UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corporation	)	**Docket No. ER98-3760-000**
California Independent System Operator Corporation	)	**Docket Nos. EC96-19-000 and ER96-1663-000**
		[Not Consolidated]

REPLY BRIEF OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION

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In accordance with the Commission's orders of April 28, 1999, 87 FERC ¶ 61,102, and January 20, 2000, 90 FERC ¶ 61,051, and the Notice of Extension of Time dated March 23, 2000, the California Independent System Operator Corporation ("ISO")[1] submits this Reply Brief addressing three of the unresolved issues in the above-captioned proceedings: Issue O.15 (Unresolved Issue No. 676) the liability standard under the ISO Tariff; Issue O.16 (Unresolved Issue No. 677) the scope of the Metered Subsystem ("MSS") proposal; and Issue O.17 (Unresolved Issue No. 675) the grandfathering of End-Use

[1] "ISO" as used herein, refers to the California ISO. Other independent system operators are referred to with identifying initials appended; e.g. NYISO.

Meters of ISO Metered Entities.[2] For the reasons described herein and in the ISO's Initial Brief, the Commission should permit the ISO to include in its tariff reasonable and appropriate limitations on its liability. The Commission should consider the MSS issue not in this proceeding but in Docket No. ER00-2019-000, where the ISO's actual MSS proposal is pending. The Commission should also confirm that the ISO retains the authority under its tariff to require upgrading of End-Use Meters of ISO Metered Entities where appropriate.

I. Executive Summary

The ISO is filing this Reply Brief with respect to three issues:

Issue O.15 (Unresolved Issue No. 676) - Whether the Commission erred in requiring modification of the liability provisions in Sections 14.1 and 14.2 of the ISO Tariff?

In its Initial Brief the ISO noted that in recent decisions involving the New York ISO ("NYISO"), the Commission has recognized that independent system operators perform activities associated with administering markets and performing control area services that go beyond the requirements of transmission providers under the Commission's *pro forma* open access tariff and that an independent system operator could protect itself under a gross negligence standard of liability for these services. In their Answering Briefs, several intervenors attempt to distinguish both the applicable state law and the operational circumstances of the two independent system operators. These

[2] Capitalized terms not otherwise defined herein are used in the sense given in the Master Definitions Supplement, Appendix A to the ISO Tariff.

attempts fail to withstand scrutiny. The Commission's decisions with respect to the NYISO compel the conclusion that at least the liability treatment accorded the NYISO should also be applied to the California ISO. In addition, an evaluation of California state law, as well as equitable and policy considerations, strongly point to the appropriateness of and need for more protective liability and damages standards to be applied to all of the ISO's activities. For these reasons, the ISO continues to respectfully request that the Commission grant rehearing and modify the liability standard it has applied to the ISO.

O.16 (Unresolved Issue No. 677 - Whether the MSS concept under the ISO Tariff should be limited so that it would only be used as a vehicle to respect existing operational capabilities for Existing Rights holders?

The ISO recently filed as Amendment No. 27 in Docket No. ER00-2019-000 a compromise transmission Access Charge. This filing includes the ISO's proposal to implement a MSS concept. The ISO believes that its Issue O.16 together with the other Unresolved Issues that related to MSS, E.1, E.2, E.3, E.4, and E.5, are moot and that the Commission should consider these issues in the Access Charge docket based on the actual MSS proposal.

O.17 (Unresolved Issue No. 675 - Whether End-Use Meters of ISO Metered Entities should all be grandfathered or whether there should be a case-by-case evaluation?

The ISO's requested clarification of Section 10.2.2 of the ISO Tariff, as that provision is proposed to be modified pursuant to the ISO's settlement with Southern Cities, is just and reasonable. The contention of the Cogeneration Association of California and the Energy Producers and Users Coalition

("CAC/EPUC") that the ISO is seeking "to eradicate rights grandfathered in the ISO Tariff" is nothing more than excessive rhetoric, for even CAC/EPUC recognizes that Section 10.2.2 authorizes the ISO to request End-Use Customers to install additional meters where necessary to maintain system reliability or to enhance operation of the ISO's markets.

II. Argument

A. Issue O.15 - Whether the Commission erred in requiring modification of the liability provisions in Sections 14.1 and 14.2 of the ISO Tariff? [Issue No. 676, Docket Nos. EC96-19-009 and ER96-1663-010]

1. Introduction

a. Background

The Commission's October 30, 1997 Order on the ISO's Phase II filings rejected Sections 14.1 and 14.2 of the proposed ISO Tariff, which contained limitations on the ISO's liability and consequential losses.[3] In addition, in its March 30, 1998 Order, the Commission rejected the ISO's proposed Amendment No. 6 to the ISO Tariff, which proposed a temporary liability limitation narrowed to make the ISO liable for gross negligence.[4] The Commission directed the ISO to modify Sections 14.1 and 14.2 of the ISO Tariff to provide that the ISO will be held liable for ordinary negligence.

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[3] *Pacific Gas and Electric Co. et al.*, 81 FERC ¶ 61,122 (1997).

[4] *California Independent System Operator Corp.*, 82 FERC ¶ 61,327 at 62,294 (1998).

On February 14, 2000, the ISO filed its Initial Brief in this proceeding, arguing, among other things, that application to the ISO of an ordinary negligence standard is inappropriate. In response, intervenors Dynegy Power Marketing, Inc. ("Dynegy"), the Transmission Agency of Northern California, M-S-R Public Power Agency, Modesto Irrigation District, Cities of Redding, Santa Clara, and Palo Alto, and The Metropolitan Water District of Southern California ("TANC *et al*."), Pacific Gas and Electric Company ("PG&E"), Western Power Trading Forum and Enron Power Marketing, Inc. ("WPTF/Enron"), The Utility Reform Network and Utility Consumers Action Network ("TURN/UCAN"), and the Public Utilities Commission of the State of California ("CPUC") all filed Answering Briefs on this issue.

Significantly, consumer advocates TURN/UCAN support the ISO's position on liability limitation, while the CPUC has taken a neutral position. The remaining intervenors' briefs contest the ISO's position. This Reply Brief responds to their arguments.

b. Summary of Positions

The intervenors' contentions can be broken down into the following four categories:

(1) Order Nos. 888 and 888-A

Intervenors argue that the ISO's proposed liability limitation would be inconsistent with Order Nos. 888 and 888-A, and with the *pro forma* Open

Access Transmission Tariff promulgated by the Commission thereunder.[5] Intervenors appear to believe that the ISO must come under the liability standard articulated in Order Nos. 888 and 888-A. The intervenors misread Order No. 888. Moreover, the ISO has the market facilitation and monitoring responsibilities of an independent Regional Transmission Organization ("RTO"). Thus, the Commission's Order Nos. 2000 and 2000-A are much more relevant precedent.[6] The ISO believes that Order Nos. 2000 and 2000-A's refusal to generically impose an ordinary negligence standard on RTOs removes any presumption that an ordinary negligence standard should apply to the ISO.

(2) Standard Applied To New York ISO

Intervenors are at pains to distinguish the Commission's Order applying a gross negligence liability standard to many of the functions performed by the NYISO. They argue that these NYISO functions are memorialized in a separate Tariff; the ISO believes this distinction exalts form over substance. Intervenors

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[5] *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, 61 Fed. Reg. 21,540, Federal Energy Regulatory Commission, Statutes and Regulations, Regulations Preambles January 1991-June 1996 ¶ 31,036, (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Statutes and Regulations ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998).

[6] *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. and Regs., Regs. Preambles ¶ 31,089 (Dec. 20, 1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), FERC Stats. and Regs., Regs. Preambles ¶ 31,092 (Feb. 25, 2000).

also argue that New York law requires the gross negligence standard; the ISO points out that the Commission, not the states, has jurisdiction over ISO liability, and furthermore that relevant New York and California law are much more similar than intervenors acknowledge. Intervenors argue that the ISO has not presented a comparison of New York and California markets; the ISO shows that this contention is without merit.

(3) California Law

Intervenors argue that California law requires the Commission to apply an ordinary negligence standard to utilities and allow consequential damages. The ISO believes this is circular reasoning: California courts apply the standard prescribed by the regulators; if the Commission chooses a standard for jurisdictional entities, that is the standard the California courts will apply. Intervenors recognize that the ISO may become the RTO for some or all of the Western Interconnection; the ISO agrees, and points out that it may be difficult to induce utilities to join an RTO if by doing so they surrender the liability protections that most states give their utilities.

(4) Policy And Equitable Arguments

Intervenors make a variety of policy and equitable arguments in favor of an ordinary negligence standard for the ISO. In response, the ISO points out that a more protective standard is fair because it lowers the costs, such as insurance expenses, the ISO must pass on to Market Participants and is more likely to encourage formation of an RTO.

2. Order Nos. 2000 and 2000-A, Rather Than Order Nos. 888 and 888-A, Should Supply The Precedent For ISO Liability

Intervenors assert that the Commission should impose an ordinary negligence standard on the ISO because this standard was *prescribed* by the Commission in Order Nos. 888 and 888-A for application in the pro forma Open Access Transmission Tariff. In fact, TANC *et al.* make this their "[f]irst and foremost" argument in favor of an ordinary negligence standard. TANC *et al.* Answering Br. at para. B.3. However, this position ignores the more recent and more directly applicable Commission Order Nos. 2000 and 2000-A.

TANC *et al*'s statement that in Order No. 888 the Commission adopted the traditional negligence standard (TANC *et al.* Answering Br. at B.3) is incorrect. In Order Nos. 888 and 888-A,[7] the Commission imposed an obligation on transmission customers to indemnify transmission providers from third party claims arising from service under the *pro forma* tariff, except when the transmission provider acted negligently or with intentional wrongdoing. The *pro forma* tariff is *silent* on liability, instead relying on state law. *Consolidated Edison Co.*, 84 FERC ¶ 61,163, 61,879 (1998).

In its Rulemaking on Regional Transmission Organizations, the Commission did not adopt an ordinary negligence standard. Instead, the Commission decided to "determine the extent of RTO liability relating to its

[7] *Order No. 888*, FERC Stats and Regs, Regulations Preambles January 1991-June 1996 at 31,765 - 66.

reliability activities on a case-by-case basis."[8] The Commission reaffirmed this determination in Order No. 2000-A.[9] As explained in the next section regarding the Commission's orders concerning the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff") and Market Monitoring Plan, the Commission has recognized that independent transmission organizations such as the New York and California independent system operators perform market administration and monitoring activities that go well beyond the open access service required under the Order No. 888 *pro forma* tariff and that these activities warrant additional protection from liability. Independent system operators are non-profit entities that do not own the assets they operate, and whose sole function is to operate the electrical grid reliably, efficiently, and fairly, and to attract voluntary participation from as many entities as possible. Liability standards are of particular importance in the case of not-for-profit independent system operators which are not heavily capitalized, and must flow through all expenses to other market participants.

Consequently, intervenors' "[f]irst and foremost" argument in favor of application of an ordinary negligence standard -- that it is prescribed by Orders 888 and 888-A -- must fail. Order Nos. 2000 and 2000-A are the relevant

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[8] *Order No. 2000*, FERC Stats. and Regs., Regs. Preambles at 31,106.

[9] *Order No. 2000-A*, FERC Stats. and Regs., Regs. Preambles at 31,373-74.

precedent for guidance, and they specifically decline to apply a predetermined liability standard.[10]

3. The Commission's Application Of A "Gross Negligence" Standard To The New York ISO Compels Use Of The Same Standard Here

There can be no mistake concerning the relevance to California of the Commission's determinations as to the liability standard applicable to the New York ISO. The Commission has ruled that a gross negligence/willful misconduct standard of liability, with no recovery of consequential damages, is appropriately applied to NYISO activities governed by its Services Tariff,[11] and that a "willful misconduct" standard shall apply to activities governed by its Market Monitoring Plan.[12] Since these cases relate to an independent system operator, and one with a structure and functions very similar to those of the California ISO, this precedent is obviously relevant, and intervenors have been

[10] One intervenor goes so far as to argue that if the Commission applies anything other than an ordinary negligence standard to the ISO, "it would have to concede to the Court of Appeals that it no longer is appropriate to apply the 'negligent and intentional wrongdoing' standard adopted in Order 888 and 888-A, as this very issue is before the Court of Appeals." Dynegy Answering Br.at 5. Dynegy has misstated the Commission's position. As described above, the *pro forma* tariff is *silent* on liability. *Consolidated Edison Co.*, 84 FERC ¶ 61,163 at 61,879.

[11] *Central Hudson Gas & Electric Corp. et al.*, 88 FERC ¶ 61,138 at 61,384 (1999).

[12] *New York Independent System Operator, Inc. et al.*, 89 FERC ¶ 61,196 at 61,604 (1999).

forced to attempt to distinguish the two independent system operators as best they can. Their attempts, however, are unpersuasive.

Intervenors are quick to point out, for example, that the Commission's NYISO Orders apply the more protective liability standards "only" to the NYISO's Services Tariff and Market Monitoring Plan. WPTF/Enron Answering Br. at 9; TANC *et al.* Answering Br. at B.5 and B.9; Dynegy Answering Br. at 4. While this is true, it must be recognized that the activities governed by the NYISO Services Tariff and Market Monitoring Plan correspond to a substantial portion of the activities governed by California's ISO Tariff. Thus, while intervenors have implied that the activities to which the Commission has applied the more protective liability standards are limited to "power sales within the state" (*see e.g.* WPTF/Enron Answering Br. at 9 and 15), this is far from true. In fact, the NYISO's Services Tariff governs (1) procedures for operation of the ISO-administered markets and for the safe and reliable operation of the control area, (2) all functions and services related to the sale and purchase of energy or capacity and the payment to suppliers who provide ancillary services, (3) load forecasting, (4) security constrained unit commitment and real-time dispatch, (5) settlements of the ISO-administered markets, (6) control area services, (7) arranging for and maintaining reliable communications and metering facilities, and (8) protecting the confidentiality of data.[13] The NYISO Market Monitoring

[13] *See* ISO Initial Br. at 15-18,citing the Services tariff at Sections 3.5, 4.1, 4.7, 4.9, 4.15, 4.18, 5.1, 5.8, and 6.1 in comparison to ISO Tariff Section 2.5 and the Ancillary Services Requirements Protocol; Section 2.2.6.8 and the Demand Forecasting Protocol; Sections 5.1.3, 5.6, and 7.2.6.2 and the Dispatch Protocol; Article 11 and the Settlement and Billing Protocol; Section 2.3, Articles 4 and 5, and the Outage Coordination Protocol; Articles 6 and 10 and the Metering Protocol; Section 20.3; and Section 2.6 and the Market Monitoring and Information Protocol.

Plan governs all activities related to monitoring market data and market participant conduct in order to detect and mitigate market power. While the ISO believes that the more protective liability standard should apply to *all* of its activities (as discussed further below) it seems obvious that the liability standards applied by the NYISO Orders should *at least* apply to the activities listed above as they are performed by the ISO under its own tariff.

One intervenor responds to this point by claiming that "... various CAISO Tariff provisions do not expressly apply to either open access transmission services or other power services, and may apply to both. . . . Market Participants should have the right to clearly know the rules of the game when transacting with the CAISO, and the CAISO's proposal will undoubtedly lead to confusion."

Dynegy Answering Br. at 5. The ISO believes that this argument is without merit. Whether the rules governing their functions are contained in two or three separate tariffs, the NYISO and the ISO perform virtually identical activities with the same types of facilities and the same kinds of market participants. The rules and protocols contained in their respective tariffs are very similar. A requirement to divide its tariff into two parts to take advantage of the liability standard applied to the NYISO would be an overly formalistic condition. As for the "confusion" Dynegy predicts if the NYISO standard is applied to the ISO, Dynegy fails to recognize that the ISO identified the comparable provisions of its tariff.[14]

Intervenors also argue that while a gross negligence standard is appropriate for the NYISO because New York law applies a gross negligence standard to utility companies, such a standard is not appropriate for the ISO because California law applies an ordinary negligence standard to utility companies. WPTF/Enron Answering Br. at 9 and 15. Yet, as the intervenors have themselves pointed out that:

> this Commission's authority or jurisdiction cannot be circumscribed by state law. Well-established concepts of federalism ensure that this Commission may exercise its jurisdiction independent of any constraints attempted to be imposed by a state. Thus, the Commission is not required to acquiesce in state laws respecting liability.

TANC *et al.* Answering Br. at para.13. In fact, the ISO would respectfully suggest that given the Commission's objective of promoting broad, regional markets, application of varying liability standards to independent system operators merely because they are located in different states seems inconsistent. This kind of discriminatory treatment of independent system operators would appear to pose an impediment to the Commission's stated goal of forming RTOs, since it may

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[14] *See* footnote 13 above citing the ISO's Initial Br. at 15-18.

prove difficult to knit together into RTOs separate control areas governed by disparate Commission-mandated liability standards.

Nevertheless, intervenors cite language from Commission Orders for the proposition that:

> the NYISO's "Services Tariff" conforms with New York law, which governs power sales within the state." The only reason why the Commission adopted the gross negligence standard in that case, therefore, is because the matter at hand is subject to New York law, which imposes such a standard.

WPTF/Enron Answering Br. at 9 (citations omitted). The ISO believes that intervenors have taken the Commission's words out of context and drawn unwarranted conclusions from them. In the New York proceedings, the Commission's main analysis for assigning liability standards to the NYISO was based on the *function* the ISO was performing. Thus, for instance, the Commission approved the application of a "willful misconduct" standard to the NYISO's Market Monitoring function because "[t]he New York ISO will not be able to properly monitor and implement measures to correct market power if the threat of lawsuits becomes a variable in its decisionmaking." *New York Independent System Operator, Inc. et al.*, 89 FERC at 61,604. (No intervenor contends that the Commission adopted this standard because New York state law applies a "willful misconduct" standard to utilities.) In addition, in each Order, the Commission actually decided which liability standard should be applied (i.e., ordinary negligence/willful misconduct for the NYISO's Transmission Tariff, gross negligence/willful misconduct for the Services Tariff, and willful misconduct for the Market Monitoring Plan); had the Commission wished to apply state law to the NYISO, it presumably would not have prescribed these preemptive liability

standards, but left the question of liability to the state courts. Finally, intervenors' portrayal of the Commission's reasoning cannot be correct simply because New York law in fact does not apply a "gross negligence" standard to most of the functions governed under the NYISO's Services Tariff. On the contrary, New York applies the "gross negligence" standard as a narrow exception to the general "ordinary negligence" rule governing utilities in that state. Thus, while the "gross negligence" standard applies to situations where a utility causes a service interruption to a customer, the ordinary negligence standard applies to other utility actions. *See e.g. Krasner v. New York State Electric & Gas Corp.*, 457 N.Y.S. 927 (App. Div. 1982); *Grosshans v. Rochester Gas & Electric Corp.*, 478 N.Y.S.2d 402 (App. Div. 1984); *Brooklyn Union Gas Co. v. MacGregor's Custom Coach, Inc.*, 471 N.Y.S. 2d 470 (Civ. Ct. 1983).[15] Obviously, this does not provide a ground on which to distinguish the liability treatment of the NYISO Services Tariff from the ISO.

Apparently realizing that their substantive arguments are weak, intervenors have also tried a burden-shifting device to overcome the Commission's NYISO precedent. Thus, PG&E argues that the Commission should not apply the NYISO precedent here because:

[15] Like California, New York courts apply liability standards as prescribed by the utility's tariff. *See e.g. Krasner v. New York State Electric & Gas Corp.,* 457 N.Y.S. at 928. Thus, the two states' utility liability laws are virtually identical, contrary to intervenors' allegations.

> The initial brief of the ISO does not specifically compare the activities of the California and New York ISOs in a manner which would establish that the levels of risk and liability should be the same. Moreover, as the Commission is aware, other ISO's do not operate the same types of market systems, have the same types of resources available, such as RMR units, or have similar charging and cost allocation provisions available as the California ISO.

PG&E Answering Br. at 11. PG&E conveniently ignores the ISO's lengthy comparison of functions performed by the NYISO and the ISO (ISO Initial Br. at 13-16). Leaving these objections aside, however, it seems clear that in fact the "levels of risk and liability" faced by the ISO are no less than those faced by the NYISO, thus requiring application of the same protective liability standard. For example, the transmission owner participants in the NYISO were organized into a tight power pool long before the institution of the NYISO. As a result, implementation of the NYISO was based on a long history of coordination, shared protocols, consistent technical and management systems and terminologies, open communication, and common experience. By contrast, the California utilities did not similarly jointly commit and dispatch their resources within a tight power pool before institution of the ISO.

More importantly, however, PG&E offers no support for the proposition that the ISO in California warrants a lower standard of liability because it is able to pass on certain charges to Market Participants. PG&E Answering Br. at 13. As a non-profit entity the NYISO is in exactly the same position and has the

same ability.[16] As the foregoing demonstrates, there is no basis for denying the ISO the same limitation on liability that the Commission has applied to the NYISO.[17]

4. California Law Supports A More Protective Liability Standard For The ISO

a. California Law Limits Liability and Consequential Damages Awards Against Utilities

Intervenors argue that California law requires the Commission to apply an ordinary negligence standard to utilities and to allow consequential damages. TANC, *et al*. Answering Br. at para. 16, WPTF/Enron Answering Br. at 12-13. To the contrary, under California law, the CPUC is authorized to establish standards of liability and limiations on damages. Section 2106 of the California Public

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[16] *See for example* Rate Schedule 1 of the NYISO Services Tariff permitting the NYISO to recover all costs related to:

> administration of the LBMP Markets; the ISO;s administration of Installed Capacity requirements and an Installed Capacity Market; the ISO's administration of Control Area Services, other than Ancillary Services provided under the ISO OATT; the ISO's administration of the Market Power Monitoring Program; and other activities related to the maintenance of the reliability in the NYCA.

[17] This conclusion applies to a prohibition against consequential damages as well as the standard of liability applied to the ISO. WPTF/Enron's strategic placement of ellipses in their "quotation" from the NYISO Services Tariff's liability provision notwithstanding (WPTF/Enron Answering Br. at 14), this provision clearly states that the ISO shall not be liable to any entity "except to the extent that the ISO, Transmission Owner, or NYSRC is found liable for gross negligence or intentional misconduct, in which case, the ISO, Transmission Owner or NYSRC will not be liable for any incidental, consequential, punitive, special, exemplary or indirect damages." NYISO Services Tariff, Section 12.3.

Utilities Code does indeed permit awards for negligent acts of utilities; under Section 1759 of the Public Utilities Code, however, which provides that only the California Supreme Court can reverse or modify a CPUC decision, a tariff provision establishing a different standard prevails over Section 2106. *Waters v. Pacific Telephone Co.*, 12 Cal. 3d 1, 4, 114 Cal. Rptr. 753, 523 P.2d 1161 (1974) (hereinafter, "*Waters*"). The Court in *Waters* resolved the apparent conflict between Public Utilities Code Sections 2106 (permitting liability actions) and 1759 (limiting those actions) by establishing the primacy of the CPUC:

> ... [I]n order to resolve the potential conflict between 1759 and 2106, the latter section must be construed as limited to those situations in which an award of damages would not hinder or frustrate the commission's declared supervisory and regulatory policies.

Waters, 12 Cal.3d at 4.

Thus, if the Commission is to look to California law to establish the standard for liability, it must conclude that it should establish a standard that takes into account the Commission's supervision and regulation of the ISO, and the policy the Commission seeks to promote through such supervision and regulation. *See id.*

Accordingly, the ISO does not dispute that Commission policy applies here. Rather, the ISO merely asks the Commission to consider its unique role in the restructured electric utility market in California, along with the standard to which other public utilities in California are exposed, before exposing it to greater liability. As the ISO explained in its Initial Brief:

> . . . a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges, shall likewise be regulated and limited as to its liabilities. In consideration of its being peculiarly the subject of state control, "its liability is and should be defined and limited."

ISO Initial Br. at 19, *quoting Cole v. Pacific Telephone and Telegraph Co.*, 112 Cal. App. 2d 416, 419 (1952) (hereinafter, "*Cole"*).

WPTF/Enron contend that the *Waters* decision is limited solely to instances in which the limitation on liability is taken into consideration in the act of setting the rates. WPTF/Enron Answering Br. at 11-12. WPTF/Enron state that "[w]hile *Waters* did limit the telephone company's liability under the circumstances in that case, it specifically relied on the fact that the Commission [CPUC] had taken into consideration Pacific's limitation of liability in fixing its rates for telephone service, . . .'" *Id.* This is incorrect. WPTF/Enron appear to be relying in part upon the Waters courts's discussion of *Davidian v. Pacific Tel.ephone &Telgraph Co.*, 16 Cal. App. 3d 750 (Ct. App. 1st Div. 1971) (hereinafter, "*Davidian*"), in which it notes that the California Court of Appeals in *Davidian* "stated that the [CPUC] had taken into consideration Pacific's limitation of liability in fixing its rates for telephone service..." *Waters* at 8. This statement does nothing to distinguish *Davidian* from the instant case. The policy underlying the limitation was not established concurrently with the rates, but earlier as a policy following a general investigation of the company's liability. *Id.* at 8-9. Indeed, the *Waters* court went on to quote the previously cited language from

Cole regarding public utilities being regulated "in all operations" and therefore their "liability is and should be defined and limited." *Waters*, 12 Cal. 3d at 7.

WPTF/Enron also argue that *Waters* is limited to "errors or omissions involving *ordinary negligence.*" WPTF/Enron Answering Br. at 13. Again, WPTF/Enron omit key language. While the *Waters* court did say that "[limitation of liability] rules with respect to errors or omissions involving ordinary negligence are reasonable, and for the future will be reasonable," the court also made clear that in 1970 the CPUC ordered the former provision changed so that California utilities are now liable only up to specified amounts for gross negligence. *Waters*, 12 Cal. 3d at 11. Thus, a gross negligence limitation on damages does exist in California. *See* "Proposed Report regarding limitation of liability of telephone corporation adopted," Decision No. 77406, Case No. 8593, 71 CPUC 229 (1970) (hereinafter, "1970 Proposed Report") (damages for gross negligence limited to instances where there is no undue detriment to utilities or their ratepayers).

Moreover, WPTF/Enron's reliance on California Civil Code, Section 1668 is inappropriate. The ISO has not sought an exemption for fraud, and the precedent cited by WPTF/Enron does not support their accusation. For example, in *Empire West v. Southern California Gas Co.*, 12 Cal. 3d 805, 528 P.2d 31 (1974), an award of consequential damages for gross negligence or willful misconduct was not even at issue. Rather, the court allowed a suit seeking actual damages incurred in reliance upon alleged fraud. *Empire West v.*

Southern California Gas Co., 12 Cal. 3d at 811. Similarly, in the 1970 Proposed Report, also cited by WPTF/Enron, the CPUC confirmed, in limiting recovery for gross negligence, that the "[l]imitation of liability rules are legal restrictions" on damage awards resulting from unlawful acts. *Id.*

TANC *et al.* argue that the cases the ISO relies upon are limited in application to the telecommunications industry. TANC *et al.* at Para.15. Section 2106 of the Public Utilities Code, however, is not limited to telecommunications companies, and nothing in *Waters* suggests that it is. Indeed, California courts have applied the *Waters* principles freely to other utilities.[18]

[18] *Ford v. Pacific Gas and Electric Co.*, 60 Cal. App. 4th 696, 70 Cal. Rptr. 2d 359 (Ct. App. 1997) (affirming trial court finding that it lacked subject matter jurisdiction over proceeding against an electric utility where the regulator exercised its authority to adopt a policy for electric utility facilities and powerlines; Public Utilities Act section restricting jurisdiction to review CPUC decision to Supreme Court barred wrongful death and products liability action brought in superior court by wife of electric lineman against electric utility); *San Diego Gas and Electric Co. v. Covalt*, 13 Cal. 4th 893, 920 P.2d 669, 55 Cal. Rptr. 2d 724 (1996) (homeowners could not bring private nuisance action, as award of damages would impermissibly interfere with CPUC's policy on power-line electric and magnetic fields); *Wise v. Pacific Gas and Electric Co.*, 77 Cal. App. 4th 287, 91 Cal. Rptr. 2d 479 (1999) (PG&E contended that the action for allegedly failing to provide certain services is barred by Public Utilities Code Section 1759 in that it interferes with the CPUC's rate-making policy; primary jurisdiction doctrine applied to action against PG&E for unfair business practices; remanded and stayed pending further CPUC proceedings). It has also been applied to water utilities. *See People v. Superior Court of Sacramento; Dyke Water Co.*, 62 Cal.2d 515, 399 P.2d 385, 42 Cal. Rptr. 849 (1965)) (Section 1759 precluded the superior court from adjudicating issues that will necessarily be presented to the commission in water company's refund proceeding). *See also American Drug Stores, Inc. v. Stroh*, 10 Cal. App. 4th 1446, 13 Cal. Rptr. 2d 432 (1992) (*citing Waters* and Section 1759 as support for conclusion that where a matter is within the purview of the regulatory agency, an action seeking a judgment which will interfere with the agency's prospective disciplinary orders is beyond the jurisdiction of the superior court).

Finally, TANC *et al.*'s reference to strict liability is misplaced. TANC *et al.* Answering Br. at para. 16. Strict product liability of public utilities has no application to the services provided by the ISO. In *Pierce v. Pacific Gas and Electric Co.*, 166 Cal. App. 3d 68 (1985), the court did conclude that, under certain circumstances, electricity is a product and PG&E, as a commercial supplier of that product, is subject to strict product liability in tort for personal injuries caused by delivery of electricity at dangerously high voltage due to a defective transformer. The ISO, however, is not a supplier of electricity. As the court stated in *Fong v. Pacific Gas and Electric Co.*, 199 Cal. App. 3d. 30, 245 Cal Rptr. 436 (1988), "[n]othing in Pierce even hints that the court was interested in overturning what is settled law in this state and in other jurisdictions: strict liability in tort does not apply to defective electric transmission lines or defects anywhere along the distribution lines." *Id*. 199 Cal. App. 3d at 36. Accordingly, TANC *et al.*'s strict liability analogy is inapt.

b. The Commission Should Promote Participation in a Western Regional Transmission Organization

Dynegy fears that if ISO is protected from undue liability exposure that future Regional Transmission Organization ("RTO") will request the same limitation on liability sought by the ISO. Dynegy Answering Br. at .6. Apparently conceding that California applies a gross negligence standard, Dynegy states

that “it is unclear whether the law in other states may apply the higher standard applied by the Commission to transmission service providers.” *Id.* at 4-5. Dynegy’s concerns are without merit.

First, while the ISO has supported an RTO in the West encompassing more than California, the ISO and other California utilities may seek a California-only RTO at least as an interim measure. Broader participation is dependent on many factors beyond the control of the ISO.

Second, as noted previously the intervenors appear to be offering conflicting views on this issue citing (or in most cases misapplying) state law for one purpose and then claiming that “the Commission is not required to acquiesce in state laws respecting liability.” TANC *et al.* Answering Br. at para. 13. In its Initial Brief, the ISO stressed that the issue of liability was a critical aspect of the service provided by the ISO and that accordingly the issue should not be left to state court proceedings. ISO Initial Br. at 20.

Third, Dynegy appears to have the issue backward. The real fear should be that greater liability exposure would likely dissuade transmission-owning entities from even joining an RTO. For example, the Court of Appeals of Oregon has stated that a limitation of liability was reasonable where there was no evidence of gross negligence. *Garrison v. Pacific Northwest Bell*, 45 Or. App. 523, 608 P.2d 1206 (1980). In upholding the limitation on liability for negligence, Oregon is not alone.

In Arizona courts, a policy of limitation on liability is also recognized. In *Olson v. Mountain States Telephone and Telegraph Co.*, 119 Ariz. 321, 580 P. 2d 782 (1978), the Court of Appeals of Arizona found that a plaintiff could not recover damages absent any evidence that the company had failed to act intentionally or deliberately, and that the plaintiff could not establish intentional or deliberate conduct within the tariff exception merely by showing a series of negligent acts.

Finally, the state of Nevada has also upheld the limitation on liability for negligence. In *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 825 P.2d 588, 591 (1992), Nevada Supreme Court found that a tariff limitation of liability precluded the customer's breach of contract and breach of warranty claims. The court relied on *Waters* in support of its enforcement of liability limiting tariffs. *Id.* Thus, while the details of their limitations vary, California's neighboring states do enforce limitations on the liability to which a utility provider is exposed.

5. Equitable And Policy Considerations Support Application To The ISO Of A More Protective Liability Standard

Intervenors have advanced a number of arguments purporting to show that equitable and policy considerations support application of an "ordinary negligence" standard (including the obligation to respond in consequential damages) to the ISO. These arguments fall into three subcategories: (1) that application of a more protective standard would be unfair; (2) that application of an "ordinary negligence" standard will not harm the ISO; and (3) that application

of a more protective standard will interfere with the state authorities' prerogatives.

a. Fairness.

TANC *et al.* advance most of the intervenors' fairness arguments. They argue that it would be unfair to deprive an innocent party of recourse in damages for another's negligence absent a compelling reason to do so (TANC *et al.* Answering Br. at para. B.20); that if the ISO is not required to respond in consequential damages, neither should the other California market participants be required to do so (*Id.* at para. B.18); and that an ordinary negligence standard is appropriate where the provider is a monopolist (*Id.* at para. B.19). In addition, PG&E argues that the ISO's liability standard should balance out the ISO's extensive authority over other Market Participants. PG&E Answering Br. at 11. The ISO's response to each of these fairness arguments is that they would be well-taken if the ISO were simply another Market Participant, but the Commission has explicitly held that it is not. *Pacific Gas & Electric Co. et al.*, 81 FERC at 61,496 ("[t]he ISO should not be deemed to procure ancillary services on its own behalf since the ISO is not a market participant in the marketplace").

It would be easy to dismiss intervenors' arguments by citing relevant precedent. It is clear, for example, that TANC *et al.*'s contention that "ordinary negligence" is the appropriate standard for a "monopolist" is simply incorrect. In fact, regulators have routinely created, and courts have routinely upheld, special protective limitations on the liability of regulated utilities, on the grounds that their

public service functions and the close oversight given them by the government make ordinary liability standards unnecessary and counterproductive. *See e.g. Waters*, 12 Cal. 3d at 7. At the same time, the other three fairness arguments advanced by intervenors were all rejected either explicitly or implicitly by the Commission in the NYISO proceedings. *See Central Hudson Gas & Electric Corp. et al.*, 88 FERC at 61,384 and *New York Independent System Operator, Inc.* et al., 89 FERC at 61,604.

But more fundamentally, the ISO believes that an "ordinary negligence" standard is both unnecessary and injurious of the interests of the very Market Participants that intervenors wish to protect. As we have noted above, the ISO is not just another company competing against California Market Participants for profit and advantage. The ISO was created by the Commission and the California state authorities in cooperation with the Market Participants, including intervenors to be a fair, objective, and independent transmission system operator. The *raison d'etre* of the ISO is to operate the California transmission grid in a reliable, efficient, and even-handed way. The ISO has no incentive – based on profit, competition, or anything else – to treat any Market Participant unfairly or negligently. *See Pacific Gas and Electric Co. et al.*, 81 FERC at 61,454 (finding that the structure of the ISO satisfies ISO Principles 1 and 2, guarding against discrimination and conflicts of interest). At the same time, there is no corporate capital from which tort judgments can be satisfied. Instead, the ISO maintains insurance coverage to pay liability claims, and the cost of the

premiums for this insurance are passed on to Market Participants in rates, an arrangement approved by the Commission elsewhere. *See New York Independent System Operator, Inc. et al.*, 91 FERC ¶ 61,012, 61,051 (2000).

The result of this state of affairs is that the ISO's incentives to use due care are provided by the ISO's institutional structure itself rather than by the fear of lawsuits. It follows that the result of increasing the exposure of the ISO to tort lawsuits is not an increase in the care the ISO takes in performing its functions, but rather only an increase in insurance premiums, resulting in an increase in rates charged to the California Market Participants. In effect, these Market Participants will then be paying higher rates for no increase in care. This is not a rational or a fair result, and should not be adopted by the Commission.

b. Harm

PG&E makes three arguments calculated to show that adoption of an "ordinary negligence"

standard for the ISO will not cause harm to the ISO. PG&E argues: (1) that the ISO can spread the cost to Market Participants if it is found liable under an ordinary negligence standard; (2) that the ISO has functioned well for two years under an ordinary negligence standard; and (3) that the standard of care applicable to the ISO is not vague, but is well-defined by Good Utility Practice, legal rules, the ISO Tariff, and the ISO Operating Procedures. PG&E Answering Br. at 12-13. The ISO's answer to all three contentions is that PG&E has missed the point. An "ordinary negligence" standard will not harm the ISO, but instead will harm Market Participants that pay the ISO's rates.

Many state utility regulators have limited the liability of utility companies, protecting them from ordinary negligence claims. *See e.g*. *Olson v. Mountain States Telephone & Telegraph Co.*, 580 P. 2d 782; *Bulbman Inc. v. Nevada Bell*, 825 P.2d 588; *Garrison v. Pacific Northwest Bell*, 608 P.2d 1206. They have done this not to protect the utilities, but to protect ratepayers. *Abraham v. New York Telephone Co.*, 85 Misc. 2d 677 (N.Y. 1976). As PG&E itself observes (see PG&E's argument (1), above), this same analysis applies to the ISO.

PG&E's second argument would seem to belie this analysis; if ISO rates have been satisfactory for the first two years of operation with the Commission-mandated "ordinary negligence" standard in place, why should the standard be changed? There are two observations that should be kept in mind. First, adoption of a more protective liability standard would likely reduce the ISO's insurance costs, leading to a decrease in rates from current levels. And second, rates often increase dramatically after the first one or two large liability events alert underwriters to the (often previously unrecognized) risks of doing business in this new paradigm. As PG&E has recognized, America's first ISO has been functioning for only two years, and others for even shorter periods. Thus, it may

be that the real long-term costs of insuring ISOs have not been encountered yet. The ISO believes that under conditions of uncertainty like this, a conservative

approach should be taken to protect ratepayers from potentially significant rate increases in the future.[19]

Finally, PG&E's third argument misses the point as well. While the ISO, Market Participants, and the Commission have of course done their best to make the rules and protocols governing the ISO as clear and consistent as possible, there is no way to tell in advance how breakdowns and failures may occur in this very new context. For the first time in history, California's electricity markets are subject to competition, traditionally vertically integrated utilities are divesting assets, and the electrical grid is being run by an independent system operator. The novelty and complexity of these new arrangements virtually guarantee that unexpected problems will arise, and in fact they already have: recall, for example, the unexpected and dramatic price spikes in the cost of Ancillary Services encountered in the summer of 1998. *See California Independent System Operator Corp.*, 86 FERC ¶ 61,059 (1999). Again, as the ISO argued in its Initial Brief, novel circumstances, unknown risks, and unpredictable harms such as those likely to occur in this new commercial context strongly suggest that the ISO be protected from "ordinary negligence" liability in order to keep rates down and minimize disruptions to its operation.

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[19] It should be recognized also that the insurance premiums are not the only costs that litigation imposes on a commercial entity. The disruption and diversion of personnel necessary to support documentary and deposition discovery, answer interrogatories, prepare reports, work with experts and lawyers, and prepare to testify may be enormous, especially in litigations as complex as those likely to arise in the new electricity markets.

c. Interference With State Authorities

Intervenors' positions on this issue are oddly contradictory. WPTF/Enron argues that:

> [A]ll utilities in California are subject to the full range of liability, including consequential damages. . . . there is no reason to . . . immunize the CAISO from liability by changing the standard itself, to preclude consequential damages, as the CAISO requests. This Commission should therefore reject the CAISO's request that it interfere with the processes of the California judicial system by providing a tariff mechanism that would preempt the ordinary operation of California civil law. . . . it must be subject to the full range of civil liability in state court proceedings, including consequential damages.

WPTF/Enron Answering Br. at 14-15. At the same time, however, TANC *et al.* point out that the California courts tailor their liability standards for utilities to accommodate the policies of the CPUC, and go on to observe that "the asserted California policy of not interfering with or obstructing the CPUC simply does not arise with respect to the ISO, which is subject to the jurisdiction of this Commission." TANC *et al.* Answering Br. at para. 14.

The ISO agrees with TANC *et al*. that the reasoning used by WPTF/Enron is circular. The California courts tailor their liability standards for utilities in order to accommodate the policies of the utility regulators. In this case, the Commission is the utility regulator in question. For the Commission to "leave it to the state courts" would in effect leave the California courts without the regulatory guidance upon which they rely to formulate appropriate liability standards in the ISO context.

Finally, allowing recovery of consequential damages against the ISO as requested by WPTF/Enron would fly in the face of the Commission's long-held position affirming tariffs prohibiting such damages. *See e.g*. *Northeast Energy Associates v. Boston Edison Co.*, 91 FERC ¶ 61,069 (2000).[20] The ISO

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[20] The Commission has routinely accepted tariff provisions limiting a jurisdictional entity's liability for consequential damages. It accepted a tariff provision that contained a waiver of consequential damages in *National Fuel Gas Supply Corp.*, 80 FERC ¶ 61,040 at 61,121 (1997), where it found that the waiver would help implement the service and would not be detrimental to the system. In *Shell Gas Pipeline Co.*, 76 FERC ¶ 61,126 at 61,692-93 (1996), the Commission approved a provision which excluded punitive, incidental, consequential or special damages from the indemnity provisions of the pipeline's tariff.

Similarly, in *Arkla Energy Resources Co. ("AERCo"),* the company proposed a tariff provision that limited its liability to general damages only. It disallowed special, continuing, exemplary, presumptive or other such elements of damage. A customer claimed that such limitation was unfair to the shipper. The Commission disagreed:

> The present approved tariff does not require AERCo to compensate for consequential damages. The Restructuring rule, [*i.e.,* Order No. 636] does not require that a pipeline accept liability for consequential damages. There is simply no basis for requiring AERCo to increase its liability exposure in this manner.

64 FERC ¶ 61,166 at 62,491 (1993).

Courts have upheld tariff provisions limiting a jurisdictional entity's liability for consequential damages. In *Premier Parks, Inc. v. Baltimore Gas & Electric Co.*, 37 F.Supp. 2d 732 (MD1999), an electric utility's tariff provision limiting liability was at issue. Finding that BGE's Electric Service Tariff, approved by the Maryland Public Service Commission, contained liability limiting language by which Baltimore Gas and Electric Company ("BGE") would not be liable for damage to customers by any cause "except willful default or neglect on its part," the U.S. District Court read the word "willful" as modifying both default and neglect. It reasoned that holding BGE liable for ordinary negligence would undermine the goal of maintaining utility rates at reasonable levels and is thus contrary to common sense.

respectfully submits that for the Commission to depart from these precedents in order to burden California electric rates with consequential damages costs would be a perverse and unjustified result.

6. Conclusion

Intervenors have failed to overcome the ISO's arguments that the Commission's decisions with respect to the NYISO compel the conclusion that at least the liability treatment accorded the NYISO should also be applied to the ISO. In addition, an evaluation of California state law, as well as equitable and policy considerations, strongly point to the appropriateness of and need for more protective liability and damages standards to be applied to all of the ISO's activities. For these reasons, the ISO respectfully requests that the Commission grant rehearing and modify the liability standard it has applied to the ISO.

B. Issue O.16 - Whether the MSS concept under the ISO Tariff should be limited so that it would only be used as a vehicle to respect existing operational capabilities for Existing Rights holders? [Issue No. 677, Docket Nos. EC96-19-009 and ER96-1663-010]

In its Initial Brief, the ISO explained that the MSS concept was introduced into the ISO Tariff to facilitate participation by existing governmental entities that had been operating as vertically integrated electric utilities, including for some the use of longstanding interconnection agreements, and that it was envisioned as a potential transitional mechanism to enable such entities to continue to utilize their Existing Rights and to participate in the ISO's markets, without terminating

or requiring certain changes in Existing Contracts. ISO Initial Br. at 27-29. The ISO noted that on October 31, 1997 it filed a *pro forma* Existing Operator Agreement ("EOA"), which would serve as the governing contractual document for an entity operating an MSS,[21] and that in its order dated December 17, 1997, the Commission conditionally accepted the *pro forma* EOA.[22] *Id.* at 28. The ISO requested that the Commission, consistent with its acceptance of the *pro forma* EOA, clarify that MSS status should be limited to entities that had been operating as utilities, prior to the formation of the ISO, under Existing Contracts. *Id.* at 32.

TURN/UCAN and the CPUC support the ISO's position. TURN/UCAN Answering Br. at 2; CPUC Answering Br. at 16. San Diego Gas & Electric ("SDG&E") agrees that "[t]he MSS concept was always intended to be a transitional mechanism for governmental entities that operated integrated utility systems that had in place Existing contracts." SDG&E Answering. Br. at 5-6. The M-S-R Public Power Agency; the Modesto Irrigation District; and the Cities of Redding, Santa Clara and Palo Alto, California ("Joint Respondents") concur "that the MSS concept is intended to apply only to Governmental entities which

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[21] The EOA set out the rights and responsibilities of the ISO and the Existing Operating Entity ("EOE") with respect to an "Existing Operating Arrangement" (*i.e.*, a pre-existing interconnection agreement) under which: (1) the EOE would deliver the output of its Generation to its Demand as a system function, and (2) the EOE would be treated as an MSS under the ISO Tariff.

[22] *Pacific Gas and Electric Co., et al.*, 81 FERC at 62,474-75. The *pro forma* EOA as accepted provides that "[t]he Existing Operating Arrangement reflected in this Agreement has been in place for a number of years pursuant to the provisions of the Interconnection Agreement." *Pro forma* EOA at 1.

operate integrated utility systems." Joint Respondents Answering Br. on Unresolved Issues on E.5 and 0.16 at 5. However, they take "strong issue" with the concept that utilization of the MSS mechanism is transitional and will terminate when Existing Contracts expire. *Id.* at 6. WPTF/Enron restate their position as expressed in their Initial Brief with respect to Issue E.5 that all Scheduling Coordinators should be permitted to qualify as MSSs, regardless of whether the resources they seek to pool are located on a separate system and regardless of whether they operated vertically integrated utility systems in the past.[23]

The ISO agrees with the Joint Respondents that with respect to the Unresolved Issues proceeding, "[t]he point to be made here, however is that this is not the proper arena for resolution of this controversy." Joint Respondents Answering Br. at 7. As the ISO noted in its Answering Brief with regard to Issues E.1, E.2, E.3, E.4, and E.5:

> [r]ecently, as part of the discussions concerning the development of a new methodology for the transmission Access Charge and mechanisms to encourage publicly owned utilities to place their transmission facilities and Entitlements under the ISO's Operational Control, Tariff language that would implement Metered Subsystems was finalized and included in the ISO's proposed Amendment No. 27, which was filed on March 31, 2000.

ISO Answering Br. at 238.

[23] *See* WPTF/Enron Answering Br. at 15-21 and Joint Initial Br. of WPTF and Enron on Issues A.6, B.5.f, E.5, L.1, and L.8, at 13-16.

The proposed Access Charge methodology approved by the ISO Governing Board and filed as Amendment No. 27 includes provisions that would enable the systems of new Participating TOs to qualify as MSSs to facilitate their continued operation of vertically integrated utility systems while also providing an alternative way to participate in the ISO's markets and to use the ISO Controlled Grid for transactions with their surplus resources. Amendment No. 27 addresses the concern raised by the Joint Respondents by proposing to amend the definition of MSS as follows:

> A geographically contiguous system of a New Participating TO, located within a single zone ~~an Existing Operating Entity as at the ISO Operations Date~~ which has been operating for a number of years prior to the ISO Operations Date subsumed within the ISO ~~Controlled Grid~~ Control Area and encompassed by ISO certified revenue quality meters at each interface point with the ISO Controlled Grid and ISO certified revenue quality meters on all Generating Units internal to the system, which is operated in accordance with ~~Existing Contracts and an Existing Operating Agreement~~ an agreement described in Section 3.3.1.

The ISO believes that limiting the availability of MSS status to entities that elect to become Participating TOs is consistent with: (1) the original intent of the concept as a means of encouraging participation by publicly owned electric utilities that chose to remain vertically integrated; (2) the Commission's recognition in Order No. 2000 that it is appropriate to encourage participation by such entities in RTOs and for RTOs to distinguish between entities that choose

to participate and those that do not;[24] and (3) the overall balancing of benefits and burdens represented in the comprehensive Access Charge proposal.

With regard to the Unresolved Issues proceeding, the ISO's Amendment No. 27 proposal addresses the concern raised by the Joint Respondents without the need to "have at it." Joint Respondents Answering Br. at 7. Moreover, Enron has protested the revised definition of MSS in Amendment No. 27, again arguing that MSS status should not be limited to existing vertically integrated governmental entities. Motion to Intervene, Protest, and Request for Maximum Five Month Suspension Period and Hearing of Enron Energy Services, Inc. in Docket No. ER00-2019-000 at 16-18. Accordingly, questions related to the MSS concept should be resolved in Docket No. ER00-2019-000 where the ISO's MSS proposal is pending, not in this proceeding.

C. Issue O.17 - Whether End-Use Meters of ISO Metered Entities Should All Be Grandfathered or Whether There Should Be a Case-by-case Evaluation? [Issue No. 675, Docket Nos. EC96-19-009 and ER96-1663-010]

In its Initial Brief, the ISO sought to confirm that the Commission's purpose in the October 1997 Order was to change Section 10.2.4 to make it clear in the ISO Tariff that the End-Use Meters of ISO Metered Entities would be deemed to be certified but that the Commission did not intend to revoke the ISO's authority under Section 10.2.2 to require necessary upgrading of meters, including End-Use Meters of ISO Metered Entities in place on the ISO

[24] *Order No. 2000*, FERC Stats & Reg. at 31,201

Operations Date. ISO Initial Br. at 32-36. The ISO recognized that the issue of potential meter upgrades needed to be considered further with stakeholders and that only if the ISO determined as a result of the stakeholder process that it would be necessary to propose that certain categories of End-Use Meters of ISO Metered Entities warranted upgrading, would it seek to require such improvements. *Id.*

Two parties submitted Answering Briefs with regard to this issue. The Cities of Anaheim, Azusa, Banning, Colton, and Riverside California ("Southern Cities") do not oppose the clarification requested by the ISO provided that Section 10.2.2 of the ISO Tariff is modified as requested by Southern Cities in its position on Issue F.2. In its Answering Brief, the ISO agreed to the modifications requested by Southern Cities:

> As reflected in Attachment C to the Report on Outstanding Issues filed in this matter on March 11, 1999, Southern Cities and the ISO reached a proposed settlement based on the following changes to the ISO Tariff:
>
> - Changes to Section 10.2.2 of the ISO Tariff as follows: The ISO may require ISO Metered Entities to install, at their cost, additional meters and relevant metering system components, including real-time metering, at ISO specified Meter Points or other locations as deemed necessary by the ISO, in addition to those connected to or existing on the ISO Controlled Grid at the ISO Operations Date, including requiring the metering of transmission interfaces connecting Zones. <u>In directing the addition of meters and metering system components that would impose increased costs on an ISO Metered Entity, the ISO shall give due consideration to whether the expected benefits of such equipment are sufficient to justify such increased costs.</u> ISO Metered Entities, at their cost, shall install and maintain, or cause to be installed and maintained, metering equipment and associated communication devices at ISO

designated Meter Points to meet the requirements of this Section 10 and the ISO metering protocols. Nothing in this Section 10 shall preclude ISO Metered Entities from installing additional meters, instrument transformers and associated communications facilities at their own cost.

- Changes to Section 5.1.1 of the Metering Protocol of the ISO Tariff as follows: The ISO has authority under Section 10.2.2 the ISO Tariff to require an ISO Metered Entity to install Metering Facilities in addition to those Metering Facilities on the ISO Controlled Grid at the ISO Operations Date. In directing the addition of meters and metering system components that would impose increased costs on an ISO Metered Entity, the ISO shall give due consideration to whether the expected benefits of such equipment are sufficient to justify such increased costs. An ISO Metered Entity may not commence installing those additional Metering Facilities until the ISO has approved its Proposal for Installation.

Southern Cities continues to "consider the addition of the foregoing language to MP 5.1.1 and ISO Tariff § 10.2.2 to provide an acceptable resolution of this issue." Joint Initial Brief of EPUC/CAC and Southern Cities on Issue F.2, at 9. While the ISO believes that these Tariff provisions are just and reasonable as filed and that no additional changes are necessary, the ISO continues to support the compromise reached with Southern Cities. However, the additional changes requested by EPUC/CAC are unwarranted.

ISO Answering Br. at 251-252.

One party, CAC/EPUC, opposes the ISO's request for clarification. CAC/EPUC argues that Section 10.2.2 of the ISO Tariff permits the ISO to order the installation of *additional* meters than those that were in existence on the ISO Operation Date as opposed to the *upgrading* of existing meters. CAC/EPUC Answering Br. at 4-5. The ISO submits that from its perspective this is a distinction without a difference. In those situations where it is necessary to install an ISO certified meter with the ability to have the data directly transmitted to the

ISO Energy management and settlements systems, the ISO cares only that this meter is in place. Thus, the ISO certified meter can either replace (upgrade) an existing meter or be installed in addition to the existing meter so as to properly account for the production and consumption of the electric facilities attached to the grid.

CAC/EPUC also argues that the ISO's original rehearing request was limited to dispatch considerations. CAC/EPUC Answering Br. at 5. However, the language quoted by CAC/EPUC, "[t]he CAISO proposed to develop criteria which could require some, but not all End-Use Meters of some ISOMEs to comply with the CAISO standards in relation to metering and polling after a grace period" (*Id.*) clearly relates not only to dispatch, but also to the ISO's polling of data for its settlement responsibilities.

The Commission should reject CAC/EPUC's excessive rhetoric. The ISO is not seeking "to eradicate rights grandfathered in the ISO Tariff." CAC/EPUC Answering Br. at 6. The ISO's requested clarification of Section 10.2.2 of the ISO Tariff, as that provision was modified pursuant to the ISO's settlement with Southern Cities, is just and reasonable.

III. Conclusion

WHEREFORE, for the reasons discussed above, the Commission should grant the relief requested herein.

Respectfully submitted,

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Date: May 8, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing documents by first class mail, postage prepaid, upon each person designated on the restricted service list approved by the Commission in this Proceeding.

Dated at Washington, D.C. on this 8th day of May, 2000.

_____

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