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June 7, 2002

The Honorable Bruce Birchman
Presiding Administrative Law Judge
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 11F-31
Washington, D.C. 20426

Re: San Diego Gas & Electric Co., et al.
Docket Nos. EL00-95-045, et al.

Dear Judge Birchman:

Enclosed is a copy of the Answer of California Independent System Operator Corporation to Motion of TransAlta Energy Marketing (California) Inc. and TransAlta Energy Marketing (US) Inc. for Leave to Take Interlocutory Appeal.

Yours truly,

Michael Kunselman
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Counsel for the California
Independent System Operator Corporation

Enclosures

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June 7, 2002

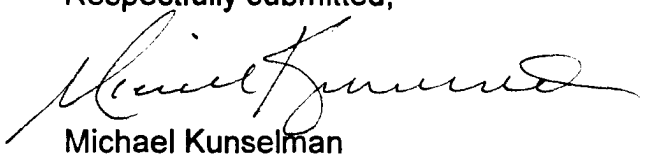
The Honorable Magalie Ramon Salas
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: San Diego Gas & Electric Co., et al.
Docket Nos. EL00-95-045, et al.

Dear Secretary Boergers:

Enclosed is an original and fourteen copies of the Answer of California Independent System Operator Corporation to Motion of TransAlta Energy Marketing (California) Inc. and TransAlta Energy Marketing (US) Inc. for Leave to Take Interlocutory Appeal. A copy has been provided to the Presiding Judge via email. 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,



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Enclosures

cc: Service List
Honorable Bruce Birchman

THE 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 Services Into Markets Operated by the California Independent System Operator 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**

ANSWER OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION TO MOTION OF TRANSALTA ENERGY MARKETING (CALIFORNIA) INC. AND TRANSALTA ENERGY MARKETING (US) INC. FOR LEAVE TO TAKE INTERLOCUTORY APPEAL

To: Honorable Bruce L Birchman
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, and the Presiding Judge's "Order Concerning Answers to Motion" issued on June 5, 2002, the California Independent System Operator Corporation ("ISO") hereby answers the Motion of TransAlta Energy Marketing (California) Inc. and TransAlta Energy Marketing (US) Inc. (collectively "TransAlta") for Leave to Take Interlocutory Appeal ("Motion for Leave"), filed on June 5, 2002. For the reasons set forth below, the Presiding Judge should deny TransAlta's Motion for Leave.

I. INTRODUCTION AND BACKGROUND

On May 7, 2002, TransAlta served the ISO with its "First Request for Admissions and First Set of Data Requests." Therein, TransAlta requested that the ISO admit that certain phone conversations between ISO and TransAlta personnel "are consistent with the subject of the conversations between ISO and TransAlta personnel on each of the hours and dates indicated therein."[1] On May 9, 2002, the ISO objected to this request on the ground that the request sought "information not relevant to the claim or defense of any party," and was not "reasonably calculated to lead to the discovery of admissible evidence."[2] TransAlta filed a motion to compel on May 17, 2002. At the Discovery Conference on May 21, 2002, the Presiding Judge, after affording TransAlta's counsel numerous opportunities to explain how the request was relevant to the issues before the Presiding Judge, denied TransAlta's motion to compel, ruling that the admission sought by TransAlta was neither relevant "nor reasonably calculated to lead to evidence that might be germane to disposition of the issues set for hearing." Tr. at 3453.

[1] In its First Request for Admissions and First Set of Data Requests, TransAlta propounded other discovery requests to the ISO, to which the ISO objected on similar grounds. However, TransAlta's motion to compel, and therefore the instant motion, was limited to the one request for admission described herein.

[2] The ISO also objected on the ground that the request was "vague, ambiguous, and overbroad, especially with respect to the phrase 'consistent with the subject of the conversations,'" and unduly burdensome.

II. ARGUMENT

TransAlta contends that prompt Commission review and reversal of the Presiding Judge's ruling is necessary because "(1) TransAlta's shareholders are at risk of bearing costs that were, in fact, caused by the ISO, and (2) by being denied discovery needed to make its case to the Commission, TransAlta has been denied due process." Motion for Leave at 4. TransAlta also argues that the Presiding Judge erred in ruling that the admission sought by TransAlta is not relevant to the issues set for hearing in this proceeding. These arguments are without merit.

In its July 25 Order,[3] the Commission determined that unjust and unreasonable rates had been charged by sellers in the California wholesale electricity markets, and ordered refunds applicable to *all spot market transactions* conducted through the ISO and California Power Exchange during the period October 2, 2000 through June 20, 2001 (the "refund period"), with discrete exceptions.[4] For purposes of calculating the refunds, the Commission set forth a specific methodology, and initiated an evidentiary hearing explicitly limited to the taking of evidence to enable the Presiding Judge to make proposed findings of fact concerning the implementation of that methodology and the results.

The fatal flaw in TransAlta's argument is that it ignores the distinction between the limited scope of the evidentiary hearing before the Presiding Judge,

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

[4] For example, the Commission exempted from refund liability transactions conducted pursuant to the Secretary of Energy's emergency orders issued under 202(c) of the Federal Power Act. July 25 Order at 61,516.

and the broader proceedings before the Commission in these dockets. As TransAlta notes in its motion, the Commission, in the July 25 Order, instructed the Presiding Judge "not to entertain any arguments relating to the methodology *or the scope of the transactions subject to refund.*" Motion for Leave at 2 (emphasis added). However, it is abundantly clear that TransAlta seeks discovery from the ISO precisely in order to frame some type of argument that certain transactions should not be within "the scope of the transactions subject to refund." In its motion, TransAlta claims that it does not "owe the ISO refunds" with respect to transactions that took place during certain hours because the ISO somehow "caused" TransAlta to incur the costs associated with those transactions. Motion for Leave at 6. The Commission's determination of "the scope of the transactions subject to refund," as set forth in the July 25, December 19[5], and May 15[6] Orders, does not consider in any way which entities might have "caused" costs associated with transactions subject to refund liability. TransAlta is clearly – by its own admission in its Motion for Leave – seeking discovery in order to frame some argument aimed at convincing the Commission to change its previous determination of "the scope of the transactions subject to refund." But the Commission explicitly directed the Presiding Judge not to entertain any arguments addressed to which transactions are subject to refund.

TransAlta also contends that the Commission, in this proceeding, is attempting to determine the "just and reasonable rate" for each hour of the refund

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[5] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, et al., 97 FERC ¶ 61,275 (2001).

[6] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, et al., 99 FERC ¶ 61, 160 (2002).

period. Motion for Leave at 7. The Commission has, in fact, reached a conclusion as to a methodology that it believes does just that, and it established the current evidentiary hearing before the Presiding Judge for the sole purpose of implementing that methodology. Thus, while TransAlta is presumably free to present its theory to the Commission in the larger proceeding, it is simply not relevant to the far more limited set of issues set for hearing before the Presiding Judge. TransAlta's contention that "the Commission established this evidentiary hearing in order to adduce evidence as to what happened during each hour of the refund period and what should have happened during each hour of the refund period,"[7] is a gross misstatement. Nowhere has the Commission so much as hinted at an intention to grant such a broad mandate to the Presiding Judge. To the contrary, the Commission explicitly confined the evidentiary hearing to "the collection of data needed to apply the refund methodology prescribed [in the July 25 Order]." July 25 Order at 61,520. As noted above, the Commission's refund methodology did not contain any component relating to "causation" of costs. TransAlta's discovery is therefore irrelevant to the application of the refund methodology established by the Commission, and consequently, irrelevant to any issues before the Presiding Judge in the current evidentiary proceeding. The Presiding Judge's denial of the Motion to Compel was patently correct.

TransAlta itself appears to recognize that the arguments it seeks to advance through the requested discovery are beyond the scope of the evidentiary proceeding that the Commission initiated before the Presiding Judge. TransAlta states that it

[7] Motion for Leave at 8.

seeks admissions from the ISO "in order to place *before the Commission*" evidence that it believes will support its claims. Motion for Leave at 8 (emphasis added). Even more telling is TransAlta's statement that it sought the admissions at issue for purposes of demonstrating that "the *Commission should make an exception to its ruling* that all losses in the ISO and PX markets for the relevant time period be netted against all gains." Motion to Compel at 4.[8]

The Presiding Judge's denial of TransAlta's motion to compel discovery will not result in any irreparable harm to Transalta, and does not constitute a denial of due process. TransAlta, like other parties in these dockets, has had a full and fair opportunity to present argument (and supporting documentation) to the Commission that issues of "causation" should be considered in determining which transactions are subject to refund, to urge the Commission to include additional issues (including "causation" issues) in the evidentiary proceeding, and to seek rehearing and appeal of any decisions that it felt were in error.[9] Thus, TransAlta's contention, coming at this stage, that the Commission cannot ignore principles of cost-causation in determining just and reasonable rates, is unmoving, since TransAlta has had adequate avenues through which to raise this argument.[10] Because TransAlta has

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[8] That motion is included with this answer as Attachment A.

[9] TransAlta did, in fact, seek rehearing of the Commission's December 19 Order. *See* Request of TransAlta Energy Marketing (California) for Rehearing and Reconsideration, Docket Nos. EL00-95-053, et al. (filed on January 18, 2002). Therein, TransAlta presented its view that it had supplied energy to the ISO at the ISO's encouragement and request. *Id.* at 7.

[10] We need not address at any length the substance of TransAlta's arguments concerning cost causation. We do note that the precedent cited by TransAlta is irrelevant even to the merits of the argument as to whether it should be liable for refunds; that precedent addresses the method of allocating refunds among a company's customers, not whether the refunds themselves were justified because rates charged were unjust and unreasonable. We also note that TransAlta's factual argument that the ISO "caused" the rates now the subject of potential refund is completely spurious. TransAlta argues, in effect, that the ISO's desperate requests for help "caused" whatever rates

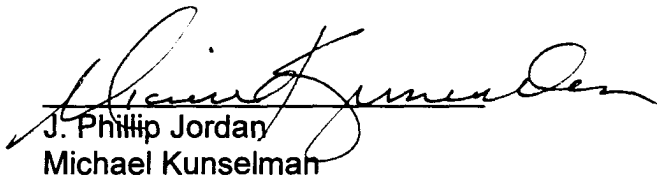
had, and continues to have, sufficient recourse through the Commission, its argument that the Presiding Judge's decision, which simply adheres to the mandate set forth by the Commission, will cause it "irreperable harm," and constitutes a denial of due process, is completely baseless. Moreover, the mere fact that TransAlta may be at risk of bearing certain costs prior to a final decision in this proceeding does not rise to the level of "extraordinary circumstances" that require immediate Commission review of the Presiding Judge's ruling in order to prevent "irreperable harm." 18 C.F.R. § 385.715(a). TransAlta has made no showing, or even a bare allegation, as to how such costs would cause it irreperable harm, such that it cannot await the Presiding Judge's findings of fact to make its appeal.

TransAlta demanded.

III. CONCLUSION

For the foregoing reasons, the Presiding Judge should deny TransAlta's Motion for Leave.

Respectfully submitted,



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Dated: June 7, 2002

CERTIFICATE OF SERVICE

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

Dated at Washington, D.C., this 7th day of June, 2002.

Michael Kunselman

ATTACHMENT A

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

**MOTION OF TRANSALTA ENERGY MARKETING INC.
TO COMPEL ADMISSIONS FROM THE
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION**

To: The Honorable Bruce L. Birchman
Presiding Administrative Law Judge

I. Introduction

Pursuant to Rule 410(b) of the Commission's Rules of Practice and Procedure,[1] TransAlta Energy Marketing Inc. ("TransAlta") hereby moves to compel admissions to its First Request for Admissions and First Set of Data Requests ("Request for Admissions and Data Requests") to the California Independent System Operator Corporation ("ISO").

On May 7, 2002, TransAlta served its Request for Admissions and Data Requests on counsel for the ISO by hand delivery, first class mail, and electronically via the

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[1] 18 C.F.R § 385.410(b) (2001).

ListServe. The ISO objected to the Request for Admissions and Data Requests on May 9, 2002.

TransAlta, in order to limit the issues that must be presented, agrees to withdraw its Data Requests and Request for Admission number 2, but respectfully requests that the Presiding Judge compel the ISO to admit those items contained in TransAlta's Request for Admissions number 1. This admission is directly relevant to Issues 2 and 3, and essential to TransAlta's ability to prepare its testimony. Any delay by the ISO in responding to this Request for Admissions will substantially prejudice the due process rights of TransAlta. Thus, since its testimony is due by July 3, 2002, TransAlta requests that this motion be considered on an expedited basis.

II. Summary of Discovery Sought

The relevant portions of TransAlta's Request for Admissions and Data Requests are attached to this motion as Exhibit 1. To summarize briefly, TransAlta wants the ISO to admit that the transcribed conversations are consistent with the subject of the conversations between the ISO and TransAlta personnel.

III. TransAlta Has Attempted to Resolve These Objections Through Direct Communication With the ISO

TransAlta has attempted to resolve the ISO's concerns through communications with counsel for the ISO. As discussed above, in an effort to reduce the burden of responding by the ISO, and to limit the issues on which it must request Your Honor's assistance, TransAlta is willing to withdraw its Data Requests and its Request for

Admission number 2. TransAlta has also offered to provide the ISO with its own copies of electronic recordings of the transcribed conversations at issue so that the ISO will not have to expend its own resources to locate these records.

IV. The ISO Has No Basis for Refusing to Provide the Admissions Sought

As demonstrated in Exhibit 2, the ISO has two objections to TransAlta's Request for Admission number 1. The ISO first objects to the request "on the grounds that it is vague, ambiguous, and overbroad, especially with respect to the phrase 'consistent with the subject of the conversations' and is unduly burdensome."

TransAlta has been in contact with counsel for the ISO in order to clarify the Request for Admissions. The ISO's counsel indicated that he understood what TransAlta was requesting. Thus, TransAlta concludes that this statement signifies that the ISO's objection on this basis has been withdrawn.

As to the ISO's objection based on the Request for Admissions being overbroad and especially burdensome, as stated in the original Request for Admissions and as reiterated in a telephone call with counsel to the ISO, TransAlta is willing to provide the ISO with its electronic recordings of the conversations. These would be provided as wav files, which are clearly labeled and quite short in length. We have taken the time and effort to transcribe these recordings and if the ISO disputes their accuracy, it can check them against its own records.

The ISO also objects to the Request for Admissions to the extent it seeks "information not relevant to the claim or defense of any party, and is not reasonably calculated to lead to the discovery of admissible evidence." However, this information is very relevant to TransAlta's case. TransAlta requires a response to its Request for Admissions number 1 to demonstrate that TransAlta was engaging in certain transactions at the prompting and, in certain instances, the specific request of the ISO. Furthermore, TransAlta requires this response to demonstrate that the Commission should make an exception to its ruling that all losses in the ISO and PX markets for the relevant time period be netted against all gains. Specifically, the Commission should make an exception when parties such as TransAlta only acquired energy because the ISO prompted it to do so. In addition, TransAlta requires this admission to develop evidence which demonstrates that it was being discriminated against vis a vis other sellers of energy in the market.

Rule 402(a) of the Commission's Rules of Practice and Procedure provides that a party may "obtain discovery of any matter, not privileged, that is relevant to the subject matter of the pending proceeding . . . It is not ground for objection that the information sought will not be inadmissible in the Commission proceeding if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[2] The

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[2] 18 C.F.R. § 385.402(a) (2001).

Commission has previously held that the rule is based on the Federal Rules of Civil Procedure, and is intended to be broad in scope.[3]

The Commission has also held that the party seeking discovery has the initial burden of demonstrating the relevance of the requested information to the proceeding, or that the requested information will lead to the production of relevant information.[4] The burden of proof then shifts to the objecting party to demonstrate that the request should be denied or limited.[5] TransAlta has demonstrated that this information is necessary to establish a pattern of solicitation for these transactions. This information is relevant and essential for TransAlta to develop its position. The ISO has not in fact refuted this proposition and thus has not met its burden of demonstrating that the request should be denied or limited.

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3 *All American Pipeline Co.*, 70 FERC ¶ 61,210 at 61,658 (1995) (citing, *Rules of Discovery for Trial Type Proceedings*, FERC Stats. and Regs., Regulations Preambles 1986-1990 ¶ 30,731 (1987), 50 Fed. Reg. 6957 (Mar. 6, 1987)).

4 *Id.* (citing, *Mojave Pipeline Co.*, 38 FERC ¶ 61,249 at 61,842 (1987)).

5 *Id.*

V. Conclusion

The ISO should be compelled to respond to TransAlta's Request for Admissions number 1, and TransAlta should be awarded its costs and fees expended on this motion.

Respectfully submitted,

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May 17, 2002