

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

Reliant Energy Power Generation, Inc.)	
and Reliant Energy Services, Inc.,)	
)	
Complainants,)	
)	Docket No. EL01-57-000
v.)	
)	
California Independent System)	
Operator Corporation)	
)	
Respondents)	

**ANSWER OF
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION
TO COMPLAINT AND REQUEST FOR FAST TRACK PROCESSING
OF RELIANT ENERGY POWER GENERATION, INC.**

Pursuant to Rule 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213, the California Independent System Operator Corporation (“ISO”)¹ submits its Answer to the Complaint and Request for Fast Track Processing of Reliant Energy Power Generation, Inc., and Reliant Energy Services, Inc., (together, “Reliant”) in the above-identified docket. Reliant’s Complaint challenges certain aspects of the ISO’s exercise of its authority to take action to avoid curtailment of firm Load in the ISO Control Area. Inasmuch as such actions are necessary to the fulfillment of the ISO’s responsibility as control area operator and are consistent with the ISO Tariff, Commission policy, and federal law, the Commission should summarily dismiss Reliant’s Complaint.

¹ Capitalized terms not otherwise defined are used with the meaning given them in Appendix A, Master Definitions Supplement, of the ISO Tariff.

I. INTRODUCTION AND SUMMARY

As the Commission is more than well aware, over the past six months the energy crisis in California has become particularly severe. While the State, the ISO, and various Market Participants work diligently to find solutions to the crisis, it is the ISO's responsibility to maintain reliable service to the California public. Because of an unfortunate convergence of factors – planned and unplanned outages, weather conditions, and the reluctance of certain Generators to bid into the ISO's markets due to the financial status of Pacific Gas and Electric Company ("PG&E") and Southern California Edison Company ("Edison") – the ISO has recently faced an unrelenting shortage of available Generation and has been forced to declare System Emergencies almost daily. In order to avoid the curtailment of firm Load, the ISO has been forced to rely significantly on its authority to issue emergency dispatch orders under Sections 5.1.3 and 5.6.1 of the ISO Tariff.

Although Reliant's Complaint appears to alternate between suggesting that the ISO is acting beyond its authority and that the ISO's authority should be restricted, as relief it requests that the Commission prescribe amendments to the ISO Tariff and to Reliant's Participating Generator Agreement with the ISO that would limit the ISO's authority. As shown below, such amendments cannot be justified.

When stripped of its rhetoric and hyperbole, Reliant's Complaint challenges two aspects of the ISO's exercise of its authority under current conditions: the ISO's adjustment of schedules for the export of Energy from the

ISO Controlled Grid² and the ISO's requirement that Generators adjust outage schedules in order to minimize the lost capacity due to planned outages. Reliant contends that such actions constitute an abuse of the ISO's emergency authority in violation of law and Commission policy.

To the contrary, the ISO's exercise of these aspects of its emergency authority is appropriate and required by regional reliability criteria, with which the ISO must comply according to the ISO Tariff, as endorsed by the Commission, California law and its responsibility as control area operator. The ISO's failure to take these actions would occasion curtailments of firm Load in California, with attendant dangers to the public health and safety. Under such circumstances, the short-term economic consequences cited by Reliant cannot take precedence, particularly in light of the Commission's April 6, 2001, order in Docket No. ER01-889, requiring that a credit-worthy guarantor stand behind the ISO's out-of-market purchases on behalf of Scheduling Coordinators.³ Contrary to Reliant's claims, neither Commission policy, the Federal Power Act, nor the Constitution compels a different result.

II. COMMUNICATIONS

Please address communications concerning this filing to the following persons:

² It should be noted that the ISO's authority to curtail exports in the event of emergencies has already been upheld by the Commission. Reliant, together with other Generators, previously filed a complaint challenging the ISO's authority to reschedule exports in the event of a System Emergency. In *San Diego Gas & Electric Company, et al., v. Sellers of Energy and Ancillary Services into Markets of the California Independent System Operator and the California Power Exchange, et al.*, 93 FERC ¶ 61,294 at 62,019-20 (2000) ("December 15th Order"), the Commission explicitly affirmed the ISO's authority.

³ In the case of an out-of-market call, Reliant will be paid under Section 11.2.4.2 of the ISO Tariff.

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III. ANSWER

Reliant asserts variously that the actions taken by the ISO to ensure adequate Generation to serve Load are an impermissible response to shortages caused by political decisions; benefit California at the expense of the stability of regional markets; hinder Reliant's ability to secure long term contracts; hurt Reliant and other Generators; exceed the authority of the Commission and the Department of Energy; violate the Commission's standards for nondiscriminatory transmission service; and run afoul of the Commerce Clause of the Constitution.

The fundamental flaw in Reliant's arguments is its failure entirely to address the alternative to the ISO's use of its emergency authority in circumstances of insufficient Generation – the curtailment of firm Load in California. The ISO's primary mission is the maintenance of reliability on the ISO Controlled Grid. California law requires the ISO to operate the ISO Controlled

Grid reliably in a manner consistent with Western Systems Coordinating Council (“WSCC”) criteria. Cal. Pub. Util. § 345. As the Commission has noted, operation in accordance with these criteria is required by, and satisfies, the Commission’s ISO Principle No. 4. *Pacific Gas & Electric Co., et al.*, 81 FERC ¶ 61,122 at 61, 456-57 (1997). Thus, the ISO Tariff specifically adopts WSCC reliability criteria.

The WSCC Minimum Operating Reliability Criteria (“MORC”) state explicitly, “Continuity of service to load is the *primary* objective” of the criteria. MORC at 8. The rationale behind this principle is obvious. Curtailment of firm Load threatens the public health, safety, and welfare, disrupting essential services (even those exempt from such curtailment will experience collateral damage from surrounding disruptions),⁴ traffic, businesses, and personal lives. The loss of traffic control can easily cause deaths and serious injury.⁵ Loss of power can severely threaten livestock and crops.⁶ Important research can be disrupted.⁷ Most of the damage occasioned by even a temporary curtailment of electricity supply is not even documented: no one records the number of ambulances delayed by loss of traffic signals or of persons injured by the abrupt interruption of construction equipment, elevators, and the like, or the impact on the other innumerable activities that are dependent on electrical service.

⁴ See, e.g. Los Angeles Times, March 21, 2001, regarding persons who depend on at-home life-support.

⁵ See, e.g., “Traffic Light Outages Causing Accidents, Headaches” Associated Press, March 21, 2001; Orange Co. Register, March 20, 2001; The Fresno Bee, December 8, 1998.

⁶ See, e.g., The Des Moines Register, December 24, 2000; Dow Jones Industrial News, April 4, 2001.

⁷ See, e.g., NPR Morning Edition, March 30, 2001.

Under such circumstances, the short-term economic impact on Generators of the ISO's exercise of its emergency authority cannot take precedence over the continuity of service to Load. This is particularly so when Generators, such as Reliant, cannot even demonstrate that the ISO's emergency authority has significantly affected their profitability. Although Reliant points to its expenses and the overdue payments from California's investor-owned Utility Distribution Companies ("UDCs"), it cannot make the case, even after the filing by PG&E for Chapter 11 bankruptcy protection, that it will ultimately be deprived of just and reasonable compensation for its sales. Apart from the fact that PG&E publicly has stated its intention to pay all debts in full,⁸ DWR will be standing behind most, if not all, of the ISO's emergency purchases.⁹ On a going-forward basis, to the extent that PG&E incurs expenses on its own behalf, the bankruptcy filing will virtually ensure full recovery.¹⁰ Moreover, California State authorities and this Commission are working tirelessly to provide market conditions under which the UDCs will be able to pay their debtors.¹¹ Further, the Commission's April 6, 2001, order in Docket No. ER01-889 requires that any real-time Energy purchases, including out-of-market calls, on behalf of a Scheduling Coordinator

⁸ See, e.g., Energy Daily, April 9, 2001.

⁹ See Declaration of John Pirog, submitted this day in Docket No. ER01-889-002.

¹⁰ Under the Bankruptcy Code, obligations incurred by a debtor-in-possession for goods delivered and services provided following the filing of its bankruptcy petition are entitled to priority in payment as administrative claims. Debtors-in-possession are required to pay administrative claims in full as a condition of reorganizing under Chapter 11. PG&E has represented to both its Bankruptcy Court and the public that it intends to pay its administrative claims timely and in full, and that it has the funds available to do so.

¹¹ On April 9, 2001, the Governor of California announced that the State had reached agreement with Edison on a plan to restore that company's financial viability. As the Commission is aware, analysis by the ISO's Department of Market Analysis has shown that California Generators received monopoly rents from the exercise of market power from May 2000 through March 2001. To the extent that the Commission or the Courts require the Generators to refund these amounts or reduce the amounts owed it, Reliant's compensation will of course be reduced accordingly.

who is not credit-worthy be backed by a credit-worthy entity. Reliant will therefore be paid for such calls under Section 11.2.4.2 of the ISO Tariff, which the Commission has approved as just and reasonable.

Neither has Reliant shown that, on an overall basis, Reliant has not earned a just and reasonable return on its investments. Reliant Energy, Inc., recently reported final quarter 2000 earnings of \$73 million, the same as the last quarter of 1999, *plus reserves of \$39 million in receivables from California sales*. Moreover, the market is certainly unconcerned about Reliant's economic future. From the beginning of the year to date, while the Dow Jones Industrial Average has fallen almost 10%, the price of the common stock of Reliant Energy, Inc., has increased almost 10%. As recently as March 23, 2001, Reliant Energy, Inc., was able to increase the price for the Initial Public Offering of Reliant Resources, Inc., which will comprise its unregulated Energy business, from \$15.50 - \$17.50 to \$25.¹²

As the Commission is aware, progress is being made toward resolving the concerns that prompted Reliant's Complaint. The PG&E bankruptcy will ameliorate conditions on a going-forward basis. The Governor and Edison have reached agreement on a plan to restore Edison's financial health. The California Department of Water Resources is providing financial backing for a significant portion of the power necessary to serve the Load that cannot be served by the UDC's own resources, and has entered a significant number of forward contracts. The California Public Utility Commission has approved two sets of rate increases, totaling over 40%, and imposed financial incentives for demand

reduction.¹³ While these measures, and others, are implemented, the Commission should not allow Reliant's insubstantial financial concerns to justify debilitating limitations of the ISO's exercise of its authority, under the ISO Tariff, to take action to ensure the ISO's ability to discharge reliability responsibilities imposed by the Commission itself.

A. Insufficient Generation Justifies the ISO's Emergency Orders Regardless of Its Cause or Duration

Reliant recites a litany of "political decisions" that it asserts are, in some degree, responsible for the current financial plight of the UDCs and the generation insufficiencies faced by California, and asserts that generation insufficiencies so caused cannot provide a basis for emergency action by the ISO. Not surprisingly, Reliant fails to mention as a cause of the UDC's financial woes the extraordinary prices that Generators have commanded in the ISO and California Power Exchange markets. This omission is particularly telling in light of the evidence, which the ISO recently submitted to the Commission in Docket Nos. EL00-95 and ER99-1722, that Generators and importers have collected over \$6 billion in monopoly rents since May 2000 through the exercise of market power. Regardless of who is responsible for current conditions, however, that question is irrelevant to the ISO's exercise of emergency authority.

Although Reliant asserts that the definition of "System Emergency" excludes repeated conditions of insufficient Generation from the potential threats

¹² Reuters, March 23, 2001.

¹³ Interim Opinion, Application of Southern California Edison Company for Authority to Institute Rate Stabilization Plan with a Rate Increase and End of the Rate Freeze Tariff, et al., Application 00-11-038, et al., California Public Utilities Commission (March 27, 2001); San Francisco Chronicle, March 27, 2001.

to operating reliability that constitute a System Emergency, its effort is unsupportable. As discussed above, the ISO's responsibility for maintaining System Reliability is guided by the WSCC Reliability Criteria. Under the MORC, reliability requires the balancing of Generation and Demand, as well as the maintenance of sufficient Generation reserves to meet, among other matters, supply requirements and on-line Demand. *See generally*, MORC at 2-4. The definition of System Emergency in the ISO Tariff, on which Reliant relies and which it distorts, derives directly from the WSCC Reliability Criteria, Part IV, Definitions at 3. The WSCC Criteria specifically include "Capacity or Energy Shortages" in the discussion of Emergency Operations. MORC at 17. Under these provisions, the ISO's need and authority to respond to threatened or imminent emergencies extends to conditions of insufficient Generation, regardless of the cause.

Reliant can point to nothing in the MORC or the ISO Tariff that limits the duration or frequency of emergency conditions.¹⁴ Reliant would certainly concede that a catastrophic event, such as an earthquake, that eliminates major Generating Units for an extended period would qualify as an emergency – so whether insufficient Generation is "short-term" cannot be determinative of whether an emergency exists.

Similarly, neither the MORC nor the ISO Tariff refer to causation as relevant to whether a System Emergency exists. The transmission system has the same problems whether insufficient Generation derives from sudden

outages, “political decisions,” or Generator withholding. The ISO can not be expected to inquire, each time it exercises its emergency authority, why adequate Generation is not available. Reliant’s attempt to import economic considerations into the exercise of the ISO’s emergency authority is unfounded.

1. The ISO May Properly Reschedule Exports in Order to Address Insufficient Generation Conditions

Reliant devotes most of its Complaint to attacking the ISO’s exercise of its authority under Section 5.6.1, “to alter scheduled deliveries of Energy and Ancillary Services into or out of the ISO Controlled Grid” in order to address conditions of insufficient Generation. The clarity of this tariff provision – a provision with which Reliant agreed to comply when it executed its Participating Generator Agreements and chose to avail itself of the benefits of the ISO Controlled Grid – is itself, without more, sufficient to defeat Reliant’s claim. This authority is incorporated in the ISO’s ability to control Generation in the instance of a real or threatened System Emergency. As the Commission found in its order authorizing the ISO’s operation, it is “essential that participants follow all orders given by the ISO . . . since otherwise, the ISO will be unable to effectively manage and control the ISO Controlled Grid.” 81 FERC. at 61,456-57.

Moreover, as discussed above, insufficient Generation, regardless of cause, constitutes an emergency condition under the MORC. Also as discussed above, the Commission, in the December 15th Order, rejected a complaint by

¹⁴ Indeed, Section 2.3.2.1 states that the ISO’s declaration of a System Emergency will be binding on all Market Participants until the ISO announces that the System Emergency no longer exists.

Reliant and others challenging the ISO's authority to curtail firm exports in order to preserve System Reliability. 93 FERC at 62,019-20.

According to the MORC:

The following operating philosophy *shall* be observed [by a control area operator, such as the ISO]:

1. **Corrective Action.** The entity(ies) experiencing the emergency condition shall take immediate steps to relieve the condition by adjusting generation, *changing schedules between control areas*, and initiating relief measure, including manual or automatic load shedding (if required) to relieve overloading or imminent voltage collapse.

MORC at 15 (emphasis added). A control area must exhaust *all possible assistance* from entities *within the control area* prior to requesting assistance from adjacent control areas. MORC at 17. In addition, entities are not to shed firm load until *all* available generating capacity is loaded and all exports that can be interrupted are interrupted. MORC at 17-18.

Reliant's assertion that the MORC do not condone curtailment of firm exports prior to curtailment of Load is beside the point. Unless Reliant is using transmission rights under an Existing Transmission Contract, its exports use transmission service under the ISO Tariff. The ISO Tariff does not distinguish firm and nonfirm transmission; all transmission is interruptible if there is congestion.¹⁵ While a transmission customer can reduce the likelihood of curtailment by submitting adjustment bids that attribute a high value to the transaction, there is no guarantee that another customer will not value the

¹⁵ Under Section 9 of the ISO Tariff, the ISO does offer FTRs, a form of financial hedge against congestion that the Commission found comparable to Firm Transmission. *See California Ind. Sys. Operator Corp.*, 87 FERC ¶ 61,143, *reh'g denied* 88 FERC ¶ 61,156 (1999). FTRs also provide scheduling priority in the Day-Ahead Market, but no scheduling priority beyond that point.

transmission more highly.¹⁶ Accordingly, except for transactions using Existing Transmission Contracts, all exports from the ISO Controlled Grid are interruptible for the purpose of the MORC.

Not only do the WSCC criteria discredit Reliant's argument against the ISO's authority to alter scheduled deliveries outside the ISO Controlled Grid, but they also belie the argument that the exercise of such authority is "protectionist," benefiting California at the expense of others in the region. To the contrary, in taking such action, the ISO is acting in conformity with *regional* reliability requirements. Even if Reliant is correct that rescheduling exports has raised the price of Energy in other parts of the Western region (and Reliant offers no evidence for the estimates included in its Complaint), the Commission should not lose sight of the fact that the ISO is implementing actions that have as their core purpose protecting the integrity not only of service to California, but also of the reliability of the interconnected interstate grid. Reliant's effort to raise the specter that other control areas will retaliate by similar actions is not an argument against the ISO's authority. The ISO would expect other control area operators, if presented with similar emergency Generation insufficiencies, to take similar action.

2. The ISO's Ability to Reschedule Outages in Emergency Situations Is Necessary to Address Insufficient Generation.

Reliant's Complaint also alleges that the ISO has abused its authority by requiring Reliant to delay planned maintenance, and Reliant's Amendment to its

¹⁶ See, generally, Section 7.2.5 of the ISO Tariff.

Complaint elaborates on this issue. Reliant points to the ISO's outage procedures as evidence that the ISO does not have the authority to control the timing of outages.

The ISO, however, does not claim that the existing tariff provides the ISO with authority, *under normal system conditions*, to control the scheduling of outages by other than Reliability Must-Run Units. Rather, the ISO's authority to delay noncritical outages stems from its need, *in emergencies*, to be able to call upon available Generation, including Generation that is scheduled to be taken out of service.

In its Answer to the ISO's Emergency Motion for Interim Relief filed in this docket, Reliant argues that a unit that is "to be taken out of service for scheduled maintenance" is by definition unavailable. Why Reliant believes this so is unclear. Logic would suggest that Generation that is capable of responding to a dispatch order is available, a logic that is supported by the letter and spirit of the tariff. As described above, the Commission has found it essential that Generators follow the ISO's instructions, absent an impairment of health or safety, if the ISO is to manage and control the grid. The relevant sections of the ISO Tariff fully support the ISO's authority. Section 2.3.2.2 authorizes the ISO, in the event of a System Emergency, to "take such actions as it considers necessary to preserve or restore stable operation of the ISO Controlled Grid." Section 5.1.3 authorizes the ISO to "take supervisory control" of Generating Units and directs Participating Generators to "take, at the direction of the ISO, such actions affecting such Generator as the ISO determines is necessary to maintain

the reliability of the ISO Controlled Grid” when “a real-time system problem or emergency condition could be in existence or is imminent.” Section 5.6.1 provides that resources owned 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.”

(Emphasis added.) None of these sections make any reference whatsoever to availability, and the explicit reference to the “control” to be asserted as necessary to avoid or lessen a System Emergency (or threat thereof) belies completed Reliant’s reading of the ISO Tariff and the ISO’s authority -- indeed, the ISO’s responsibility.

Further, Section 5.6.1 specifically authorizes the ISO to direct a Participating Generator to bring its Generating Unit on-line and to increase its output. Certainly, if the ISO may direct a Participating Generator to bring a Generating Unit on-line, it may direct the Participating Generator to keep the Unit on-line and, if the ISO is to be able to require a Generating Unit to increase its output, the Generating Unit can do so only by staying on-line.

In its Motion for Interim Relief filed in this docket, and in a letter to the Commission dated March 30, 2001, the ISO addressed the particular outage cited in Reliant’s Amendment to its Complaint. The ISO explained that it had initially directed Reliant to reschedule the outage of the particular unit because the outage would severely threaten reliability and had not been identified as safety-related. The ISO further explained that, when Reliant suggested that the outage was safety-related, the ISO allowed Reliant to go ahead with the outage

in order to correct the particular safety issue. As described in Attachment A, Declaration of Gregory Van Pelt¹⁷, and contrary to Reliant's characterizations in its Answer, the ISO yielded to plant management's opinion on this matter even though the ISO did not agree that an emergency repair was necessary. Importantly, Reliant later retracted its assertion of safety issues and admitted that the outage was simply for maintenance.

As further described in Mr. Van Pelt's Declaration, Reliant's assertions in its Answer to the ISO's Motion that the ISO's position was inimical to system reliability are misleading. The ISO did not ask Reliant to postpone the outage to a point where it would threaten system reliability. The ISO suggested an outage in late April that would allow Reliant to perform the needed maintenance without creating the threat of a system emergency. Reliant's assertions about the impact of the delay on overall system reliability also deserve little credence for a simple reason – because outage schedules are confidential, Reliant does not have the information available to it to make such judgments. In contrast, because the ISO's outage coordination procedures provide it with all outage schedules, the ISO can judge when a scheduled outage threatens system reliability.

Mr. Van Pelt also explains that, despite Reliant's protestations, postponement of the installation of new NOx controls will not cause excessive financial hardship or exclude Reliant from the market. Neither is it necessarily advantageous that the maintenance be performed and that the NOx controls be installed during the same outage. Ordinarily, the ISO would not attempt to

¹⁷ Generator Outage Programs are confidential under the ISO Tariff. Therefore, pursuant to 18 C.F.R. §388.112, the ISO requests that Attachment A be treated as confidential.

prevent Reliant from minimizing its time out-of-service by combining the outages. The ISO's responsibility to take action to avoid System Emergencies, however, compels adjustment of those plans when they could occasion a System Emergency. Given system conditions, it may well be that two separate outages, even with a longer total duration, will better avoid emergencies. An independent system operator, like the ISO, with available information about the entire system, is better prepared to make that determination than Reliant.

Finally, Reliant's assertion that the ISO had not declared a Stage Three System Emergency when it directed Reliant to postpone the outage is irrelevant. The ISO's authority under its tariff properly extends to threatened System Emergencies. Further, the ISO declared a Stage Two System Emergency two days before and three of the four days immediately following the removal of the Reliant unit from service. The other day was a Stage One System Emergency. These declarations establish that, at the time Reliant wished to commence its outage, the reliability of the system had been compromised. To *whatever* degree the outage of the Reliant unit exacerbated that System Emergency, it was unwarranted and significantly increased the likelihood that the ISO would be forced to curtail firm Load.

B. The ISO's Authority to Alter Scheduled Deliveries Out of the ISO Controlled Grid Is Consistent with Law and Commission Policy

Perhaps because Reliant's complaints about the harm that it might suffer from the ISO's emergency actions pale in light of the potential consequences to the public of the ISO's failure to take emergency actions, Reliant unearths novel theories that the ISO's actions are contrary to law and Commission policy.

Reliant asserts that the ISO's actions violate the commerce clause of the Constitution, exceed those permissible under the Federal Power Act, and are inconsistent with Commission policy. Each of these assertions, when examined, is simply inapplicable to the ISO's actions.

1. The ISO's Authority to Alter Scheduled Deliveries Out of the ISO Controlled Grid Is Consistent with the Commerce Clause of the Constitution.

Citing *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), and other cases, Reliant asserts that the ISO's emergency alteration of schedules transmitting power out of the ISO Controlled Grid runs afoul of Constitutional prohibitions against interference with interstate commerce. This contention is fundamentally flawed.

Reliant has already made this argument in another forum, where it was rejected. In his March 21, 2001, Order Granting Preliminary Injunction requiring Reliant to respond to emergency dispatch orders, Judge Frank C. Damrell, Jr., stated:

In its supplemental opposition filed the afternoon before the status conference, Reliant argues for the first time that the "ISO's requested injunction would violate the commerce clause." More particularly, Reliant argues that the ISO's position that its emergency dispatch instructions "trump" any existing contracts California generators have with purchasers in other states undermines federal policy and violates the commerce clause, as it "impedes the development of a broader regional market in the West."

Reliant's argument, however, fails to take into account that the ISO issues emergency dispatch instructions when reliability criteria issued by the [WSCC] are violated. . . . The WSCC's reliability criteria relied upon by the ISO were established to protect the entire Western Regional grid Thus, contrary to Reliant's assertions, the ISO does not issue emergency dispatch instructions "at the expense" of its neighbors, but rather pursuant to a set of criteria designed to protect the entire Western region. Given

the above, Reliant's eleventh hour argument that the ISO's issuance of emergency dispatch instructions violates interstate interests rings hollow.

California Ind. Sys. Oper. Corp. v. Reliant Energy Serv. Corp., et al., No. Civ. S-01-238 FCD/JFM at 30-31 (March 21, 2001). Were Judge Damrell's decision final, it would constitute *res judicata*; it has, however, been stayed by the U.S. Court of Appeals for the Ninth Circuit based on jurisdictional concerns.

Nonetheless, its reasoning is compelling and it should be given great weight.

Moreover, Reliant's contention suffers another fatal flaw. The "negative" aspect of the Commerce Clause limits *state* actions that interfere with interstate commerce. *See, e.g., New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 269 (1988). Even if one were to characterize the ISO's actions as "state action," which is questionable, the ISO's emergency orders are not issued pursuant to the sovereign authority of the state, but rather pursuant to the ISO Tariff and the Participating Generator Agreement filed with the Commission. The Commerce clause prohibitions are therefore not applicable. The Supreme Court has distinguished carefully between a state's exercise of its regulatory powers, to which the Commerce Clause limitations apply, and its actions as a "market participant," which are not limited. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 805-808 (1976). New Hampshire's statute prohibiting the export of power, which was voided in *New England Electric Power Co.*, was clearly the former. Although the ISO is not a market participant, the ISO's operation under its tariff is more akin to action in the latter category.

The distinction, as described by the U.S. Court of Appeals for the Second Circuit, is whether "a private party could have engaged in the same actions" or

“the state avails itself of the unique powers or special leverage it enjoys as sovereign.” *Incorporated Village of Rockville Center, et al., v. Town of Hempstead, et al.*, 196 F.3d 395, 399 (2d Cir. 1999) (citations omitted). The ISO’s operations under the ISO Tariff, and in particular its emergency dispatch orders, could as easily be performed by a for-profit transmission company or a utility (such as Edison or PG&E) as by the ISO. The ISO’s authority to dispatch Reliant comes from the binding commitments of the Participating Generator Agreement and from the Commission’s approval of the ISO Tariff, *not* from the ISO’s relationship with the State of California. As a result, the “negative aspect” of the Commerce Clause is simply not relevant.

2. The ISO’s Authority Is Consistent with the Federal Power Act

Reliant argues that the ISO’s authority exceeds that granted to the Commission and the Department of Energy under section 202(c) of the Federal Power Act. Although Reliant goes to great length to explain the limits on the Commission’s authority under the Federal Power Act, the discussion is irrelevant to the issues at hand. The Commission’s and Department of Energy’s authority involves calling upon *any* Generator, including nonjurisdictional entities, regardless of the existence of a tariff or contract regarding the delivery of Energy from those Generators.

In contrast, the ISO’s authority is governed by its Tariff, and applies only to those entities that make use of the ISO Controlled Grid and enter into Participating Generator Agreements in which they agree to abide by the terms of the ISO Tariff. While the Commission certainly has the authority under section

205 and 206 of the Federal Power Act to determine the appropriate scope of the ISO's authority, that authority is distinct and separate from the Commission's own separate authority under section 202(c). This proceeding concerns the necessary and appropriate scope of the ISO's emergency authority. Section 202(c) is not a consideration in that determination.

3. The Need to Develop Regional Solutions Does Not Obviate the Need to Preserve Reliability in the Interim.

Citing Order No. 888, Order No. 2000, the Commission's December 15th Order, and the Commission March 14th Order in Docket EL01-47-001, 94 FERC ¶ 61,272 (2001), Reliant also contends that the ISO's exercise of its emergency authority to reschedule exports from the ISO Controlled Grid is inconsistent with the Commission's efforts to preserve the interstate power market and to promote regional markets and cooperation. Reliant ignores the fact, noted above, that the ISO is simply implementing established WSCC procedures. It also confuses long term solutions to reliability issues with the need to address immediate emergencies.

The Commission has clearly set forth its commitment to long term regional solutions to the power supply shortages in the Western states, and has implemented a number of short term measures to alleviate the immediate problem. Reliant's ability to complete scheduled exports during a System Emergency, however, is neither part of nor essential to the Commission's initiatives. The Commission's initiatives are intended to address the root source of power shortages, not to govern a control area operator's response to emergencies that are attributable to such shortages. These initiatives provide no

basis for requiring the ISO to condemn the California public to recurring blackouts in order to preserve Reliant's exports.

IV. Conclusion

Accordingly, the ISO request the Commission to summarily dismiss Reliant's Complaint.

Respectfully submitted,

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