO requests that the Commission deny SWP’s motion.

Respectfully submitted,

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Dated: August 11, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon all parties on the official service list compiled by the Secretary in the above-captioned proceeding, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Folsom, California this 11th day of August, 2004.

 /s/ Anthony Ivancovich
Anthony Ivancovich