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August 12, 2002

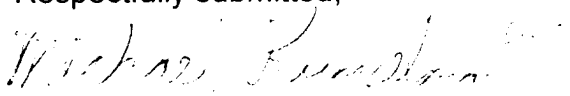
The Honorable Magalie R. Salas
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

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

Dear Secretary Salas:

Enclosed is an original and fourteen copies of the Motion of the California Independent System Operator Corporation to Strike Testimony Submitted on Issues 2 and 3. Two copies have been provided to the Presiding Judge. Also enclosed is an extra copy of the filing to be time/date stamped and returned to us by the messenger. Thank you for your assistance.

Respectfully submitted,



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Enclosures

cc: Service List
The Honorable Bruce Birchman

THE UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

MOTION OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION TO STRIKE TESTIMONY SUBMITTED ON ISSUES 2 AND 3

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

Pursuant to Rule 509 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.509 (2001), and the Presiding Judge's Procedural Schedule in this matter, the California Independent System Operator Corporation ("ISO") hereby requests that the Presiding Judge strike portions of the Parties' responsive, rebuttal, and surrebuttal testimony and exhibits identified below because they are beyond the scope of, or irrelevant to, the issues set for hearing in this phase of the proceeding.

I. MOTION TO STRIKE

In establishing these evidentiary hearings in the July 25 Order, 96 FERC ¶ 61,120 (2001), the Commission was clear that the scope of the hearings was "limited to the collection of data needed to apply the refund methodology prescribed herein; we will direct Judge Birchman not to entertain any arguments relating to the methodology or the scope of transactions subject to refunds, except as otherwise indicated in this order." 96 FERC at 61,520. During this phase of the proceeding, the Presiding Judge has reminded parties of this requirement in orders issued on July 25, 2002[1] and July 31, 3002.[2] Nevertheless, several participants have submitted evidence in testimony and exhibits that argues for results that are inconsistent with the methodology for calculating refunds or the scope of transactions subject to refund as set forth in the Commission's July 25, December 19,[3] and May 15[4] Orders. In other cases, parties have presented evidence that goes to issues already addressed and litigated in the first phase of this proceeding. Therefore, the testimony and exhibits pertaining to the following issues, as identified below, should be stricken.

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[1] Order Concerning Substantially Duplicative and Irrelevant Testimony, 100 FERC ¶ 63,007 (2002).

[2] Order Adopting Joint Narrative Stipulation of Issues and Concerns with Regard to whether Certain Issues are Beyond the Scope (2002).

[3] *San Diego Gas & Electric Co.*, et al., 97 FERC ¶ 61,275 (2001).

[4] *San Diego Gas & Electric Co.*, et al., 99 FERC ¶ 61,160 (2002).

A. Testimony Addressing the Correct Method for Calculating MMCPS is Not Appropriately Before the Presiding Judge in this Phase of the Proceeding (See Stipulated Issue I.A.3).

One party has filed testimony discussing the appropriate calculation of MMCPs to be used in the ISO's settlements rerun. This issue was thoroughly litigated in the first phase of this proceeding, and the Presiding Judge should not permit it to be re-litigated now. The Presiding Judge explicitly questioned the appropriateness of this testimony in his July 25, 2002 Order. Therefore, the following testimony should be stricken:

Party	Portions of Testimony and Exhibits to Strike	Portions of Rebuttal and Surrebuttal Testimony Affected
Sellers	**SEL-19** at 8 ("Table 1") – 9:2 (including Table 1), 9:6 ("These MMCPs") – 11:14, 52:3 ("There are") – 53:9, 54:12-62:10. **SEL-31** **SEL-32** **SEL-33** **SEL-34** **SEL-35** **SEL-36** **SEL-37** **SEL-38**	**ISO-37** at 12:15-18.

B. The Issues of Whether the ISO Should Mitigate Transactions (1) Where a Party was Obtaining Supplies on Behalf of the ISO or (2) Where a Party Forewent Other Opportunities in Order to Sell to the ISO are Not Before the Presiding Judge in This Proceeding (See Stipulated Issues I.A.2.f and I.A.2.h).

TransAlta argues that the ISO should not mitigate transactions in which TransAlta "forwent other opportunities to sell power" in selling to the ISO or obtained "incremental supplies on behalf of the ISO." Neither argument is properly before the Presiding Judge, because the Commission has not stated that either factor should be considered in addressing the three issues set for hearing in this case, i.e., the mitigated price to be applied to transactions, the amount of refunds owed by suppliers, and amounts owed and owing to suppliers by the ISO, the Investor-Owned Utilities and the State of California. *See* July 25 Order at 61,520. Moreover, the Presiding Judge recognized that these issues are not properly part of this proceeding in his May 20, 2002 ruling denying TransAlta's motion to compel discovery of the ISO on these matters. *See* Tr. at 3450:19-3453:10. For these reasons, the following testimony should be stricken:

Party	Portions of Testimony and Exhibits to Strike	Portions of Rebuttal and Surrebuttal Testimony Affected
TransAlta	**TRA-1** at 2:15 ("Second") – 3:1 ("ISO"), 3:18-5:13, 7:12-11:2. **TRA-3** **TRA-4** **TRA-6** at 5:16-9:5 **TRA-11**	**ISO-37** at 93:9-95:9. **CAL-54** at 29:9-30:5.

C. The Issue of Whether Certain Short-Term (Spot) "Bilateral" Sales to the ISO are Exempt from Mitigation is Not Properly Before the Presiding Judge (See Stipulated Issue I.A.2.a)

A number of parties argue that certain spot market transactions with the ISO should be exempt from mitigation under the Commission's refund orders. These parties characterize these sales as "bilateral" sales with the ISO and maintain that the Commission did not intend that these sales be subject to mitigation. Parties also suggest that certain of these spot transactions do not fall into the category of OOM transactions that the Commission stated were to be mitigated. None of these arguments is properly before the Presiding Judge in this proceeding. The Commission, in its various orders, has never indicated that any spot sales made to the ISO would be considered "bilateral" transactions and therefore excluded from refund liability. The Commission only used the term "bilateral" to refer to (1) transactions entered into between end-use purchasers and suppliers, and (2) transactions entered into by CDWR to cover the net-short position of the three California IOUs. *See* July 25 Order at 61,514-515; December 19 Order at 62,194-197. Similarly, the Commission has not limited the definition of what constitutes an OOM transaction in the manner suggested by parties. In the July 25 Order, the Commission stated that:

> To the extent the ISO made spot market OOM purchases (i.e., 24 hours or less and that were entered into the day of or day prior to delivery), such purchases are no different than purchases through its markets. Both types of purchases are made by the ISO in order to procure the resources necessary to reliably operate the grid. Therefore, we clarify that spot market OOM transactions are subject to refund and subject to the hourly mitigated price established in the ordered hearing.

July 25 Order at 61,515.

In the December 19 Order, the Commission addressed and explicitly rejected arguments of the type that parties raise in their testimony. On rehearing of the July 25 Order, several sellers that did not have a normal contractual relationship with the ISO during the refund period argued that spot market OOM transactions should not be subject to mitigation because "OOM sales do not involve sales into either the ISO's or PX's markets; rather, they are bilateral transactions that arise out of a separate authorization under the ISO's tariff for the purpose of assuring grid reliability." December 19 Order at 62,194. The Commission rejected this argument, especially the comparison to DWR bilateral arrangements, explaining that:

> ISO OOM transactions, on the other hand, are purchases for the purpose of maintaining reliability on the ISO-controlled grid and are necessarily purchases of short-term energy. They are contemplated in the ISO Tariff as a backstop to the ISO's auction markets. It is only when the ISO market produces insufficient resources that the ISO must resort to out of market purchases. It follows that if the price in these markets is subject to refund, then the price for the OOM transaction (which is a purchase of last resort in lieu of a market purchase) is subject to refund also.

December 19 Order at 62,195.

Some parties also argue that because they are governmental entities, certain sales that they made to the ISO are excluded from refund liability. The Commission, however, has not directed the ISO to exclude any transactions that it entered into with governmental entities from mitigation. Therefore, pursuant to the Commission's instructions that the Presiding Judge not address arguments

as to the scope of transactions subject to refund liability, it would be entirely inappropriate to litigate this issue in the current proceeding.

Except for clearly delineated exceptions involving DWR and DOE transactions, the Commission has consistently made clear that all *spot* transactions with the ISO during the refund period are subject to mitigation, regardless of the transacting entity. All of these arguments were already raised, or should have been raised, with the Commission in the form of requests for rehearing or motions for clarification. The belated attempt of these parties to raise these arguments in the current proceeding should be rejected and the associated testimony stricken.

Party	Portions of Testimony and Exhibits to Strike	Portions of Rebuttal and Surrebuttal Testimony Affected
BPA	**BPA-57** at 3:18-4:16, 5:9-11:5, 12:3-9. **BPA 65** through **BPA 206** **BPA 218**	**ISO-37** at 82:19-93:7. **ISO-45** at 6:1-7:18. **CAL-54** at 20:3-31:6. **CAL-83** at 17:12-18:8. **S-106** at 8:5-17:18.
Burbank	**BUR-4** at 10:10-19.	
Grant Co. PUD	**GC-1** at 4:21-6:13.	

LADWP	**DWP-21** at 3:15 ("(3)" through "LADWP; and"), 5:1-6:12, 14:1-19:5, 20:16 ("(3)") – 18 ("million; and"). **DWP-29** **DWP-30** **DWP-31** **DWP-32** **DWP-33** **DWP-38** at 2:8 ("(1)") – 10 ("the ISO"), 2:16-4:22.	
Redding	**REU-1** at 4:9 ("Additionally") – 11 ("period"), 4:20-12:14, 17:1-22. **REU-2** **REU-3** **REU-4** **REU-5** **REU-6** at 2:12-5:7.	
Sempra	**SET-6** at 2:5 (" and (ii)") – 10, 4:7-8:16. **SET-9** **SET-10** **SET-11** **SET-12**	
Turlock	**TID-1** at 3:18-4:1 ("to the ISO"), 4:7 ("The ISO's") – 12, 7:1-11:20, 12:13-16:16. **TID-4** **TID-7** **TID-11** at 3:8-13:21 **TID-12** **TID-13** **TID-14**	
TransAlta	**TRA-6** at 5:10 ("In addition") – 15.	

D. The Issue of Whether a Cap Should be Applied to the Neutrality Adjustment Charge is Not Properly Before the Presiding Judge in this Proceeding (See Stipulated Issue I.A.2.k.ii)

Dr. Cicchetti, testifying for the Competitive Supplier Group, argued in his responsive testimony that the neutrality charge type, Charge Type 1010, should have been capped during the ISO's settlements re-run at a certain amount per megawatt-hour through February 26, 2001 and thereafter at a certain amount per megawatt-hour on an annual basis. Mr. Nichols, testifying for Salt River Project, asserted in responsive testimony that the ISO has understated Salt River Project's refund numbers due to overcollection of approximately $8 million in Neutrality Adjustment charges. Various other witnesses responded to Dr. Cicchetti in one form or another during the rebuttal round. Those witnesses were the following: Dr. Berry, testifying for the California Parties; Mr. Gerber, testifying for the ISO; Mr. Nichols; Ms. Patterson, testifying for the Commission Staff; Dr. Stern, testifying for the California Parties; and Mr. Tranen, testifying for the California Generators. Finally, in the surrebuttal round, several witnesses responded to the rebuttal testimony described above, as well as to the Presiding Judge's request for information concerning the separate proceedings concerning the Neutrality Adjustment charge in Docket Nos. EL00-111 and EL01-84. Those witnesses were the following: Dr. Berry; Dr. Cicchetti; Mr. Gerber; Mr. Nichols; Ms. Patterson; and Mr. Tranen.

The issue of whether a cap should be applied to Neutrality Adjustment charges is not properly before the Presiding Judge. This issue is one of the

issues in the neutrality proceedings in Docket Nos. EL00-111 and EL01-84. On July 31, 2002, a Settlement Agreement was filed in the neutrality proceedings that would resolve all issues in those proceedings by, *inter alia*, providing for no refunds for Neutrality Adjustment charges in excess of any cap. *See* Exh. ISO-46. The issues raised in the neutrality proceedings should be resolved in those proceedings.

Dr. Cicchetti would have the ISO's production data base altered to apply the cap on Neutrality Adjustment charges that is at issue in the neutrality proceedings. If the Settlement Agreement is approved, however, the outcome of the neutrality proceedings will be that the production data base will not be altered. *See* Exh. ISO-46 at 12-14. In other words, importing consideration of a maximum level on the Neutrality Adjustment charges into the refund proceeding could result in two Commission proceedings with potentially different resolutions of a single issue.

The issue of a cap for Neutrality Adjustment charges is no different from any other type of specific dispute that might be pending between the ISO and a Market Participant (for example, in arbitration under the ISO Tariff), or a dispute in another complaint proceeding at the Commission. Any of these charge type disputes, once resolved, could cause a re-invoicing for some particular period of time. But none of these disputes are properly before the Presiding Judge. Nor is the issue of any cap on Neutrality Adjustment charges, or the effect to be accorded any cap.[5] Attachments 1 and 2 to this motion are excerpts from the

[5] The Settlement Agreement allows further changes to Scheduling Coordinators' settlement

pre-filed testimony of Spence Gerber in this proceeding, in which he describes in greater detail the neutrality proceedings and why the cap at issue in those proceedings should not be applied in this proceeding. Rather than repeating Mr. Gerber's discussion here, we ask that the Presiding Judge consider the substance of the discussion in this pre-filed testimony as incorporated herein.

For all of these reasons, the issue of whether a cap should be applied to Neutrality Adjustment charges is not properly before the Presiding Judge. Therefore, the following testimony on that subject should be stricken:

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statements resulting from Commission and/or court proceedings, including changes resulting from the refund proceeding. Thus, if the Settlement Agreement is approved, there will be no bar to changes to the Neutrality Adjustment charge resulting from application of the MMCP to other charge types in this proceeding. *See* Exh. ISO-46 at 41-42.

Party	Portions of Testimony and Exhibits to Strike	Portions of Rebuttal and Surrebuttal Testimony Affected
Sellers	**SEL-19** at 25:14 – 31:4 **SEL-22** **SEL-23**	**ISO-37** at 25:15 – 28:20 **ISO-45** at 10:1-20:2 **ISO-46** **CAL-53** at 14:16-15:5 **CAL-54** at 43:13-46:4 **CAL-83** at 36:16-37:21 **GEN-83** at 27:11-30:16 **GEN-85** at 2-3 **GEN-89** at 8:8-12:10 **S-106** at 32:8-33:10 **S-116** at 8:1-9:20 **S-117** **SEL-48** at 2:2-9:16 **SRP-5** at 3:14-9:7 **SRP-8** at 3:16-11:16
Salt River Project	**SRP-1** at 8:18 ("In addition") – 9:2	**ISO-37** at 25:15 – 28:20 **ISO-45** at 10:1-20:2 **ISO-46** **SRP-5** at 3:14-9:7 **SRP-8** at 3:16-11:16

E. The Issue of How Shortfalls in Cash Available for Distribution, if Any, Should be Treated is Beyond the Scope of Issues Set for Hearing Before the Presiding Judge (See Stipulated Issue III.G)

A number of parties have addressed this issue in testimony filed during this Phase of the proceeding. However, it is beyond the scope of those issues that the Commission set for hearing before the Presiding Judge. In the December 19 Order, the Commission stated that it would determine the "mechanism by which refunds would flow to customers" after the Presiding Judge has made his findings of fact to the Commission. December 19 Order at 62,223-224. This issue falls squarely within the ambit of the "mechanism by which refunds would flow to customers," a fact which the Presiding Judge explicitly recognized in his July 31 Order. Therefore, the testimony addressing this issue should be stricken.

Party	Portions of Testimony and Exhibits to Strike	Portions of Rebuttal and Surrebuttal Testimony Affected
AEPCO	**AEP-15** at 5:13-6:2.	**CAL-35** at 11:10-23. **CAL-53** at 2:17-3:17.
CA Generators	**GEN-36** at 15:10-13.	
Sellers	**SEL-19** at 44:5-22.	
Modesto	**MID-20** at 7:18-9:12. **MID-23**	
PPL	**PPL-21** at 2:20-3:12.	
Sempra	**SET-1** at 10:20-12:8.	
Salt River Project	**SRP-1** at 11:15-14:26.	

F. The Issue of When, and Under What Circumstances, and Subject to What Conditions Should Cash Flow Between Buyers and Sellers is Not Before the Presiding Judge in This Proceeding (Stipulated Issue III.H)

A number of parties have addressed this issue in testimony filed during this Phase of the proceeding. However, it is beyond the scope of those issues that the Commission set for hearing before the Presiding Judge. In the December 19 Order, the Commission stated that it would determine the "mechanism by which refunds would flow to customers" after the Presiding Judge has made his findings of fact to the Commission. December 19 Order at 62,223-224. This issue falls squarely within the ambit of the "mechanism by which refunds would flow to customers," a fact which the Presiding Judge explicitly recognized in his July 31 Order. Therefore, the testimony addressing this issue should be stricken.

Party	Portions of Testimony and Exhibits to Strike	Portions of Rebuttal and Surrebuttal Testimony Affected
AEPCO	**AEP-14** at 3:8-15, 6:7-8:10, 10:9-17. **AEP-15** at 6:3-10.	**ISO-37** at 40:20-41:8. **CAL-82** at 14:20-16:16.
Sellers	**SEL-19** at 5:1-3, 74:14-75:10. **SEL-42** at 3:20-20:16. **SEL-43**	
Modesto	**MID-20** at 9:13-20.	

Powerex	**PWX-53** at 3:23 ("This compliance") – 4:3, 25:21-26:10 **PWX-74** at 7:22-8:7. **PWX-77** at 16:15-17:1.	
PPL	**PPL-21** at 5:17-6:4.	
Salt River Project	**SRP-1** at 20:16-21:5, 21:11-22:2. **SRP-5** at 14:15-19:3.	
Vernon	**VER-10** at 10:14-12:3.	

G. Certain Testimony as to the "Actual Costs" of Parties as it Relates to Refund Liabilities is Not Properly Before the Presiding Judge in this Proceeding.

In testimony filed on behalf of the Harbor Cogeneration Company ("Harbor"), Mr. Brian Ferguson presents and explains calculations that he has performed comparing the "actual costs" incurred by Harbor with respect to certain transactions with the refund liability calculated by the ISO for these transactions. Mr. Ferguson explains that in cases where Habor's "actual costs" exceeded the mitigated price, he replaced the ISO's refund amount with an amount equal to those "actual costs."

This testimony is inappropriate because it proposes a methodology for calculating refunds completely at odds with the one mandated by the Commission in its June 25, December 19, and May 15 Orders. As noted in the introduction to this motion, the Commission has directed the Presiding Judge not to entertain any arguments relating to the methodology for calculating refunds. For these reasons, this testimony should be stricken.

Party	Portions of Testimony and Exhibits to Strike[6]	Portions of Rebuttal and Surrebuttal Testimony Affected
Harbor Cogeneration	**HAR-1** at 2, question beginning "What review have you made of the exhibit . . ." through page 4, question begging "Did you make a complete review . . ."	**None**

H. Testimony Relating to a Pre-Existing Dispute Between the ISO and NCPA Concerning the Classification of Certain Transactions Should Not be Considered by the Presiding Judge in the Current Proceeding.

In his July 3, 2002 testimony filed on behalf of NCPA, Mr. Park contends that the ISO improperly re-classified certain RMR transactions as OOM transactions, and that if any of these sales have been "erroneously" mitigated as OOM sales, they should be removed from mitigation. In his surrebuttal testimony filed on behalf of NCPA, Mr. Dockham provides additional background as to these re-classifications and states that the ISO and NCPA have had previous discussions as to this issue.

This testimony should not be considered by the Presiding Judge in the current proceeding. As Mr. Dockham acknowledges, the classification of these transactions has been the subject of discussions between the ISO and NCPA.

[6] Harbor did not provide line numbers for its testimony. Therefore, identification of portions to be stricken have been done by reference to page and relevant question.

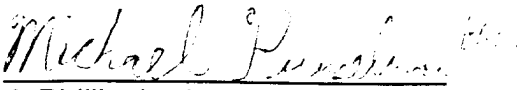
Moreover, the RMR Contract provides procedures for resolving these types of disputes. It would be impossible for the Presiding Judge and the Commission to take up in this proceeding all outstanding disputes between the ISO and other market participants that might impact the final amounts owed by and owing to those market participants. Instead, these issues should be resolved outside of the refund proceeding, and the results of the refund proceeding as to the appropriate mitigated price and the scope of its application would then be applied to these transactions. For these reasons, the following testimony should be stricken:

Party	Portions of Testimony and Exhibits to Strike	Portions of Rebuttal and Surrebuttal Testimony Affected
NCPA	**NCP-10** at 6:20-7:11. **NCP-14** at 6:26-7:12.	**ISO-45** at 24:18 ("However") – 27:7.

II. CONCLUSION

Wherefore, for the reasons stated herein, the ISO respectfully requests that the Presiding Judge strike the portions of the testimony and exhibits identified in Section I of this Motion.

Respectfully submitted,



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Dated: August 12, 2002

ATTACHMENT 1

EXCERPT FROM REBUTTAL TESTIMONY OF SPENCE GERBER ON BEHALF OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION IN DOCKET NOS. EL00-95-045, *ET AL.*, FILED ON JULY 26, 2002

Q. WHAT IS YOUR VIEW OF DR. CICCHETTI'S AND MR. NICHOLS' TESTIMONY CONCERNING THE NEUTRALITY CHARGE AND THE "CAP" TO WHICH THEY REFER?

A. **[Spence Gerber]** I disagree with their view that the neutrality charges should be capped at some amount during the refund period. The alleged "cap" to which Dr. Cicchetti and Mr. Nichols refer was always intended to be used for planning purposes only. In addition, it is the subject of another, separate FERC proceeding in Docket Nos. EL00-111 and EL01-

EXCERPT FROM REBUTTAL TESTIMONY OF SPENCE GERBER ON BEHALF OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION IN DOCKET NOS. EL00-95-045, *ET AL.*, FILED ON JULY 26, 2002

84, in which parties currently are engaged in settlement discussions. The Commission has stayed its order in that proceeding pending the outcome of these settlement discussions. Thus, these witnesses' reliance on that order is misplaced.

The treatment of neutrality charges as proposed by these witnesses would result in wholesale revisions to settlement amounts during the refund period. If the charges to the neutrality adjustment were limited to the amount of the "cap" alleged by these witnesses, the result would be residual un-allocated costs not assigned to any Scheduling Coordinator. Such a result would violate a fundamental obligation of the ISO, as a revenue-neutral entity, authorized under the California electric industry restructuring legislation and Commission precedent, to recover from Scheduling Coordinators on whose behalf it acquired Energy and Ancillary Services the amounts it pays to other Scheduling Coordinators to procure those products. The ISO always must balance cash disbursements against cash received to maintain revenue neutrality. That is, the ISO has no basis for absorbing neutrality costs because the ISO's entire settlement system is premised upon payments to creditors only in proportion to cash received from debtors. Therefore, if some kind of "cap" were applied to the amount charged to some SCs through neutrality, the ISO would be

EXCERPT FROM REBUTTAL TESTIMONY OF SPENCE GERBER ON BEHALF OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION IN DOCKET NOS. EL00-95-045, *ET AL.*, FILED ON JULY 26, 2002

required to recoup amounts previously paid to other SCs in order to maintain its revenue neutrality.

The ISO has never treated the alleged "cap" in the way Dr. Cicchetti and Mr. Nichols propose, in its production data base or anywhere else. Nor should the ISO treat the alleged "cap" any differently now. Since the existing production data base is what is used to conduct the rerun of the refund period and is the source of the data to which the MMCP is to be applied in the present proceeding, changing the treatment of the alleged "cap" would require a change to the data base. For purposes of this proceeding, the data base should be taken as is, because the objective of this proceeding is to impose a rerun on the historical data base the ISO originally used for settlement during the refund period.

In addition, a second negative result (in addition to the wholesale revision of settlement amounts, as noted above) would arise should the ISO treat the alleged "cap" as Dr. Cicchetti and Mr. Nichols propose. Specifically, the second negative result would be the import of issues currently subject to Commission consideration and settlement discussions in the neutrality proceeding, into the present proceeding. Besides being duplicative of Commission consideration in the neutrality proceeding, inclusion of the neutrality "cap" issue in the refund proceeding would require the

EXCERPT FROM REBUTTAL TESTIMONY OF SPENCE GERBER ON BEHALF OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION IN DOCKET NOS. EL00-95-045, *ET AL.*, FILED ON JULY 26, 2002

Commission either to assume an ultimate outcome in one proceeding in order to achieve consistency in the second proceeding, or risk having inconsistent Commission decisions on the same topic. (For example, Messrs. Cicchetti and Nichols would have the Presiding Judge assume that the ISO is required to refund certain amounts now showing in the production data base as neutrality charges; a conceivable outcome of the ongoing settlement discussions in the other proceeding, however, could well be that the Commission is asked to waive refunds.)"

Another way to look at the testimony of Dr. Cicchetti and Mr. Nichols is that it does not address any issue whatsoever concerning the ISO's application of MMCPs to the production data base. Rather, these parties are arguing for changes in that production data base itself. This is analogous to a party trying to import into this proceeding a billing dispute that it has with the ISO concerning a transaction during the refund period. This proceeding clearly is not the proper forum for addressing such disputes. Simply stated, any dispute about the amounts that the ISO charged under neutrality during the refund period is completely outside the scope of this proceeding – and is, in fact, as noted above, the subject of another proceeding.

ATTACHMENT 2

E. NEUTRALITY

Q. MR. GERBER, PLEASE DESCRIBE FURTHER THE COMPLAINT PROCEEDINGS BEFORE THE COMMISSION CONCERNING THE APPROPRIATE TREATMENT OF NEUTRALITY CHARGES, WHICH YOU BRIEFLY DESCRIBED IN THE PREPARED REBUTTAL TESTIMONY YOU PROVIDED IN THE PRESENT PROCEEDING ON JULY 26, 2002.

A. **[Spence Gerber]** The proceeding before the Commission concerning the appropriate treatment of neutrality charges is an ongoing proceeding in Docket Nos. EL00-111 and EL01-84. As I will explain below, the latest development in the neutrality proceeding is that a number of parties, including the ISO, jointly filed an "Offer of Settlement and Settlement Agreement" ("Settlement Agreement") on July 31, 2002 to resolve all issues in the neutrality proceeding.

I wish to emphasize at the outset of my testimony that, in order to get a full understanding of the history and issues raised in the neutrality proceeding, the best resource to review (other than the entire record of the proceeding) is the "Explanatory Statement in Support of Offer of Settlement" ("Explanatory Statement") and the Settlement Agreement as filed with the Commission on July 31, 2002, and to which the ISO is a signatory. The Explanatory Statement and Settlement Agreement are included in the present filing in Exhibit No. ISO-46. The description of the

neutrality proceeding that I provide below, while useful for purposes of gaining a broad understanding of the history and issues, cannot reasonably serve as a substitute for the full Explanatory Statement and Settlement Agreement.

The neutrality proceeding is the result of two complaints filed with the Commission, one submitted by the Southern Cities on September 15, 2000 in Docket No. EL00-111, and the other submitted by Salt River Project ("SRP") on June 1, 2001 in Docket No. EL01-84. The neutrality proceeding concerns the ISO's implementation of two different calculations of Neutrality Adjustment charges, as were variously authorized by the Commission, during the period of June 1, 2000 to February 27, 2001.

Inasmuch as the neutrality proceeding focuses on the timing for which different calculation methodologies should have been used, that proceeding addresses the ISO's adherence to the several different maximum levels of Neutrality Adjustment charges. The maximum Neutrality Adjustment charge and the time period over which it is to be calculated is the "cap" to which Dr. Cicchetti and Mr. Nichols refer in the testimony they submitted on July 3, 2002 in the present proceeding. I presented a detailed discussion of the Neutrality Adjustment charge that the ISO uses in my Rebuttal Testimony filed on July 26, 2002.

Q. PLEASE CONTINUE WITH YOUR DESCRIPTION OF THE ISSUES AND HISTORY CONCERNING THE NEUTRALITY PROCEEDING.

A. **[Spence Gerber]** On March 14, 2001, the Commission issued an order concerning the Southern Cities complaint ("March 14 Order"), in which it found that the ISO had violated the alleged "cap" in the ISO Tariff on the ISO's Neutrality Adjustment charges, and ordered the ISO to pay to one of the complainants refunds of amounts charged above the alleged "cap". 94 FERC ¶ 61,268, at 61,934 (2001). However, the Commission found that there was no basis for requiring the ISO to absorb the costs of such refunds, and so permitted the ISO to allocate those costs to the remaining Scheduling Coordinators in proportion to their relevant metered Demands. Additionally, the Commission found moot the aspect of the Southern Cities' complaint concerning the manner in which the ISO allocated Energy costs. The ISO and other parties filed requests for rehearing of the March 14 Order.

On May 14, 2001, the Commission issued an order on rehearing of the March 14 Order ("May 14 Order"), in which it reaffirmed its determination that the ISO had violated the alleged "cap" on Neutrality Adjustment charges. 95 FERC ¶ 61,197, at 61,687 (2001). The Commission required the ISO to apply the alleged "cap" equally to all customers that were assessed Neutrality Adjustment charges, and to calculate the Neutrality

Adjustment charges assessed to all Scheduling Coordinators in accordance with the alleged "cap". Additionally, the Commission denied the Southern Cities' request for rehearing of their complaint concerning the ISO's allocation of Energy costs. The ISO and other parties filed requests for rehearing of the May 14 Order.

Subsequently, the ISO, the Southern Cities, and SRP jointly filed a motion with the Commission to begin settlement proceedings to resolve the issues raised in the Docket Nos. EL00-111 and EL01-84 complaint proceedings. (SRP's complaint had not been addressed by the Commission by the time the motion to initiate settlement proceedings was filed.) The Commission granted the motion, and stayed further consideration of the issues in the neutrality proceeding pending the outcome of settlement discussions, and Judge Jacob Leventhal was appointed as settlement judge. Further, parties that had filed petitions for review of the March 14 and May 14 Orders with the United States Court of Appeals for the District of Columbia Circuit had their cases voluntarily dismissed without prejudice pending the outcome of settlement discussions.

Q. WHAT OCCURRED AFTER SETTLEMENT PROCEEDINGS IN THE NEUTRALITY PROCEEDING WERE INITIATED?

A. [Spence Gerber] Following a number of months of settlement discussions among a number of parties, the ISO, Southern Cities, SRP, Vernon, and CDWR agreed to the Settlement Agreement, which was filed with the Commission on July 31, 2002. My understanding is that the Settlement Agreement will now be subject to comment pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.

Q. PLEASE DESCRIBE THE NATURE OF THE NEGOTIATED SETTLEMENT EMBODIED IN THE SETTLEMENT AGREEMENT.

A. [Spence Gerber] As with the description of the history and issues in the neutrality proceeding, the best description of the Settlement Agreement is contained in the Explanatory Statement and, of course, in the Settlement Agreement itself, provided in Exhibit No. ISO-46. However, I can summarize the nature of the negotiated settlement embodied in the Settlement Agreement.

The Settlement Agreement would, as a matter of compromise, assign responsibility for the costs of Energy procured by the ISO to the Scheduling Coordinators for which the ISO purchased Energy to serve their loads during the period December 8-11, 2000. (If not for the Settlement Agreement, assignment of cost responsibility in this manner

would have begun on December 12, 2000, pursuant to a Tariff change contained in Amendment No. 33 to the ISO Tariff). The Settlement Agreement provides that the parties to the Settlement Agreement would agree, as a matter of compromise, to request that the Commission exercise its discretion to decline to order the ISO to pay refunds of amounts collected in excess of a Neutrality Adjustment cap, if any, during the period June 1, 2000 through February 26, 2001.

The Settlement Agreement also provides that the terms of the Settlement Agreement are non-severable. Thus, should the results of the refund proceeding alter the terms and conditions of the Settlement Agreement, that agreement would be null and void. Simply stated, the refund and neutrality proceedings have different purposes: *i.e.*, the refund proceeding concerns the application of the MMCP to the sales and purchases of Imbalance Energy and Ancillary Services while the neutrality proceeding concerns allocation of certain portions of ISO charges for Energy and Ancillary Services, among other products and services, that are invoiced and settled through the Neutrality Adjustment charge. That is, the Settlement Agreement narrowly resolves the actual Neutrality Adjustment charges and the Settlement Agreement, if approved by the Commission, would in no way interfere with the outcome of the refund proceeding. As explained on page 16 of the Explanatory Statement, amounts shown on Scheduling Coordinators' settlement statements that changed as the

result of applying the terms of the Settlement Agreement would remain subject to further changes as a result of other proceedings pending before the Commission and/or the court(s). The Explanatory Statement specifically mentions the refund proceeding as an example of a proceeding that may require such further changes to Scheduling Coordinators' settlement statements. The Explanatory Statement goes on to state that the Settlement Agreement would not in any way interfere with the outcome of the refund proceeding, because the settlement statements would reflect further changes resulting from the refund proceeding.

Q. PLEASE DESCRIBE THE LEVEL OF SUPPORT FOR THE SETTLEMENT AGREEMENT THAT CURRENTLY EXISTS AMONG PARTIES IN THE NEUTRALITY PROCEEDING.

A. **[Spence Gerber]** As noted in the Explanatory Statement, in addition to the parties that filed the Settlement Agreement, the Commission Staff, Southern California Edison Company, the Modesto Irrigation District, Silicon Valley Power, the City of Redding, California, the City of Palo Alto, California, and the M-S-R Public Power Agency support or do not oppose the Settlement Agreement. In fact, the only party that opposes the Settlement Agreement is Pacific Gas and Electric Company.

Q. DO YOU BELIEVE THAT THE ISSUES RAISED IN THE NEUTRALITY PROCEEDING SHOULD BE ADDRESSED IN THE REFUND PROCEEDING?

A. [Spence Gerber] No, I do not. As I have described, the neutrality proceeding concerns issues that are separate from those under consideration in the refund proceeding, and the Commission has before it now a Settlement Agreement that would resolve all Neutrality Adjustment issues.

Thus, the issues raised in the neutrality proceeding should be resolved in that proceeding, and should not needlessly be imported into the present proceeding. Dr. Cicchetti would have the ISO's production data base, which is not at issue in this refund proceeding, altered to apply the alleged cap on Neutrality Adjustment charges that is at issue in the neutrality proceeding. Yet, the outcome of the neutrality proceeding itself, if the Settlement Agreement is approved, will be that the production data base will not be altered. In other words, importing consideration of a maximum level on the Neutrality Adjustment charge into the refund proceeding could result in two Commission proceedings with different resolutions of a single issue. Moreover, the issue of the "cap" for Neutrality Adjustment charges is no different from any other type of specific dispute that might be pending between the ISO and a Market Participant (for example, in arbitration under the ISO Tariff), or a dispute in another complaint

proceeding at the Commission. Any of these charge type disputes, once resolved, could cause a re-invoicing for some particular period of time. Therefore, inasmuch as the Neutrality Adjustment issue does not concern Market Clearing Prices and is already pending in a narrowly tailored Commission proceeding to resolve the specific charge limits, the issue should not be "imported" into this proceeding; neither should the dispute embodied in the neutrality proceeding be dealt with here as Dr. Cicchetti suggests by altering the production data base in a manner inconsistent with the Settlement Agreement.

Additionally, as I explained above, the Settlement Agreement, if approved, would allow further changes to Scheduling Coordinators' settlement statements resulting from Commission and/or court proceedings, including changes resulting from the refund proceeding. Therefore, there is no possibility that the approval of the Settlement Agreement would cause interference with the outcome of the refund proceeding. That is, even if the Settlement Agreement is approved, there will be no bar to changes to the Neutrality Adjustment charge resulting from application of the MMCP to other charge types in this proceeding.

On the other hand, if the Settlement Agreement is abandoned because, for example, the issue is imported into the present refund proceeding and the Commission orders the ISO to apply the "cap" to the entire refund

period (or any other) period, the ISO will be required to charge Market Participants accordingly to obtain funds needed to pay other Market Participants for prior charges above the "cap". The Commission has already approved the ISO charging Market Participants to obtain funds needed for "refunds" for all such prior charges and so, if the Settlement Agreement is abandoned, some Market Participants will incur charges that they would not otherwise have incurred if the Settlement Agreement had been approved. Stated differently, a majority of parties in the refund proceeding will either be indifferent or benefited should the Settlement Agreement be adopted but these parties will incur charges from the ISO should the ISO be required to obtain funds from its Market Participants in order to make refunds for any past Neutrality Adjustment charges that are above specified maximum levels during the refund period.

Q. IS MCP APPLIED TO THE NEUTRALITY ADJUSTMENT CHARGE?

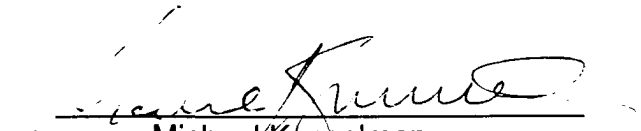
A. [Spence Gerber] No. The Neutrality Adjustment charge type is not a charge to which any Market Clearing Price, mitigated or not, is applied. Instead, the Neutrality Adjustment charge type is a balancing charge type that the ISO uses to ensure allocation and collection of costs remaining after certain charges are first settled through other charge types that do have Market Clearing Prices applied to their specific calculation formulas. That is, differences between the amounts paid and charged as a result of a Market Clearing Price applied in several other ISO charge types are

"bundled" into the Neutrality Adjustment charge type in order to assure their collection, and thus, revenue neutrality for the ISO.

CERTIFICATE OF SERVICE

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

Dated at Washington, DC, on this 12th day of August, 2002.



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