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October 30, 2003

## **Via Electronic Filing**

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

**Re: Sacramento Municipal Utility District v. Pacific Gas and  
Electric Company, et al.  
Docket No. EL04-2-000**

Dear Secretary Salas:

Enclosed please find the Motion to Intervene and Answer of the California Independent System Operator Corporation, submitted in the captioned docket.

Thank you for your attention in this matter.

Respectfully submitted,



Bradley R. Miliauskas

Counsel for the California  
Independent System Operator  
Corporation

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

<b>Sacramento Municipal Utility District,</b>	)	
	)	
<b>Complainant</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. EL04-2-000</b>
	)	
<b>Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas &amp; Electric Company,</b>	)	
	)	
<b>Respondents</b>	)	

**MOTION TO INTERVENE AND ANSWER OF THE  
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION**

Pursuant to Section 206 of the Federal Power Act (16 U.S.C. § 824e (1994)) and Rules 213 and 214 of the Commission’s Rules of Practice and Procedure (18 C.F.R. §§ 385.213, 385.214 (2003)), the California Independent System Operator Corporation (“ISO”)<sup>1</sup> hereby moves to intervene in the captioned proceeding, and submits its answer to the complaint filed by the Sacramento Municipal Utility District (“SMUD”) in the proceeding on October 8, 2003 (“Complaint”). The ISO respectfully asks that the Commission deny the Complaint. The relief requested in the Complaint is inconsistent with directives in prior Commission orders and with sound policy. Like all other transmission customers seeking to make use of the facilities turned over to the ISO’s

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

Operational Control, SMUD can and should take open access service under the terms and conditions specified in the ISO Tariff.

## **I. COMMUNICATIONS**

Please address communications concerning this filing to the following persons:<sup>2</sup>

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## **II. MOTION TO INTERVENE**

The ISO is a non-profit public benefit corporation organized under the laws of the State of California and responsible for the reliable operation of a grid comprising the transmission systems of Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company ("SCE"), San Diego Gas & Electric Company ("SDG&E"), and the Cities of Vernon, Anaheim, Azusa, Banning, and Riverside, California. The Complaint names PG&E, SCE, and SDG&E as respondents and states that it challenges their "refusal . . . to honor SMUD's exercise of its right of first refusal to extend the term of service under an August 1, 1967 transmission contract between the parties [i.e., the EHV

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<sup>2</sup> The CAISO requests waiver of the Commission's Regulations to permit more than two persons to be included on the service list in this proceeding.

Contract].” Complaint at 1. The ISO requests that it be allowed to intervene because it has a significant interest in this matter, and its unique interest cannot be adequately represented by any other party.

### **III. SUMMARY OF ANSWER**

The dispute raised by the Complaint centers around the nature and extent of SMUD’s right of first refusal (“ROFR”) with regard to the EHV Contract between SMUD and PG&E, SCE, and SDG&E. SMUD argues that these entities have failed to honor SMUD’s ROFR under the EHV Contract. SMUD entirely misconstrues the concept of a ROFR as established by the Commission in Order No. 888 and its application to the new California market structure. SMUD’s interpretation of the ROFR is inconsistent with Order No. 888, Commission directives issued prior to the start of ISO operations, subsequent statements of Commission policy, and an Initial Decision issued within the past three months. SMUD’s interpretation is based solely on a selective reading of orders and cases – a reading that does not give sufficient consideration to the precedents that show the flaws in SMUD’s position. SMUD is not entitled to the relief it requests in the Complaint, but instead is required to take service under the ISO Tariff. Therefore, the Complaint should be denied.

#### IV. ANSWER

##### A. SMUD Misstates the Scope of the Right of First Refusal Under Order No. 888

SMUD notes that the purpose of the ROFR under Order No. 888 was “to preserve the certainty and continuity of transmission service.”<sup>3</sup> The ISO agrees this is the purpose of the ROFR. Where SMUD goes wrong is in taking an overly expansive view of the scope of the ROFR. Contrary to SMUD’s reading of Order No. 888, the Commission has never equated the ROFR with the ability to simply extend the rates, terms, and conditions of an existing transmission service agreement. To the contrary, the ROFR was meant to assure that

all firm transmission customers (requirements and transmission-only), upon the expiration of their contracts or at the time their contracts become subject to renewal or rollover, should have the right to continue to take transmission service from their existing transmission provider.<sup>4</sup>

Service, however, was not to be taken under the expired agreement, but rather under the new open access transmission tariff (“OATT”).<sup>5</sup> Thus, the ROFR is not an independent right imposed pursuant to Section 206 of the Federal Power Act upon a pre-existing agreement, but rather one that was incorporated into service under the Order No. 888 OATT – a tariff that in the case of the California investor-owned utilities that have been superseded by the ISO Tariff.

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<sup>3</sup> Complaint at 7 (quoting *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 735 (D.C. Cir. 2000)).

<sup>4</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs., Regs. Preambles ¶ 31,048, at 30,195 (1997) (“Order No. 888-A”).

<sup>5</sup> See Section 2.2 of the Commission’s Pro Forma OATT, Order No. 888-A at 30,511.

Moreover, the use of the new tariff was “to allow an existing firm transmission customer to continue to receive transmission service under terms that are just, reasonable, not unduly discriminatory, or preferential.”<sup>6</sup> The ROFR was *not* designed to insulate transmission customers from the possibility of having to pay an increased rate under a different rate design in the future.<sup>7</sup>

Accordingly, SMUD’s attempt to use the ROFR to seek an extension until the year 2025 of the rates terms and conditions of its pre-existing contract (Complaint at 3) is improper. SMUD cannot have it both ways: it cannot rely on a ROFR – which would mean taking service under a new agreement – to compel the extension of the terms of an about-to-expire agreement.

**B. The Commission Previously Recognized That the Order No. 888 Right of First Refusal Is Not Compatible With Open Access Under the ISO Tariff**

PG&E, SCE, and SDG&E turned their facilities over to the ISO’s Operational Control pursuant to the Transmission Control Agreement (“TCA”). Under the TCA, “use of the ISO Controlled Grid by the Participating TOs and other Market Participants shall be in accordance with the rates, terms, and conditions established in the ISO Tariff and the Participating TO’s Tariff.”<sup>8</sup> While the ISO must honor the obligations of Existing Contracts,<sup>9</sup> no Participating TO is permitted to create any new Encumbrance or extend the term of an existing

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<sup>6</sup> Order No. 888-A at 30,197.

<sup>7</sup> *Id.* at 30,198.

<sup>8</sup> TCA, § 12.1. Excerpts from the TCA are provided as Attachment A to the present filing.

<sup>9</sup> TCA, § 13.

Encumbrance without the ISO's consent.<sup>10</sup> The ISO is to refuse consent if the request is inconsistent with the Participating TO's obligations under the ISO Tariff or if the change may materially impair the ISO's ability to exercise Operational Control over the relevant lines or facilities or may reduce the reliability of the ISO Controlled Grid.<sup>11</sup> The ISO believes that SMUD's request would materially impair the ISO's ability to exercise Operational Control, and therefore the Complaint should be denied.

Before the start of ISO operations, the California Department of Water Resources ("DWR") contended that:

the Transmission Control Agreement should accommodate first refusal rights for renewal of a contract following its expiration. DWR believes that Existing Contract rights to increase service or extend the term, change points of delivery and receipt (in the case of non-participants in the ISO) and to operate or integrate resources with loads, are all Existing Contract rights that must be honored, consistent with Order No. 888 and the California Restructuring Legislation.<sup>12</sup>

The Commission rejected this position, concluding as follows:

We disagree with DWR that existing contract holders should have the right of first refusal with respect to service under the ISO Tariff. As initially proposed, the ISO Tariff does not provide for the long-term reservation of transmission capacity. As proposed, the ISO will attempt to accommodate the transmission service schedules of participants on a daily basis. To the extent that the ISO receives more requests for service than it can accommodate, it will attempt to efficiently ration constrained transmission capacity through congestion pricing. The ISO's proposal to schedule transmission on a day-ahead and hour-ahead basis is not compatible with the long-term reservation of discrete physical

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<sup>10</sup> TCA, § 4.4.3

<sup>11</sup> *Id.*

<sup>12</sup> *Pacific Gas and Electric Company, et al.*, 81 FERC ¶ 61,122, at 61,468 (1997) ("October 1997 Order").

transmission rights. Moreover, in Order No. 888, the Commission was addressing the tension that existed for the use of available transmission capacity between native load, existing third-party contracts, and new third-party transmission customers. That tension does not exist here.

We find that the ISO's congestion pricing proposal is significantly different from the circumstances we considered in Order No. 888. In Order No. 888 we were addressing the firm reservation of physical transmission rights whereas the ISO's congestion management proposal is applicable to the efficient rationing of constrained transmission capacity on an hourly basis. Therefore we find DWR's assertion that the right of first refusal should extend to the ISO congestion pricing proposal to be inapposite.<sup>13</sup>

SMUD's attempt to dismiss this unambiguous precedent as "irrelevant" (Complaint at 8) is without merit. No party, including SMUD, requested rehearing of or appealed this aspect of the Commission's October 1997 Order. Accordingly, SMUD's filing is an impermissible collateral attack on the Commission's prior determination.

**C. The Commission's October 1997 Order Limiting the Right of First Refusal With Respect to Facilities Turned Over to the ISO Is Consistent with Sound Public Policy and with Commission Direction in the Context of the Natural Gas Industry**

The Commission has recognized the inefficiencies and operational challenges imposed on the ISO and its customers due to the need to honor Existing Contracts. As the Commission stated with regard to "phantom Congestion":

Software that perpetuates the non-conforming schedules will not fix this problem of "Phantom Congestion." We believe that this approach simply suggests an iterative scheduling process that will not allow sufficient time for the market to respond and will leave the ISO with insufficient time to manage the grid reliably. Furthermore,

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<sup>13</sup> *Id.* at 61,472-73 (footnote omitted).



while [governmental entities] contend that their scheduling flexibility is a valuable asset, it results in overall market inefficiencies due to scheduling time lines that do not conform to the time lines of the overall markets. It is difficult to justify the scheduling flexibility disadvantage in light of the congestion these rights cause the ISO. Therefore, "Phantom Congestion" is a market inefficiency that must be addressed and rectified as soon as possible.<sup>14</sup>

The inefficiencies and operational challenges caused by the honoring of Existing Contracts would be needlessly magnified and perpetuated if the relief that SMUD requests were granted. No purpose is served by extending the term of the EHV Contract by more than two decades.

Extending the EHV Contract as SMUD requests would also set a bad precedent because it could give SMUD an undue advantage over other entities. The Commission should instead seek to establish a level playing field as a matter of fairness to all Market Participants.

Moreover, the establishment of a level playing field is consistent with the Commission's actions in the context of the natural gas industry, with respect to individually certificated, Part 157 transportation contracts (which are the natural gas industry's equivalent of pre-Order No. 888 contracts). Specifically, the Commission ruled that conversion to open access, Part 284 transportation service was appropriate for shippers whose contracts for Part 157 service expires or terminates.<sup>15</sup> The Commission should make an analogous finding here.

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<sup>14</sup> *California Independent System Operator Corporation*, 91 FERC ¶ 61,205, at 62,727 (2000).

<sup>15</sup> *See Transcontinental Gas Pipe Line Corporation*, 60 FERC ¶ 61,119 (1992).

**D. The Recent Initial Decision in Docket Nos. ER01-2998, et al. Correctly Recognizes that Requests for Continued Service Should Be Made Pursuant to the Terms of the ISO Tariff**

The Complaint ignores the recognition, in the proceeding in Docket Nos. ER01-2998, *et al.*, that requests for continued service should be made pursuant to the terms of the ISO Tariff. In this regard, Staff witness Linda Patterson summarized the ISO's transmission service as follows:

The ISO does not offer firm and non-firm transmission services, *per se*, as separate service options. Nor does the ISO offer long-term firm service. Rather, the ISO accepts Day-Ahead and Hour-Ahead schedules over the ISO Controlled Grid from a scheduling coordinator who submits balanced schedules for its load and resources. If there is no congestion, a TO Tariff customer . . . will pay the Wheeling Access Charge for transmission service. If there is congestion over a transmission path, a customer has the option either to pay, in addition to the Wheeling Access Charge, congestion charges or to interrupt its service. The ISO basically rations capacity over inter-zonal congested interfaces to those who value it the most, *i.e.*, those who are willing to pay usage charges.<sup>16</sup>

In the proceeding, the intervenors contended that because they might have to pay Congestion charges under the ISO tariff, the ISO service is not firm, and therefore it does not satisfy what they argued was a pre-existing obligation of PG&E's commitments under the so-called "Stanislaus Commitments."<sup>17</sup> Staff witness Patterson summarized the position of two of the intervenors, Northern California Power Agency ("NCPA") and Silicon Valley Power ("SVP"), as follows:

It appears that NCPA's and SVP's issue is not whether firm transmission service can be provided by the ISO. The issue is whether they can obtain that firm service at rates comparable to the rates they were previously charged by PG&E, that is, rates that do

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<sup>16</sup> Prepared Responsive Testimony of Linda M. Patterson, Docket Nos. ER01-2998-002, *et al.*, Ex. No. S-1 at 15:15-16:4 (dated Mar. 11, 2003) ("Patterson Testimony").

<sup>17</sup> *Pacific Gas and Electric Company, et al.*, 104 FERC ¶ 63,029, at P 36 (2003) ("August 2003 Initial Decision").

not include congestion charges. Ex. SVP-1, page 12, lines 19-23; Exhibit NCP-1, page 24, lines 4-6.<sup>18</sup>

The Presiding Administrative Law Judge in the proceeding rejected the position of NCPA and SVP, concluding that

[s]imilarly, SVP argues that the Commission did not abrogate existing contracts when the CAISO began operations. SVP I.B. at 23. This is true, but SVP, like NCPA, has failed to show that it has been denied access to transmission service that is sufficient to serve its load. Had SVP been able to show that, following the September 1, 2002 effective date of its MSS with the CAISO, it has been denied access to transmission service which is sufficient to move its load, then evidence would exist to show that the CAISO transmission service does not fulfill PG&E's obligation under the Commitments. To the contrary, as stated *supra*, SVP has acknowledged that the CAISO does have the physical capability to provide transmission service that meets the same characteristics and qualities as that previously provided by PG&E. Here, the bottom line is that SVP just does not believe that it should have to pay for any congestion charges.

In sum, the CAISO transmission service fulfills PG&E's obligations under the Commitments since it provides comparable transmission service to NCPA and SVP on par with PG&E's retail customers.<sup>19</sup>

The quoted finding of the Presiding Administrative Law Judge is correct, and supports the ISO's contention that requests for continued service should be made pursuant to the terms of the ISO Tariff, not the extension of Existing Contracts.

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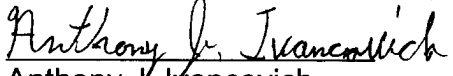

<sup>18</sup> Patterson Testimony, Ex. No. S-1 at 18:20-23.

<sup>19</sup> August 2003 Initial Decision, 104 FERC at P 44-45.

**V. REQUEST FOR RELIEF**

For the foregoing reasons, the ISO requests that SMUD's Complaint be denied.

Respectfully submitted,

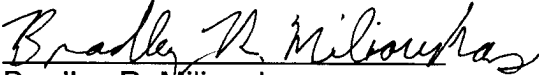
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Dated: October 30, 2003

## CERTIFICATE OF SERVICE

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

Dated at Washington, D.C., on this 30<sup>th</sup> day of October, 2003.

  
Bradley R. Miliauskas