UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Green Energy Express, LLC and 21st Century Transmission Holdings, LLC	))	Docket No. EL10-76-000

MOTION FOR LEAVE TO INTERVENE AND PROTEST OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION

The California Independent System Operator Corporation ("ISO") submits this motion to intervene and protest in this proceeding, which concerns a Petition for a Declaratory Order ("Petition") filed by Green Energy Express, LLC and 21st Century Transmission Holdings, LLC (together "Green Energy Express"), filed on July 2, 2010.[1] For the reasons discussed below, the ISO requests that the Commission deny the Petition.

I. BACKGROUND

On July 2, 2010, Green Energy Express filed the Petition, requesting the Commission to determine that, under the terms of the ISO Tariff, transmission developers that are not participating transmission owners ("Participating TOs") with the ISO have the right to build Network Upgrades identified in the ISO's Large Generator Interconnection Procedures ("LGIP") and transmission lines approved as Location Constrained Resource Interconnection ("LCRI") facilities. Green Energy Express further asks the Commission, if the Commission agrees with the ISO regarding the terms of the ISO Tariff, to exercise its authority under section 206 and section 306 of the Federal Power Act to modify the ISO Tariff to

[1] The ISO submits this filing pursuant to Rules 212 and 213 of the Commission's rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.213 (2010).

provide non-incumbent transmission developers the right to build LGIP Network Upgrades and LCRI facilities. Green Energy Express further asks that the Commission evaluate, and then commence a section 206 proceeding regarding the explicit right of Participating TOs under the existing ISO Tariff to build reliability projects and projects to maintain the feasibility of long-term Congestion Revenue Rights ("CRRs").

On June 4, 2010, the ISO filed amendments to the ISO Tariff in Docket No. ER10-1401 to implement a revised transmission planning process. In that proposal, the ISO established an open solicitation process whereby all potential project sponsors, existing participating transmission owners and independent transmission developers alike, can propose to build public policy-driven and economically driven transmission elements found to be needed by the ISO. The ISO retained existing tariff provisions that provide that (1) participating transmission owners with service territories are responsible for building and owning transmission upgrades and additions that are needed to (a) meet identified reliability needs on the participating transmission owner's system, or (b) maintain the feasibility of long-term CRRs; (2) participating transmission owners build and own LCRI facilities; and (3) participating transmission owners to whose existing facilities new generators will interconnect are responsible for building and owning the Reliability and Delivery Upgrades identified through the LGIP study process that are required to accommodate such generator interconnections. With respect to (3) above, the ISO also clarified that this limited right and obligation would apply to expanded LGIP Network Upgrades

that the ISO finds are needed to better address system need if the original upgrade would have been included in the relevant Large Generator Interconnection Agreement ("LGIA") as a result of the LGIP Phase 2 studies. In the Petition, Green Energy Express challenges the ISO's position that only existing participating transmission owners have the right to build such facilities.

II. MOTION TO INTERVENE

The ISO is a non-profit public benefit corporation organized under the laws of the State of California, with a principal place of business at 151 Blue Ravine Road, Folsom, CA 95630. The ISO is an independent transmission system operator operating the transmission systems of its Participating TOs: Pacific Gas and Electric Company, San Diego Gas & Electric Company, Southern California Edison Company, the Cities of Vernon, Pasadena, Anaheim, Azusa, Banning, and Riverside, California, of Atlantic Path 15, LLC and Startrans IO, L.L.C. and, with regard to the Path 15 transmission lines in California, the Western Area Power Administration, Sierra Nevada Region. The ISO is a Balancing Authority and coordinates the ancillary services and electricity markets within its Balancing Authority Area.

The ISO operates under the terms of the ISO Tariff, which is on file with the Commission. The Petition seeks a ruling on the meaning of the ISO Tariff that is contrary to the interpretation under which the ISO is operating. Green Energy Express also seeks modification of some provisions of the ISO Tariff in the event that the Commission agrees with the ISO's interpretation and seeks modification of other provisions of the ISO Tariff where there is no dispute as to the meaning of those provisions. Accordingly, the ISO has an interest in this

proceeding that no other party can represent and the Commission should permit the ISO to intervene.

III. PROTEST

A. Petition for Declaratory Order

1. LGIP Network Upgrades

Green Energy Express contends that existing provisions of the LGIA cannot be interpreted to provide existing participating transmission owners with a right to build and own LGIP Network Upgrades.[2] It argues that sections 5.1 and 11.3 of the LGIA, which the ISO cited in its June 4, 2010, filing, simply provide that construction of necessary LGIP-based Network Upgrades is the responsibility of the "Participating TO" to whose existing facilities the generator will interconnect. Green Energy Express asserts that the term "Participating TO" is not defined explicitly with reference to existing participating transmission owners; rather, it contends, under the LGIA, the "Participating TO" is defined simply as the counterparty to the interconnecting generator in the agreement, and could be any entity that would own, operate and maintain the participating transmission owner system with which the generator would interconnect, such as facilities proposed by any entity that seeks to develop transmission facilities in the ISO Balancing Authority Area during the transmission planning process.[3]

Green Energy Express goes on to argue that neither sections 5.1 and 11.3 nor the planning provisions in section 24 of the ISO Tariff prohibit non-incumbent transmission developers from constructing and owning LGIP facilities. According

[2] Petition at 10-11.

[3] Petition at 10.

to Green Energy Express, to the extent a developer that is not a participating transmission owner were assigned the right to build and own an LGIP Network Upgrades, it later would become a "Participating TO" as the facilities were placed in service.

The interpretation advanced by Green Energy Express is inconsistent with the express terms of the ISO Tariff (including the LGIA and LGIP provisions of the ISO Tariff), the express terms of the Transmission Control Agreement between the ISO and its Participating TOs, Order No. 2003 *et seq.,* and the Commission's *pro forma* LGIP and LGIA. Importantly, Green Energy Express ignores the fact that LGIP Network Upgrades are constructed pursuant to the LGIP tariff provisions of the ISO Tariff, which track, in relevant part, the *pro forma* Open Access Transmission Tariff; they are not constructed pursuant to the transmission planning provisions of the tariff as Green Energy Express suggests.

The responsibility of the "Participating TO" to construct Network Upgrades is set forth in section 12.1 of the LGIP. The LGIP incorporates the definitions in Appendix A of the ISO Tariff and "Participating TO" is defined in the Appendix A as "[a] party to the Transmission Control Agreement whose application under section 2.2 of the Transmission Control Agreement has been accepted and who has placed its transmission assets and Entitlements under the [ISO's] Operational Control in accordance with the Transmission Control Agreement."[4] Not only does the definition speak in terms of completed, not potential, acts, but in addition Section 2.2.5 of the Transmission Control Agreement provides, "A

[4] Notwithstanding Green Energy Express's claims to the contrary, "Participating TO" is not defined in the LGIA at all, let alone as "the counterparty."

Party whose application under this Section 2.2 has been accepted shall become a Participating TO *with effect from the date when its [Transmission Owner} Tariff takes effect*." (Emphasis added.) In other words, the definition of "Participating TO" in both the ISO Tariff and the Transmission Control Agreement expressly excludes entities that have not placed transmission assets and Entitlements under the ISO's operational control and that do not have a Transmission Owner Tariff in effect.

In addition, the LGIA acknowledges the LGIP as controlling the procedures for interconnection, and the LGIP adopts the definitions of Appendix A of the ISO Tariff. The LGIA also states that the ISO Tariff will control in the event of any conflict with the terms of the LGIA. Section 12.1 of the LGIP and sections 5.1 and 11.3 of the LGIA are unambiguous and do not refer to "potential" participating transmission owners. Accordingly, an entity that does not yet have an effective Transmission Owner Tariff cannot be a participating transmission owner within the meaning of section 12.1 of the LGIP and sections 5.1 and 11.3 of the LGIA.[5] It makes no difference that the LGIA does not explicitly "prohibit" other entities from constructing Network Upgrades; it effectively does so by conferring exclusive responsibility to build on the interconnecting "Participating TO."

[5] Likewise, the LGIP and LGIA provide that the generator(s) will interconnect at a Point of Interconnection to the CAISO Controlled Grid. By definition, that is a point on transmission facilities that have already been turned over to the ISO's operational control. Likewise, the definition of Reliability Network Upgrades and Delivery Network Upgrades under the ISO's LGIA contemplates upgrades to a Participating TO's Transmission System beyond the Point of Interconnection. As indicated above, this means interconnection facilities that constitute a Participating TO's system that have been turned over to the ISO's operational control and that are already part of the CAISO Controlled Grid.

Moreover, numerous other provisions of the ISO's LGIP and LGIA and the Commission's *pro forma* LGIP and LGIA contemplate that large generators will connect to existing facilities owned by participating transmission owners. For example, Sections 2.4.2 and 3.5.1 of the ISO's LGIP and Article I of the LGIA contemplate interconnection to the "CAISO-Controlled Grid" at a point of interconnection where the generator's interconnection facilities connect to the "Participating Transmission Owner's Transmission System." The "CAISO-Controlled Grid" and the "Participating Transmission Owner's Transmission System" are defined in Appendix A of the ISO Tariff as facilities owned and operated by the Participating TO that have been turned over to the ISO's operational control. As discussed above, under the Transmission Control Agreement these necessarily must be existing facilities of existing participating transmission owners.

The relevant provisions of the ISO's versions of the LGIA and LGIP are intended to track the substantive provisions of the Commission's *pro forma* LGIP and LGIA. The *pro forma* LGIP and LGIA definitions and substantive provisions similarly contemplate connection to facilities owned and operated by a "Transmission Provider" that already are used to provide service under a Commission-approved open access transmission tariff.[6] By definition, these are necessarily existing facilities, not yet-to-be-built facilities.

[6] *See, e.g.,* Sections 1 and 12.1 of the Commission's Standard Large Generator Interconnection Procedures and Articles 1 and 5.1 and 11.3 of the Commission's Standard Large Generator Interconnection Agreement, as posted on the Commission's website current through Order No. 2003-C.

It is no surprise that Order No. 2003 does not expressly prohibit construction of Network Upgrades by non-participating transmission owners who, by definition, have not yet turned facilities over to the operational control of the ISO. Order No. 2003 was concerned with the relationship between public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce and those seeking interconnection to the networks of these transmission providers:

> This Final Rule requires all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file standard procedures and a standard agreement for interconnecting generators larger than 20 MW. The Commission expects that this Final Rule will prevent undue discrimination, preserve reliability, increase energy supply, and lower wholesale prices for customers by increasing the number and variety of new generation that will compete in the wholesale electricity market.
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> This Final Rule requires public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to file revised open access transmission tariffs . . . to add Standard Large Generator Interconnection Procedures . . . and a Standard Large Generator Interconnection Agreement.[7]

In other words, Order No. 2003 presumed that existing transmission owners (*i.e.,* those public utilities that already "own, control or operate facilities used for transmitting electric energy in interstate commerce") would fulfill the requirements of the LGIP and LGIA.

Green Energy Express' proposed interpretation of the LGIP and LGIA would turn Order No. 2003 on its head. If the Commission were to adopt the interpretation of the ISO's LGIA and LGIA advanced by Green Energy Express, there would be no basis for applying a different interpretation to the *pro forma*

[7] Order No. 2003 at PP 1-2 (footnotes omitted).

LGIA and LGIP provisions adopted by every other public utility transmission owner in the country. Green Energy Express is essentially arguing that an unlimited number of *potential* transmission developers who do not own and operate existing facilities to which a new generator proposes to connect should have some amorphous, undefined right to build LGIP Network Upgrades for every large generator interconnection request under a Commission-approved tariff in the country. A petition for declaratory order pertaining solely to the ISO's LGIP and LGIA provisions is not the appropriate procedural avenue to address sweeping, industry-wide changes to the Commission's LGIP program that was developed through a formal rulemaking process and is applicable to every Commission-regulated public utility.

The Commission recognized in Order No. 2003-A that requiring a transmission provider to cede ownership of stand-alone Network Upgrades and the transmission provider's Interconnection Facilities under the LGIA was inconsistent with Commission precedent.[8] In rejecting arguments that Interconnection Customers should be able to own, operate and maintain stand-alone Network Upgrades and Transmission Provider Interconnection Facilities, the Commission recognized that "such a regime would fragment the Transmission System, thereby undermining reliability."[9] That is why the *pro forma* LGIP and LGIA provide that the existing transmission owner to whose

[8] *Standardization of Generator Interconnection Agreements and Procedures,* Order No. 2003-A at P 230, FERC Stats. & Regs. ¶ 31,160 (2004). The Commission did note that the transmission owner *may* agree to permit the Interconnection customer to construct or own these facilities.

[9] Order No. 2003-A at P 236.

facilities the generator will interconnect is responsible for building and owning all Reliability and Delivery Network Upgrades.

The Commission also has recognized on numerous occasions that because existing transmission owners have the risk and responsibility for reliably operating their transmission systems, these owners should have sole responsibility to construct and own transmission provider interconnection facilities and Network Upgrades to existing network facilities and substation facilities.[10] To find otherwise would not only raise reliability, liability, safety, and engineering concerns as the Commission's prior orders recognize, it would impact the states' jurisdiction over siting and raise potential "constitutional taking" issues.[11]

Green Energy Express has provided no basis for its arguments that, under the ISO Tariff, it has the right to construct and own LGIP Network Upgrades. The Commission should deny the Petition in this regard.

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[10] *See Arizona Public Service Company,* 102 FERC ¶ 61,303 at P 11 (2003)(recognizing that transmission providers are not required to allow interconnecting customers to own network upgrades, but they may agree to provide that opportunity). Consistent with Commission decisions, the ISO's proposed tariff provision provides this opportunity but does not require it. *See also,* Order No. 2003-A at PP 221-236; *Cambridge Electric Light Company,* 96 FERC ¶ 61,205 at 61,874 (2001); *Virginia Electric Power Company,* 93 FERC ¶ 61,307 at 62,054 (2000), *order on re'hg,* 94 FERC ¶ 61,164 at 61,589 (2001); *Carolina Power & Light Company,* 93 FERC ¶ 61,032 at 61,072-73 (2000). The Commission has also noted that the provision in the LGIA that allows interconnection customers reasonable access to the transmission provider's facilities when necessary to facilitate an interconnection does not give the interconnection customer the right to build and own facilities on the transmission owner's facilities and rights of way. *Longview Power LLC v. Monongahela Power Co.,* 112 FERC ¶ 61,022 at PP19-20, n.11 (2005).

[11] Even assuming *arguendo* that the significant legal and practical hurdles identified above could be overcome, allowing third-parties to build LGIP projects would add substantial complications to the generator interconnection process. These complications would likely cause significant delays in the processing of interconnection requests and create needless confusion and increased uncertainty for interconnection customers. For example, interconnection customers are generally concerned about moving as quickly as possible toward the completion of an LGIA once their LGIP Phase II study results are completed and available. Adding a competitive process for building LGIP Network Upgrades likely would significantly delay generator interconnection agreements and commercial in-service dates of generators. Under the LGIP and LGIA, the right to finance, own, and construct additions and expansions necessary to effectuate the interconnection is thus appropriately assigned to the transmission owners who have the current obligation to provide interconnection service.

Green Energy Express goes on to argue that even if the LGIA does contemplate that participating transmission owners have a right to build LGIP Network Upgrades, that right does not extend to expanded versions of such Network Upgrades. This issue is not appropriately raised in this proceeding. Under the existing ISO Tariff, there are no expanded LGIP Network Upgrades. Green Energy Express' request is therefore not ripe. Further, the amendments that would provide for expanded LGIP Network Upgrades are already pending before the Commission in connection with the ISO's Section 205 tariff amendment filing in Docket No. ER10-1401. Green Energy Express is essentially asking the Commission to opine in a declaratory order whether provisions proposed in a pending Section 205 filing are just and reasonable. This issue is appropriately addressed in the ISO's Section 205 proceeding, not in response to the instant request for declaratory order. Green Energy Express has already availed itself of the opportunity to submit comments in that Section 205 proceeding, and it would be inappropriate to provide Green Energy Express with a separate "bite at the apple" in the instant proceeding.

Green Energy Express also fails to acknowledge the limited nature of the right to build expanded LGIP Network Upgrades that is included in the ISO's proposal. The participating transmission owners' right to build extends ***only*** to expansion of and additions to a Network Upgrade that would have been included in an LGIA as a result of the Phase II studies if built under the LGIP.[12] This is the

[12] In contrast, if the transmission planning process (a) determines that a different facility would be optimal and such facility obviates the need for a Network Upgrade identified in the Phase II study, or (b) expands or modifies a Network Upgrade in such a way as to create further needs for additional upgrades or additions, the different facility identified under (a) or the

logical corollary of the existing transmission owner's right to build the original Network Upgrade that would have been included in the LGIA. For example, suppose that the LGIP Phase II study calls for a single circuit Network Upgrade on the participating transmission owner's system from point A to point B, which is then expanded through the transmission planning process to a double circuit facility. In such a case it would not be practical, consistent with Good Utility Practice, consistent with Commission precedent (and legal and factual findings), or consistent with the existing transmission owner's property rights to have the participating transmission owner build the single circuit Network Upgrade identified under the LGIA Phase II studies and then another entity modify the existing transmission owner's single circuit Network Upgrade on its right-of-way to a double circuit facility, and then own, maintain, and operate that modification to the existing transmission owner's line. Moreover, this approach would not promote reliability or safety. As discussed above and in the ISO's Transmittal Letter in Docket No. ER10-1401,[13] the Commission has long recognized that third-parties do not have the right to build facilities on facilities, right-of-way, and sub-stations owned by other transmission providers and that such a practice would jeopardize safe and reliable operations.

2. LCRI Facilities

Green Energy Express disagrees with the ISO's statement that, under the current ISO Tariff, existing Participating TOs are the only entities with the right to

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additional facilities identified under (b) would not automatically be built by the participating transmission owner. In particular, if any of these other facilities are public policy-driven or economically-driven elements of the ISO's transmission plan, they would be open to all project sponsors to submit proposals to build.

[13] June 4, 2010 Transmittal Letter in Docket No. ER10-1401 at 69-71.

build LCRI facilities. Green Energy argues that the ISO knew how to incorporate explicit right to build provisions for existing Participating TOs and did not do so for LCRI facilities because it did not use the words "Participating TO with a Participating TO Service Territory." As a result, according to Green Energy Express, the ISO cannot point to any specific language establishing such a right to build.[14]

Green Energy Express's arguments flow from a misunderstanding of the role of LCRI facilities and the interplay of the ISO's controlling documents. The reason that ISO Tariff does not state that Participating TOs with a PTO Service Territory are responsible for building LCRI facilities that connect to their transmission systems is that the ISO did not intend to limit the construction of LCRI facilities only to those Participating TOs that have a PTO Service Territory. LCRI facilities are radial gen-tie facilities that typically are built and paid for by generators; they are not network upgrades to an existing PTO's transmission system. Because there was thus no need to limit the construction of LCRI facilities to Participating TOs with a PTO Service Territory, all Participating TOs are eligible to build LCRI facilities.

Further, once a new project developer becomes a Participating TO, it too will have the right to build and own LCRI facilities. However, as discussed below, a party cannot become a Participating TO by tuning over only radial LCRI facilities to the ISO's operational control.

[14] Petition at 12.

The only logical reading of the LCRI provisions of the ISO Tariff is that LCRI facilities are built and owned by existing Participating TOs. Under Section 26.4.6 of the ISO Tariff, the costs of the unsubscribed portion of an LCRI facility are recovered through a Participating TO's transmission revenue requirement. Under Sections 2.2 and 4.1 of the ISO's Commission-approved Transmission Control Agreement, a transmission owner can become a Participating TO only by turning over to the ISO's operational control "transmission lines and associated facilities forming part of the transmission network that it owns or to which it has Entitlements." However, under Section 4.1.1 of the Transmission Control Agreement, "radial lines and associated facilities interconnecting generation do not constitute part of a participating transmission owner's transmission network." The only exception is generation interconnection 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," a category that does not include LCRI facilities. Further, the Commission has ruled that radial generation-ties cannot be included in a Participating TO's transmission revenue requirement[15] except as an LCRI facility.[16] Thus, a party that owns – and seeks to turn over to the ISO's operational control – solely radial lines cannot become a Participating TO. That is, the ISO Tariff permits all existing Participating TOs to place LCRI transmission facilities under the ISO's operational control but, under the Transmission Control Agreement, no

[15] *Southern Cal. Edison Co.*, 112 FERC ¶ 61,014 at PP 41-42 (2005); *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,061 at P 65 (2007).

[16] *Cal. Indep. Sys. Operator Corp.*, 121 FERC ¶ 61,286 at PP 63-65 (2007).

transmission owner or developer can become a Participating TO by seeking to place only LCRI lines under the ISO's operational control. Further, under Section 2.2.5 of the Transmission Control Agreement, a party cannot become a Participating TO until the ISO has accepted its Participating TO application and the Commission has approved its Transmission Owner Tariff. In other words, "potential" Participating TOs are not Participating TOs under the ISO Tariff and Transmission Control Agreement.

Other LCRI tariff provisions clearly contemplate that LCRI facilities are built and owned by existing Participating TOs (and not by entities that are not yet Participating TOs).[17] For example, Section 24.1.3.1(b)(1) of the existing ISO Tariff provides, as one of the requirements for an LCRI, that the addition of the capital cost of the LCRI facility to the High Voltage TRR of a Participating TO will not cause the aggregate investment in all LCRI facilities to exceed a specified cap. Section 24.1.3.1 (c) provides that each Participating TO shall report annually to the ISO the amount of its net investment in LCRI facilities and High Voltage Transmission Facilities so that the ISO can determine whether the cap on LCRI costs has been met. These provisions would not be limited to Participating TOs if non-Participating TOs could build LCRI facilities.

Green Energy Express suggests that because the proposed Section 24.1.3 of the ISO's proposed revised transmission planning process states that the "CAISO, CPUC, CEC, a Participating TO, or any other interested parties may propose a transmission addition" as an LCRI project, non-Participating TOs have

[17] The ISO also notes that these tariff provisions are not limited to Participating TOs with PTO Service Territories.

the right to build LCRI facilities under the existing tariff.[18] However, the right to propose does not imply the right to build. The primary beneficiaries of the LCRI mechanism are generators and public agencies who have responsibility for promoting renewable resources, such as the CPUC and the CEC. It makes good sense, therefore, that they have a right to propose LCRI facilities, but no one would reasonably infer that the CPUC and CEC have a right to build LCRI transmission facilities based on that right to propose. As such, Green Energy Express' arguments that Section 24.1.3 of the ISO Tariff provides non-Participating TOs with some ability to build and own LCRI transmission facilities is incorrect.

The ISO Tariff does not accommodate the construction of LCRI facilities by "potential" Participating TOs. Therefore, the Commission should reject this portion of the Petition. In Section II.B.3 of this filing, the ISO addresses and refutes Green Energy Express' argument that if the existing tariff does provide that only existing Participating TOs can build LCRI facilities, then such provision is unjust, unreasonable, and unduly discriminatory.

3. Commission Precedent

[18] Green Energy Express' statement is also factually inaccurate. Existing Section 24.1.3 of the ISO Tariff provides, "The CAISO, CPUC, CEC, a Participating TO *or any other Market Participant* may propose a transmission addition as a Location Constrained Resource Interconnection Facility." (Emphasis added.) A Market Participant is "[a]n entity, including a Scheduling Coordinator, who either: (1) participates in the CAISO Markets through the buying, selling, transmission, or distribution of Energy, Capacity, or Ancillary Services into, out of, or through the CAISO Controlled Grid; or (2) is a CRR Holder or Candidate CRR Holder. Thus, under the existing ISO Tariff, transmission developers that are not Participating TOs and are not active in the ISO market do not have the right under this provision to even propose an LCRI transmission facility. Such non-incumbents are not Market Participants Although the ISO has proposed in its June 4 tariff to revise the language to refer to interested parties, that proposal is irrelevant to the interpretation of the existing ISO Tariff.

In support of both of its proposed interpretations of the ISO Tariff, Green Energy Express also cites the Commission's decisions in *Primary Power LLC*,[19] and *Central Transmission, LLC v. PJM Interconnection,*[20] as well as the Commission's Notice of Proposed Rulemaking, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities* ("NOPR").[21] The Commission, however, must interpret the ISO Tariff in light of its language and context and, if those are ambiguous, in light of extrinsic evidence of the parties' intent.[22] Commission precedent is not relevant to tariff interpretation unless, of course, the Commission has previously interpreted similar language.[23] In this instance, the precedent to which Green Energy Express cites is wholly unrelated and not relevant to the meaning of the specific tariff provisions for which it is seeking an interpretation. Similarly, proposed changes in regulations do not change the proper interpretation of a previously-accepted tariff provision. If Green Energy Express believes that subsequent Commission precedent has rendered portions of the ISO Tariff unjust, unreasonable, or unduly discriminatory, then its remedy is to file a complaint under section 206 of the Federal Power Act. It has not done so. Nonetheless, the ISO will discuss these arguments in the context of Green Energy Express' impermissible request for Section 206 relief.

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19 131 FERC ¶ 61,015 (2010), *reh'g pending* (hereafter "*Primary Power*").

20 131 FERC ¶ 61,243 (2010) (hereafter "*Central Transmission*").

21 131 FERC ¶ 61,253 (2010)

22 *New York Ind. Sys. Operator, Inc.* 131 FERC ¶ 61,032 at P 12 (2010).

23 As discussed in Section II.B.1 below *Primary Power* and *Central Transmission* involve interpretations of provisions of the PJM tariff and operating agreement that do not correspond to the language of the ISO Tariff provisions at issue in this proceeding.

B. Section 206 Relief

With regard to both LGIP Network Upgrades and LCRI facilities, Green Energy Express requests that, if the Commission finds that the ISO Tariff provides a right to build to existing Participating TOs, then the Commission should exercise its authority under sections 206 and 306 of the Federal Power Act to find that those provisions are unjust, unreasonable, and unduly discriminatory.[24] Green Energy Express also asks the Commission to evaluate, and then commence a section 206 proceeding, regarding the explicit right of Participating TOs under the existing ISO Tariff to build reliability projects and transmission projects to maintain the feasibility of long-term CRRs.[25]

Green Energy Express' filing, however, does not comport with the regulations regarding complaints that the Commission established in Rule 206 of the Commission's Rules of Practice and Procedure.[26] Green Energy Express recognizes this, but requests waiver of the rules. The Commission established its rules on complaints following a rulemaking, in order to ensure that the Commission had adequate information to process complaints and that parties made reasonable attempts to informally resolve issues.[27] Green Energy Express has provided no basis whatsoever for waiver of the rules. Green Energy Express's requests are thus not only substantively flawed (as discussed below),

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[24] Petition at 11, 12.

[25] Petition at 13-14.

[26] 18 C.F.R. § 385.206 (2010).

[27] *Complaint Procedures*, Order No. 602, FERC Stats. & Regs. ¶ 31,071, at 30,758, *order on reh'g*, Order No. 602-A, FERC Stats. & Regs. ¶ 31,076 (1999).

but also procedurally flawed. The Commission should reject these requests based on the procedural flaws alone.

1. Commission Precedent

As discussed above, Green Energy Express contends that provisions of the ISO Tariff that provide Participating TOs with a right to build LGIP Network Upgrades and LCRI facilities are inconsistent with the Commission's decisions in *Primary Power* and *Central Transmission*, as well as with the NOPR. Green Energy Express reads Commission precedent too broadly, and the NOPR should not govern the outcome of this proceeding.

Primary Power sets forth no Commission policy on the right of third parties to construct LGIP Network Upgrades or LCRI facilities. Indeed, neither of these cases has anything to do with LGIP Network Upgrades, LCRI facilities, or the right of a project sponsor to become a participating transmission owner solely by building and turning over radial gen-tie facilities to the operational control of an ISO or Regional Transmission Organization ("RTO"). Rather, *Primary Power* merely interpreted a provision of the PJM operating agreement that allows PJM to designate an existing transmission owner or some other entity to build needed projects identified in its transmission plan.[28] The Commission did note that PJM must administer the tariff provision in a nondiscriminatory manner,[29] but that is just the restatement of a fundamental requirement of the Federal Power Act.

Even if *Primary Power* were a statement of policy rather than an interpretation of the PJM tariff and operating agreement, which it was not, it

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[28] 131 FERC ¶ 61,015 at PP 63-64.

[29] *Id.* at P 65.

would not be relevant here. *Primary Power* did not involve LGIP Network Upgrades, and the Commission did not find that third-parties are entitled to build and own Network Upgrades. Rather, *Primary Power* pertained solely to the ability of a party that is not an existing transmission owner to build baseline transmission projects identified by PJM as needed during the transmission planning process. LGIP Network Upgrades are not evaluated in PJM's transmission planning process or the ISO's transmission planning process (they are evaluated in the respective company's LGIP processes); so, *Primary Power* cannot be interpreted as requiring that third-parties have an opportunity to build and own LGIP Network Upgrades.[30] Further, nothing in *Primary Power* even remotely suggests that a transmission-developer can become a Participating TO by constructing radial, gen-tie facilities. In PJM, the sponsor of a proposed transmission project would become a participating transmission owner only by building baseline reliability or economic projects, similar to the ISO's tariff provisions. The ISO's compliance with tariff provisions providing existing Participating TOs with the right and obligation to construct and own LGIP Network Upgrades and LCRI facilities is not discriminatory tariff administration, nor is it a new concept.

Central Transmission does not modify the Commission's holdings in *Primary Power*; it simply applies that holding to the circumstances addressed in

[30] In *Primary Power*, the Commission noted its previous findings that merchant transmission developers have no right to build on transmission facilities owned by others. *Primary Power* at n. 57, citing *PJM Interconnection LLC,* 102 FERC ¶ 61,277 (2003). Those tariff provisions were based on PJM's Commission-approved generation interconnection procedures which did not give interconnection customers the right to build Network Upgrades to or on an existing transmission owner's system or rights-of-way. If anything, this language in *Primary Power* supports the conclusion that third-parties do not have the right to build LGIP Network Upgrades or upgrades to an existing transmission owner's system.

the Central Transmission complaint, which involved a new network line to relieve congestion.[31] The discussion in the prior paragraph applies with full force to the findings in *Central Transmission*.

Green Energy Express also cites the Commission's ruling with regard to the GridSouth RTO filing that existing transmission owners participating in that proposed RTO should not have a right of first refusal in their service territories and directing GridSouth to undertake competitive solicitation for transmission expansion and upgrades.[32] The GridSouth proponents, however, proposed a blanket right of first refusal. The Commission has since explained that a limited right of first refusal may be permissible under its precedents. In ruling on Southwest Power Pool's ("SPP") filing to comply with Order No. 890, the Commission noted that "broad" rights of first refusal might violate its precedent, citing the *GridSouth* decision, and that participation in the transmission planning process by third parties may be discouraged by a broad transmission owner right of first refusal. It found, however, that it could not determine the breadth of SPP's right of first refusal proposal in its Order No. 890 compliance filing and directed SPP to file clarifying language.[33] The Commission subsequently approved a limited right of first refusal for SPP.[34] The right to build in the current ISO Tariff is limited, and has been approved by the Commission.

The ISO submits that it would be premature for the Commission to evaluate the ISO's existing tariff based on the Commission's tentative

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31 131 FERC ¶ 61,243 at P 46.

32 *Carolina Power & Light Co.*, 94 FERC ¶ 61,273, *reh'g denied* 95 FERC ¶ 61,282 (2001).

33 *Southwest Power Pool, Inc.,* 124 FERC ¶ 61,028 at PP 40-41 (2008).

34 *Southwest Power Pool, Inc.*, 127 FERC ¶ 61,171 at PP 42-50 (2009).

conclusions and suggested requirements in the NOPR. The NOPR is, by definition, a proposal and not a final rule. The tentative conclusions of the NOPR will be subjected to considerable analysis and debate, in which the ISO intends to participate, prior to their finalization. Many parties will provide additional information, evidence, perspectives, and arguments in response to the Commission's tentative conclusions and, if history is any guide, the Commission's final rule is likely to modify and clarify the NOPR's conclusions and proposed requirements, at least in part.

Moreover, it is not clear that the right of existing participating transmission owners to build LGIP network upgrades and LCRI facilities is inconsistent with the NOPR. The NOPR pertains to regional transmission planning and the right to build projects approved through a regional transmission planning process. It does not purport to modify the generator interconnection process, which is relevant to, but not a part of, the transmission planning process. The NOPR does not discuss the LGIP study and Network Upgrade process or state that its proposal applies to LGIP Network upgrades. Indeed, the tariff revisions that the NOPR proposes are to Attachment K – Transmission Planning Process in each transmission provider's tariff. The Commission does not propose any tariff revisions to the LGIP and LGIA provisions of a transmission provider's tariff. Thus, the NOPR cannot serve as a basis for undoing the ISO's – and the industry's – generation interconnection procedures.

Further, the applicability of the NOPR to LCRI facilities is questionable. Nowhere in the NOPR does the Commission state (let alone discuss) that project

developers can become Participating TOs by turning over only radial, gen-tie facilities to an ISO's or RTO's operational control. The NOPR deals with the evaluation of projects in a transmission planning process, not an ISO's minimum requirements to become a Participating TO that are reasonably related to an ISO's or RTO's core business. It would be inefficient and unfair for the Commission to direct the ISO to modify its tariff based on preliminary findings and proposed policies that may change and before the Commission clarifies the scope of the NOPR. If any ISO Tariff provisions are inconsistent with the Commission's final rule, they would more appropriately be modified in the ISO's filing to comply with that final rule.

2. LGIP Network Upgrades

Green Energy Express does not really provide any legal or factual argument, other than as described above, as to why the Commission should find the Participating TOs' right to build LGIP Network Upgrades unjust, unreasonable, or unduly discriminatory. The ISO submits that there would be no basis for such a ruling.

It is worthwhile to first address the Commission's responsibility in determining whether a rate is just and reasonable. It is not the Commission's role under the Federal Power Act to protect competitors in the transmission development business:

> "[T]he [Supreme] Court has articulated the interests that must be protected through [FERC's determination of a just and reasonable rate]: '[T]he fixing of 'just and reasonable' rates [ ] involves a balancing of the investor and the consumer interests." [*FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602, at 603 (1944)]. Both interests are economic and tied directly to the transaction regulated: "the investor interest has a legitimate concern with the

> financial integrity of the company whose rates are being regulated," *id.*, while there is a "consumer interest in being charged non-exploitative rates.' *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, 1178 (D.C.Cir.1987)."[35]

A non-incumbent transmission developer is neither an investor in nor a customer of a regulated utility. If anything, providing non-incumbents a right to build LGIP Network Upgrades would interfere with, rather than protect, legitimate investor interests. Moreover, increased competition cannot be an end in itself. Although the Commission has authority to consider competitive factors when acting under the public interest mandate of the Federal Power Act,[36] Congress provided specific mechanisms for the Commission to advance such considerations, such as requiring interconnections.[37] That authority does not extend to using rate-making authority to compel a regulated utility to surrender its construction rights to others. In order to find that the right to build LGIP Network Upgrades unjust or unreasonable, therefore, the Commission would need to conclude that it renders *customer's* rates unjust or unreasonable.

The Commission cannot make such a finding based solely on an argument that competition in the field of transmission development will reduce transmission rates. The Federal Power Act does not require that a utility's rates be the most cost-effective among rates that could be provided by other utilities. There are many factors other than cost that cannot affect rates, such as the need to maintain reliability. Rates are just and reasonable as long as they reflect the prudently incurred costs of the providing utility. They also need not be the *most*

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35 *Grand Council of the Crees v. FERC*, 198 F.3d 950, 957 (2000).

36 *Central Iowa Power Coop. v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979).

37 *See Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973).

just and reasonable rate; it suffices that a rate be within the "zone of reasonableness." As the D.C. Circuit recently observed:

> The Supreme Court has repeatedly rejected the argument "that there is only one just and reasonable rate possible ... and that this rate must be based entirely on some concept of cost plus a reasonable rate of return." *Mobil Oil Corp. v. Fed. Power Comm'n,* 417 U.S. 283, 316, 94 S.Ct. 2328, 41 L.Ed.2d 72 (1974); *see also In re Permian Basin*, 390 U.S. at 796-98, 88 S.Ct. 1344 (explaining that there is not one reasonable rate but rather a "zone of reasonableness"); *Fed. Power Comm'n v. Hope Natural Gas Co.,* 320 U.S. 591, 602, 64 S.Ct. 281, 88 L.Ed. 333 (1944) (noting that "the Commission was not bound to the use of any single formula or combination of formulae in determining rates"); *Me. Pub. Utils.,* 520 F.3d at 471 ("The Supreme Court has disavowed the notion that rates must depend on historical costs and has held that rates may be determined by a variety of formulae.").[38]

There is no evidence in this proceeding that would support a finding that the right of Participating TOs to build LGIP Network Upgrades takes customer rates outside the zone of reasonableness or otherwise renders the terms and conditions of transmission service to the customers of the ISO and its Participating TOs unjust and unreasonable. The invocation of "competition" cannot fill that void. The Commission cannot evaluate rates by relying "'solely on theoretical postulates' divorced from relevant facts."[39]

Moreover, as explained above, in order to find that the ISO's Order No. 2003-compliant LGIA and LGIP require the ISO to open up construction of LGIP Network Upgrades to competitive solicitation, the Commission would need to find such a requirement in Order No. 2003. As discussed above, there is no such requirement in Order No. 2003. Any finding to the contrary or change in the

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[38] *Blumenthal v. FERC*, 552 F.3d 875, 873 (D.C. Cir. 2009).

[39] *Electric Consumers Resource Council v.* FERC, 747 F.2d 1511, 1514, 1518 (D.C. Cir. 1984).

Order No. 2003 framework would radically transform the generator interconnection process across the country and create substantial delays and uncertainty in the connection of generation (renewable or otherwise) to the transmission grid. Further, as discussed above, it would create reliability, liability, and safety concerns as the Commission has previously recognized. That is why the Commission has clearly held that third-parties do not have the right to build and own upgrades on or to a transmission provider's facilities, rights-of-way, and sub-stations. This also recognizes the fact that the Commission does not have siting authority except for its EPAct backstop authority which is not implicated here.

These considerations, as well the participating transmission owners' obligation to build under Order No. 2003, also rebut any claims of discrimination. Such factors establish that, with regard to LGIP Network Upgrades, existing transmission owners are not similarly situated to transmission developers who do not have existing facilities to which generators will interconnect. Moreover, it is well-established that distinctions between Network Upgrades and other types of transmission expansions are not discriminatory.[40]

3. LCRI Facilities

Green Energy Express provides no greater basis for concluding that a Participating TOs' right to build LCRI facilities is unjust, unreasonable, or unduly discriminatory than it does with regard to LGIP Network Upgrades. Accordingly, the Commission cannot grant Green Energy Express' requested relief.

[40] *See, e.g.*, *Old Dominion Elec. Coop. v. FERC*, 518 F.3d 43, 53 (D.C. Cir. 2008).

As an initial matter, the ISO notes that there is no evidence in this proceeding that would support a finding that the right of Participating TOs to build LCRI facilities takes customer rates outside the zone of reasonableness or otherwise renders the terms and conditions of transmission service to the customers of the ISO and its Participating TOs unjust and unreasonable. As such, the discussion in Section II.B.2 concerning the Commission's authority to modify tariff provisions of a public utility also applies to the ISO Tariff provisions governing LCRI facilities.

Moreover, the ISO Tariff and Transmission Control Agreement provisions that establish the right of Participating TOs to build LCRI facilities right are consistent with the purpose of the LCRI category of transmission. The ISO's LCRI proposal was designed solely as a funding mechanism to assist generation developers who are seeking to develop generation in areas remote from the grid.[41] It simply provides alternative cost allocation for a temporary period of time for what would otherwise be generator interconnections built by either the participating transmission owner or the interconnection customer and paid for by the interconnection customer. This is precisely how the Commission described the LCRI proposal in approving the concept; it also noted that the ISO sought a finding that the proposal was an appropriate variation from Order No. 2003's default generator interconnection policies.[42] The Commission plainly understood

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41 *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,061 at PP 4, 62-63.

42 *Id.* at P 1.

that participating transmission owners would be responsible for construction of LCRI facilities.[43]

The costs of LCRI facilities are not intended to remain in the transmission access charge permanently. The LCRI tariff provisions are only intended as a temporary funding mechanism. As generators come on-line to use the LCRI facility, LCRI facility costs associated with their capacity are removed from the transmission access charge and assigned directly to such generators. Once the LCRI facility is fully subscribed, the costs of the LCRI facility are no longer included in the transmission access charge. The ISO has not been established to serve as a "revolving door" for transmission owners that would only be Participating TOs on a temporary basis and which are not turning over facilities that are integral to the ISO's core functions.

Further, the right of Participating TOs to build LCRI facilities is not unduly discriminatory because it treats similarly situated transmission owners similarly. As discussed above, all transmission owners that turn over to the ISO's Operational Control "transmission lines and associated facilities forming part of the transmission network it owns or to which it has Entitlements" are eligible to become Participating TOs, and all Participating TOs are eligible to build and own LCRI facilities. As indicated above, that right is not limited to Participating TOs with a PTO Service Territory. Once a new project developer becomes a Participating TO, it too will have the right to build and own LCRI facilities.

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[43] *Id.* at PP 72, 76.

However, as discussed below, a party cannot become a Participating TO by turning over only radial LCRI facilities to the ISO's operational control. There is no undue discrimination under these circumstances. The Transmission Control Agreement provisions that preclude a transmission owner from becoming a Participating TO owner solely by turning over radial lines (including LCRI facilities) to the ISO apply with equal force to all transmission owners. In contrast, allowing entities owning only LCRI gen-tie facilities to become Participating TOs could be unduly discriminatory because other entities owning only gen-tie facilities, including gen-tie lines that interconnect renewable resources, would not be permitted to become Participating TOs.

The Transmission Control Agreement's limitation of Participating TO status to entities with network facilities is also not undue discrimination. It is reasonably related to the ISO's core mission of maintaining reliable grid operations, and performing balancing authority area responsibilities.[44] On the other hand, the ISO's mission is not to be operating gen-tie lines, and operating gen-tie lines is not integral or related to the ISO's core functions.

Unlike network facilities, radial lines (with the exception of those types of radial lines expressly identified in the Transmission Control Agreement) are not integral to the ISO's every day achievement of those objectives. Thus, this

[44] *See also Pacific Gas and Elec. Co., et al.,* 81 FERC ¶ 61,122 at 61,562 and 61,568 (1997) (rejecting a proposed change to Section 4.1.1 of the Transmission Control Agreement and accepting the ISO's explanation that the test used in that section "is founded on the Commission's order No. 888 technical and functional test to distinguish transmission from local distribution. In the ISO's judgment the test provides a reasonable means to fulfill its obligation to ensure reliable operations."); *Pacific Gas and Electric Co.,* 77 FERC ¶ 61,204 at 61,822 (1996); *See also Central Iowa Power Coop., et al. v FERC*, 606 F.2d 1156 (D.C. Cir. 1979) (affirming a Commission decision conditionally approving a power pool agreement and noting that criteria for selection of members of the pool in accordance with the valid interests of the pool reasonably furthers the interests of the power pool).

minimum eligibility requirement to become a Participating TO is not discriminatory on its face and is reasonably related to the ISO's core purpose. LCRI facilities do not benefit the ISO and are not needed to enable the ISO to perform its core function. They are gen-tie facilities that benefit generators and which are typically paid for by generators. One should not become a Participating TO by virtue of its turning over only gen-tie facilities to the ISO. As noted above, the Commission explicitly approved the distinction between network facilities and radial facilities. Under the Transmission Control Agreement provisions approved by the Commission, a transmission owner that does not meet the minimum eligibility requirements to become a participating transmission owner is not entitled to receive the benefits (or bear the burdens) accorded to participating transmission owners.

Finally, the ISO notes that Green Energy Express only challenges the LCRI tariff provisions as being unjust and unreasonable. It does not even mention the minimum Participating TO eligibility requirements of the Transmission Control Agreement, let alone raise any arguments that such minimum requirements are unjust, unreasonable and unduly discriminatory. Thus, Green Energy Express has not carried its burden of proof.

4. Reliability Projects and Projects to Maintain the Feasibility of Long-Term CRRs

As noted above, Green Energy Express also asks that the Commission evaluate, and then commence a section 206 proceeding, regarding the explicit right of Participating TOs under the existing ISO Tariff to build reliability projects and projects to maintain the feasibility of long-term CRRs.

The ISO believes that there is no basis for this request. Green Energy Express does not provide any arguments or evidence to support its request or demonstrate that the ISO's existing tariff provisions are unjust and unreasonable. To the contrary, in its Answer to Protests filed on July 15, 2010 in Docket No. ER10-1401, the ISO demonstrated why existing transmission owners should remain responsible for reliability projects addressing reliability needs on their systems. Nonetheless, the ISO notes that the Commission will be addressing such issues in its deliberations on the NOPR. Green Energy Express has not identified anything unique about the ISO's provisions that require the Commission to evaluate them separately from those of other RTOs and ISOs as part of the NOPR process. Further, the Commission is likely to issue a final rule before it would complete the evaluation and proceedings requested by Green Energy Express. Thus, even if Green Energy Express' request had merit, there would be no reason to grant it.

IV. COMMUNICATIONS

Please address all communications concerning this proceeding to the following persons:

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V. CONCLUSION

The ISO respectfully requests that the Commission grant its motion to intervene in the captioned proceeding, allow the ISO to participate in the proceeding with full rights as a party thereto, deny Green Energy Express' Petition and deny the requested relief under sections 206 and 306 of the Federal Power Act.

Respectfully submitted,

/s/ Sean Atkins

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Dated: July 23, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each party listed on the official service list for these 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 Washington, D.C. on July 23, 2010.

/s/ Michael E. Ward

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