UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corporation	**)** **)** **)** **)**	**Docket No. ER12-1856-001**

ANSWER OF
THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION
IN OPPOSITION TO MOTIONS FOR RECONSIDERATION

The California Independent System Operator Corporation ("ISO") hereby submits this answer in opposition to the motions for reconsideration of PacifiCorp and the Portland General Electric Company (collectively, "the Motions")[1] filed in this proceeding regarding the Commission's August 31, 2012, Order on Compliance Filing.[2] The Commission should dismiss the Motions as untimely requests for rehearing. If the Commission nonetheless considers the Motions, it should deny them because PacifiCorp has provided no evidence or arguments that call into question the Commission's conclusions in the August 31 Order. The Motions constitute nothing more than an attempt to obtain from the Commission special treatment that PacifiCorp could not obtain from the California Air Resources Board.

[1] Because Portland General Electric Company adopts PacifiCorp's arguments, the ISO will herein refer to the joint arguments as PacifiCorp's arguments.

[2] *Calif. Indep. Sys. Operator Corp.*, 140 FERC ¶ 61,169 (2012) ("August 31 Order").

I. SUMMARY

The ISO's compliance filing established the ISO as the contracting counterparty for all transactions in the ISO market. The filing included a tariff provision stating that the ISO shall not be listed as the purchasing selling entity on e-tags (which document transactions between balancing authority areas), because title shall pass directly from the entity that holds title when the energy enters the ISO grid to the entity that removes the energy from the ISO grid. The tariff provisions also establish that transactions in the ISO markets occur within the state of California. The Motions seek reconsideration of the Commission's approval of these tariff changes because of "changed circumstances," to wit, that the California Air Resources Board "finalized" its greenhouse gas emission regulations after the August 31 Order.

PacifiCorp presents no valid basis for reconsideration. First, the relevant circumstances have not changed. The California Air Resources Board's greenhouse gas regulations, by PacifiCorp's own admission, were final and in effect before the ISO even made its compliance filing. That the California Air Resources Board stated it would be willing to consider amendments to the regulations, as noted by PacifiCorp, did not make them less than final. To the extent that those regulations raised concerns regarding the ISO's filing, those concerns were fully ripe for consideration prior to the time that protests and comments on the ISO's filing were due.

Second, there is no logical nexus between the circumstances that have supposedly changed (relating to the state regulations) and the issues that

PacifiCorp raises in its Motion. PacifiCorp contends that the ISO's e-tag provision is inconsistent with North American Energy Standards Board ("NAESB") requirements and that the ISO did not demonstrate that transactions in the ISO markets occur in California. PacifiCorp points to nothing in the California Air Resources Board's regulation that would affect – in any manner – the merits of either of these arguments.

Finally, PacifiCorp's late challenges to the Commission's order have no merit. Because title passes directly from the importer to the buyer, the ISO does not meet the definition of a "purchasing selling entity." Moreover, the location of an electricity market transaction is a legal concept and thus is appropriately established in legal documents. In this case, because the ISO tariff governs the ISO's markets, it determines where transactions in those markets occur.

II. BACKGROUND

Through Order No. 741,[3] the Commission sought to improve the management of risk and the use of credit in organized wholesale electricity markets. The Commission required independent system operators and regional transmission organizations to implement seven market modifications, one of which was actions to address the risk that the organization's netting and set-offs might be challenged in bankruptcy proceedings.

Section 35.47(d) of Title 18, Code of Federal Regulations, promulgated in Order No. 741, provides organized wholesale electric markets with four options

[3] *Credit Reforms in Organized Wholesale Markets*, 133 FERC ¶ 61,060 (2010), *on reh'g* Order No. 741-A, 134 FERC ¶ 61.126, *reh'g denied,* Order No. 741-B, 135 FERC ¶ 61,242 (2011).

for addressing this risk, one of which was to establish a single counterparty to all market participant transactions. The ISO, in consultation with stakeholders, concluded that this was the best option for the ISO markets. On May 25, 2012, the ISO made its compliance filing, establishing the ISO as the contracting counterparty to each scheduling coordinator, congestion revenue rights holder, black start generator, or participating transmission owner for any purchase or sale of any product or service, or for any other transaction, that is financially settled by the ISO under the ISO tariff.[4]

As part of the filing, the ISO proposed revisions to address potential concerns regarding counterparty status. Among other things, the ISO was concerned that its contractual counterparty status might be interpreted to mean that the ISO was to be a purchasing/selling entity listed on an e-tag, which could result in the ISO becoming the entity responsible for procuring emissions permits under greenhouse gas regulations promulgated by California Air Resources Board. The ISO explained that the consensus of the stakeholders and the California Air Resources Board was that the ISO should not be the entity with this responsibility and that identification of the ISO as the purchasing/selling agent would undermine the purpose of the greenhouse gas regulation because the ISO could not respond to the incentives created by the regulations by selecting a generation source with lower emissions. Stakeholders also considered it undesirable for the ISO to have this liability because the ISO would have to pass

[4] The one exception was energy to be used in Mexico.

on additional costs to market participants. Consequently, for clarity, the ISO proposed to revise tariff section 4.5.3.2.2 to add the following language:

> For purposes of E-Tags, the CAISO is not, and shall not be listed as, the "Purchasing Selling Entity"; title to Energy shall pass directly from the entity that holds title when the Energy enters the CAISO Controlled Grid to the entity that removes the Energy from the CAISO Controlled Grid, in each case in accordance with the terms of this CAISO Tariff.

Also relevant to the Motions, the ISO revised section 11.29 to provide that transactions financially settled by the ISO under its tariff are deemed to occur within California.

In the August 31 Order, the Commission adopted the proposed amendments (with modifications that are not relevant to the issues raised by the Motions).

On October 22, 2012, PacifiCorp and Portland General Electric moved to intervene in the proceeding out-of-time and moved for reconsideration of the August 31 Order. PacifiCorp contends that both the late intervention and reconsideration are justified by alleged changed circumstances. According to PacifiCorp, the California Air Resources Board has only recently finalized its greenhouse gas regulations, as a result of which the tariff provisions providing that the ISO is not the purchasing/selling agent will now have an unjust impact on PacifiCorp.[5] PacifiCorp also (1) challenges the ISO's "assertion" that it is not the purchasing/selling agency and argues that the ISO has not explained who is the purchasing/selling agency and contends that the amendment puts market participants in the position of having to violate applicable NAESB e-tag

[5] PacifiCorp Motion at 7.

requirements; and (2) asserts that the ISO has not justified the tariff provision stating that sales under the ISO tariff take place in California. The ISO explains below that these arguments have no merit.

III. ANSWER

A. The Commission Should Deny the Motions as Untimely Requests for Rehearing Because the Relevant Circumstances Have Not Changed.

Section 313(*l*) of the Federal Power Act[6] requires that requests for rehearing of a Commission order be filed within 30 days of the order, a deadline that had passed by the date on which PacifiCorp and Portland General Electric filed the Motions. Unlike requests for rehearing, requests for reconsideration do not have a prescribed deadline and may be filed at any time. In order for the Commission to entertain a motion for reconsideration, the motion must show "new information or evidence of changed circumstances that would warrant reconsideration" by the Commission.[7] Absent such a showing, the Commission's practice is to deny requests for reconsideration as merely requests for rehearing styled as requests for reconsideration.[8]

1. The California Green House Gas Regulations Have Been in Effect for More than Ten Months

PacifiCorp states that at the time of the ISO's May 25, 2012 filing, the California Air Resources Board was still in the process of developing its greenhouse gas regulations and, for this reason, PacifiCorp did not intervene and

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6 16 U.S.C. § 825*l.*

7 *EPGT Texas Pipeline, LP*, 99 FERC ¶ 61,295, at 62,253 (2002), *reh'g denied*, 106 FERC ¶ 61,184 (2004)

8 Order No. 2001-B, 100 FERC ¶ 61,342, at 62,556 (2002).

comment on the ISO's filing.[9] It asserts that, had it raised its concerns earlier, the Commission would have rejected those concerns as speculative. According to PacifiCorp, the Commission should reconsider the August 31 Order because the regulations are now final, and PacifiCorp's concerns have ripened.

The flaw in PacifiCorp's reasoning is patent in its own Motion. In a footnote, PacifiCorp acknowledges, "[California Air Resources Board's] Cap-and-Trade Regulation was adopted on October 20, 2011, and *went into effect* on January 1, 2012."[10] PacifiCorp attempts to avoid the obvious conclusion that this fact contradicts its claim of changed circumstances by noting that the California Air Resources Board directed its staff to continue to work on certain issues, including possible amendments to the regulation. Such a direction to staff, however, does not in any manner affect the fact that the regulations were *final in and effect* at the time of the ISO's filing. They were enforceable against PacifiCorp or any other entity, and there was nothing "speculative" about the impact on PacifiCorp.

The ISO has been unable to identify any circumstance in which the Commission, or a court, has found a regulation that is in effect to be less than final because an agency has left open the possibility of amendment. The ISO is also unaware of any circumstances in which the Commission has found a rehearing request premature because some future, but uncertain action might revise an effective order, regulation, or statute. Indeed, although the Commission

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[9] Although PacifiCorp's excuse for its failure to intervene is, as discussed below, factually incorrect, the ISO will not object to PacifiCorp's or Portland General Electric Company's intervention.

[10] PacifiCorp Motion at 7 n.16 (emphasis added).

has on a number of occasions, when approving an ISO tariff amendment, directed the ISO to consider future revisions to the tariff to accommodate stakeholder concerns, on none of those occasions has the Commission ruled that rehearing requests regarding approval of the amendment were unripe.[11]

In an effort to establish that the Commission would have found its concerns unripe, PacifiCorp relies on the Commission's ruling in the August 31 Order that certain arguments raised by intervenors were speculative and the Commission's statement, among other things, that "the California Air Resources Board [was still] developing the greenhouse gas regulations."[12] In contrast to PacifiCorp's argument, the speculative nature of the concern raised by intervenors and others did not arise from any lack of finality of the California Air Resource Board's regulations. The parties recognized that the regulations assigned the responsibility for permits to the first deliverer of energy into California.[13] The concern at issue was that the California Air Resources Board *might,* at some undefined *future* date, interpret the ISO's tariff amendment as establishing the ISO as the first deliverer of energy into California.[14] In contrast, PacifiCorp's concern arises from the regulations that existed at the time. In other words, the former concerns are conditional upon a future event; Pacific's were already

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[11] *See, e.g., Cal. Indep. Sys. Operator Corp.*, 136 FERC ¶ 61,239 (2011), *reh'g denied*, 138 FERC ¶ 61,090 (2012).

[12] PacifiCorp Motion at 6, citing August 31 Order at P 28. The Commission's summary description of parties' comments does not constitute a finding of the actual status of the regulations at that time. PacifiCorp's acknowledgement that the regulations were in effect speaks for itself.

[13] August 31 Order at P 12.

[14] Northern California Power Agency Limited Protest at 9.

concrete. That the California Air Resources Board was first willing to entertain potential revisions, and later made clear at a September 20, 2012, meeting that it had decided not to make any revisions, does not alter the fact that the regulations were final and in effect as of January 1, 2012, prior to the ISO's May 25, 2012, filing and prior to the August 31 Order.

Even if the Commission were to decide that the regulations were not final until September 20, 2012, that fact would not justify the Motions. September 20 was more than a week before the deadline for rehearing requests of the August 30 Order.

There are thus no changed circumstances that would justify a Motion for Reconsideration of the August 31 Order. The Motions are belated requests for rehearing and impermissible collateral attacks on the August 31 Order.[15]

2. The Circumstances that PacifiCorp Claims Have Changed Would Not Justify the Requested Reconsideration Because They Would Not Have Prevented PacifiCorp from Obtaining the Relief It Seeks

As noted, PacifiCorp argues reconsideration is appropriate because the California Air Resources Board's regulations were not final while the May 25 filing was pending, and the Commission would thus have dismissed its concerns as premature if it had raised those concerns in a protest or comments. The regulations, however, have no logical nexus to the arguments that PacifiCorp raises in its Motion and cannot provide a basis for now considering those arguments.

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[15] *See, e.g.*, *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,053 at P 13 (2007),

PacifiCorp makes two substantive arguments. First, PacifiCorp contends that the ISO's amendment has the effect of forcing sellers to submit non-compliant e-tags.[16] Yet the California Air Resources Board's regulations make no changes, and could not make changes, to NAESB's e-tag regulations. Neither do the California Air Resources Board regulations affect the requirements that the ISO's amendment imposes on sellers with regard to e-tags. PacifiCorp presents no evidence that the amendments to the California Air Resources Board regulations that were under consideration would or could have affected these matters. Therefore, even if those regulations had not been final, this PacifiCorp argument would have been ripe prior to their finality.

Second, PacifiCorp argues that the ISO inaccurately declares that out-of-state transactions occur in-state. The California Air Resources Board's regulations, however, have no impact on where transactions in the ISO market occur. Again, there is no reason that PacifiCorp could not have raised this argument earlier.

PacifiCorp may contend that it could not have raised these arguments earlier because, prior to the "finality" of the California Air Resource's Board regulations, it could not allege harm and therefore lacked standing. This argument, too, would fail. Even assuming a lack of finality, if the ISO's amendment indeed has the effect of forcing sellers to submit noncompliant e-tags – which it does not – that effect is independent of the California Air Resource Board's regulations. More importantly, standing is not a prerequisite to filing a

[16] PacifiCorp Motion at 8.

protest; under section 211 of the Commission's Rules of Practice and Procedure, *any* interested party can file a protest.[17] Accordingly, there are no changed circumstances that would justify the Commission's reconsideration of its order based on PacifiCorp's arguments.

B. The ISO's Amendment Does Not Have an Unjust, Unreasonable, or Unduly Discriminatory or Preferential Impact on PacifiCorp.

Although PacifiCorp alleges that it undertook extensive efforts to guide the California Air Resources Board's regulations so that the ISO's tariff revision would not have an adverse impact[18] and that it was trying to have its concerns addressed through the California Air Resources Board's process,[19] it does not explain what impacts and concerns could have been resolved. The closest it comes is a statement that continued compliance with the ISO's e-tag requirements may make PacifiCorp responsible for compliance with the new regulations from the California Air Resources Board.

PacifiCorp does not explain, however, why it should not be responsible for compliance with the new state regulations. The ISO's tariff provisions simply maintained the status quo practices with respect to e-tagging. They do not treat PacifiCorp, or similarly situated importers of energy into the ISO's markets, differently from other sellers into the ISO's markets, who are responsible for compliance with the regulations. PacifiCorp does not explain why the Federal Power Act compels the ISO to provide special treatment to PacifiCorp, or, indeed,

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[17] 18 C.F.R. § 385.211 (2012); *see Mojave Pipeline Co.*, 58 FERC ¶ 61,074 at 61,246 (1992).

[18] PacifiCorp Motion at 2.

[19] *Id.*

how the Federal Power Act would not prohibit such special treatment as unduly discriminatory.

PacifiCorp acknowledges it made its case to the California Air Resources Board and was unsuccessful. PacifiCorp now, in essence, asks the Commission to give it the special treatment that the California Air Resources Board denied it. That is not the Commission's role and the Commission should reject PacifiCorp's effort to put it in this position.

C. PacifiCorp's Substantive Arguments Lack Merit.

1. The ISO's E-Tag Policy Is Consistent with NAESB Regulations.

PacifiCorp challenges the validity of tariff section 4.5.3.2.2, which provides that the ISO shall not be listed as the purchasing/selling agent on e-tags. First, PacifiCorp contends that the statement in section 4.5.3.2.2 that the ISO does not take title to the energy contradicts the core premise of being a central counterparty and that Order No. 741 "clearly explains" that the ISO must take title to the energy transacted in its market.[20] PacifiCorp provides no citation, however, to the "clear" explanation, nor could it. PacifiCorp is erroneously conflating status as a counterparty with taking physical delivery. Moreover, it is the Commission, not PacifiCorp, who determines what Order No. 741 requires. The Commission accepted section 4.5.3.2.2 as compliant with Order No. 741. It is not for PacifiCorp to say otherwise.

The remainder of PacifiCorp's arguments depend upon its premise that the ISO takes title to the energy, which it repeatedly asserts as fact with no support.

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[20] *Id.* at 10.

PacifiCorp contends that "the CAISO takes title to energy transacted in its markets as part and parcel of its compliance with Order No. 741, even if it does not explicitly so state in the Tariff."[21] Yet section 11.29 of tariff, which the Commission approved and which is the filed rate, *explicitly* states the contrary.

PacifiCorp also states that the ISO fails to identify the purchasing/selling agent and that the ISO requires sellers to submit non-compliant e-tags because sellers cannot identify the ISO as the purchasing/selling agency, which is the" only option."[22] Yet PacifiCorp acknowledges that it has been identifying itself as the purchasing/selling agent and provides no explanation why this is problematic, other than that it might be responsible for compliance with the California Air Resource Board regulations.[23] Again, PacifiCorp's argument appears to be based on its disagreement with the California Air Resources Board, not on any legal or factual flaw of the ISO tariff provisions.

Moreover, as a practical matter, identifying the ISO as the purchasing/selling agent would be inconsistent with the ISO's acceptance of the role of contracting counterparty. This role was only acceptable to ISO stakeholders on the basis that the ISO would not be responsible for greenhouse gas emission costs. A requirement that the ISO become the purchasing/selling

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21 *Id.* at 11.

22 *Id.* at 12.

23 PacifiCorp does assert that e-tags that do not identify the ISO has the purchasing/selling agency may interfere with the Commission's efforts to collect accurate transaction data in Electric Quarterly Reports by leading to data showing the same entity as the source and the sink in transactions where the ISO is the true sink. Nothing in the ISO's tariff, however, prohibits the identification of the relevant ISO load zone as the sink on the e-tag, as has been the practice since the commencement of ISO operations.

agent would force to ISO to consider a different mechanism for compliance with Order No. 841.

2. The ISO Tariff Properly Deems Transactions Settled Under the ISO Tariff to Have Occurred Inside California.

PacifiCorp contends it and others regularly engage in transactions at the COB (California Oregon Board) and PV (Palo Verde) scheduling points that are "undeniably" outside of California and that it is "improper" for the ISO to assert that an out-of-state transaction is actually occurring within California.[24] According to PacifiCorp, "The important consequence of this change is that the State of California – and California Air Resources Board in particular – would assert jurisdiction to regulate transactions that occur fully outside the State of California."[25]

Again, PacifiCorp simply assumes the premise of its argument – that these transactions "occur fully outside the state of California." It presents no legal basis for that premise. Simply saying it is so does not make it true. Although COB and PV are located outside of California, they are simply scheduling points in the ISO's software for energy that entities such a PacifiCorp are exporting *to be delivered to load within California*. The use of COB and PV as scheduling points is irrelevant to a determination of the location at which transfer of title occurs. Other exporters into California schedule energy at scheduling points within the physical boundaries of California, yet there is no practical difference between those transactions and transactions using the COB and PV scheduling points.

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[24] PacifiCorp Motion at 13.

[25] *Id.* at 14.

Both the location of a transaction and title are legal concepts, and the location at which a transaction occurs is thus established by the relevant legal documents. In the case of a bilateral sale, this would be a power purchase agreement. In the case of sales into the ISO market, it is the ISO tariff. Under section 205 of the Federal Power Act, the ISO is entitled to establish the terms and conditions for sales into its market, subject to approval by the Commission. Parties that participate in the market agree to abide by those terms and conditions, including that the transactions are deemed to occur in California just as they agree that the tariff is governed and construed according to California law, as set forth in section 22.8 of the tariff. There is nothing "improper" about establishing the terms and conditions of the ISO market in the ISO tariff.

IV. CONCLUSION

For the reasons explained above, the Commission should dismiss the Motions as untimely, or alternatively deny them on the merits.

Respectfully submitted,

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Dated: November 6, 2012

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 proceedings, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Executed at Folsom, CA, on this 6th day of November, 2012.

/s/ Anna Pascuzzo

Anna Pascuzzo