UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

REPLY BRIEF OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION AS TO SECTION 202(C) TRANSACTIONS

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

Pursuant to Rule 706 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.706 (2001), and the briefing schedule established by the Presiding Judge, the California Independent System Operator Corporation ("California ISO" or "ISO") submits its Reply Brief as to Section 202(c) Transactions in this proceeding.

I. INTRODUCTION

In their Initial Briefs, suppliers[1] advance various theories as to why certain sales made to the ISO's markets should be treated as made pursuant to the Secretary of Energy's emergency orders under Section 202(c) of the Federal Power Act ("DOE Orders"). What these arguments have in common is that they eschew the need for any contemporaneous evidence establishing which transactions suppliers and the ISO actually considered as being made pursuant to Section 202(c) at the time that they were entered into; instead, the arguments rely on what can most generously be characterized as circumstantial evidence and after-the-fact characterizations.

This is the fundamental distinction between the positions of the ISO, California Parties, and, to a lesser extent, Commission Trial Staff ("Staff"), on the one hand, and the positions of sellers claiming 202(c) transactions. Because the Commission has exempted 202(c) transactions from price mitigation in the current proceeding, it is only natural that suppliers seek to gather as many of their sales as possible under the umbrella of Section 202(c). With this desire, however, comes the danger of post-hoc rationalizations, and thus, the need for a rigorous and careful determination of which sales were actually made pursuant to the DOE Orders, and not for other reasons. Instead, suppliers suggest that the finder of fact and the Commission should engage in sweeping assumptions concerning the nature of sales made to the ISO during this period based on nothing more than circumstantial and contextual evidence that either favors the ISO's position or, at the very least, cuts both ways. Adopting suppliers' approach would do injustice to the Commission's

[1] We will refer to the suppliers using the same abbreviations as in our initial brief.

attempt to restore confidence and fairness to California markets for a period during which suppliers enjoyed an unprecedented opportunity to realize unjust and unreasonable profits.

Suppliers also criticize the ISO's position because of admitted imperfections in the evidence compiled by the ISO as to which transactions were conducted pursuant to Section 202(c), arguing that the only alternative to a flawless record is to resort to unwarranted assumptions based on little or no contemporaneous evidence. This "throw the baby out with the bath water" approach is hardly compelling. It is not the ISO's responsibility to establish which transactions were and were not made pursuant to Section 202(c) – that burden properly rests with suppliers. Moreover, parties have had sufficient opportunity to present contemporaneous evidence to demonstrate which transactions were made pursuant to the DOE Orders, and it is on this record that the Presiding Judge must rest his recommendations and the Commission must rest its decision. While a "perfect" outcome that reflects the nature of each transaction with 100% accuracy is likely impossible given the nature of this proceeding, we submit that the best determination of which transactions were made pursuant to Section 202(c) is one that relies on the contemporaneous evidence in the record that shows parties' understandings at the time that those transactions were entered into, rather than circumstantial evidence and after-the-fact characterization.

II. ARGUMENT - WHAT TRANSACTIONS WERE CONDUCTED PURSUANT TO SECTION 202(C) OF THE FEDERAL POWER ACT?

While we have endeavored to respond to sellers' arguments under the various subheadings contained in the Joint Narrative Stipulation of Issues, some issues are not amenable to such treatment. Therefore, we address several preliminary issues in this section.

?? Sellers Properly Bear the Burden of Proof as to which Transactions Were Made Pursuant to Section 202(c)

In our Initial Brief, we explained why suppliers should bear the burden of proving their claims that certain sales were made pursuant to the DOE Orders. ISO Brief at 5-7. However, "MID" contends that sellers should not bear this burden. Instead, MID maintains that the named "Complainants" in this proceeding are the entities "who bear the burden of showing that their claim for refunds is just and reasonable." MID Brief at 4-5. MID's legal analysis is completely flawed. MID overlooks the fact that the Commission has already found that refunds are appropriate with respect to "spot"[2] sales of energy made through the ISO and PX spot markets, as well as through out-of-market ("OOM") transactions and that suppliers, including MID, are liable for refunds for any amounts earned over the mitigated price ultimately derived from the Commission's methodology.[3]

Thus, "Complainants" have already sustained their burden of proof, as required under Section 206 of the Federal Power Act. In the July 25 Order, however, the Commission exempted from its mitigation methodology any

[2] The Commission has defined "spot" sales as those sales made 24 hours or less prior to delivery.

[3] *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, et al., 96 FERC ¶ 61,120 (2001) at 61,499, 61,511 ("July 25 Order").

transactions entered into pursuant to Section 202(c) of the Federal Power Act. July 25 Order at 61,516. The issue before the Presiding Judge, therefore, is not whether *refunds are owed* on spot market and OOM transactions during the refund period: the Commission has already said refunds are owed. The question for resolution here is whether certain transactions that otherwise would fall squarely within *the group already determined to be subject to refund* are *not* to be subject to refund (at least in *this* proceeding) because they were entered into pursuant to Section 202(c) of the Federal Power Act. It is this burden of proof that suppliers more appropriately bear, since it must be affirmatively established that these sales were made pursuant to the DOE Orders in order to take them *out* of the treatment *all other similar sales* will receive, and it is sellers that will obtain the benefit of any such findings. *See* ISO Brief at 5-7.

?? **The Determination of Which Sales Were Made Pursuant to 202(c) Should Not be Based on Punitive Factors**

The burden of proof argument is closely tied to another theme that appears throughout several suppliers' briefs: namely, that a finding that their claimed transactions were not made pursuant to Section 202(c) would be tantamount to some sort of "punishment." *See* SOC Brief at 5, 8-9; SMUD Brief at 6, 19-20 (noting that the ISO is seeking to "expose 202(c) sellers to refund liability"); MID Brief at 5. For example, MID states that "the Commission's exemption from refund liability effectively stated that it would not punish entities who helped keep the lights on in California by complying with the DOE Orders." MID Brief at 5. It is of course true that suppliers have been or will be paid for all of the sales at issue in this proceeding; the issue is *only* one of whether they are paid the mitigated price calculated as set forth by the Commission in the July 25 Order, like all other suppliers during the

refund period, or whether they receive the full price demanded at the time that the sales were made.[4]

Suppliers "punishment" paradigm reflects a fundamental misunderstanding of the Commission's rationale for exempting 202(c) sales from price mitigation. Contrary to suppliers' arguments, the Commission did not exempt 202(c) sales from the generally-applicable mitigation scheme established in the July 25 Order in order to reward entities for helping to "keep the lights on in California." Instead, the Commission's decision rested on its conclusion that rates for transactions entered into under Section 202(c) were properly determined under a separate mechanism than rates for those entered into under Section 205. *See* July 25 Order at 61,516. Thus, the Presiding Judge should decline suppliers' invitation to consider any alleged punitive consequences that the classification of these transactions might have, as the suggestion of "punishment" is nothing more than a red herring.

?? **The Doctrine of Equitable Estoppel Does not Support a Finding that Certain Transactions Were Entered into Pursuant to Section 202(c)**

Pasadena raises the novel argument that even if its sales do not meet the "literal requirements" of the DOE orders, the Commission should still conclude that the ISO is estopped from disputing that Pasadena's sales were DOE sales. Pasadena Brief at 5-6. Pasadena maintains that such a finding is merited because the ISO represented to Pasadena throughout the period of the DOE Orders that the ISO needed any available excess power and that Pasadena was obligated under the DOE Orders to provide such excess power to the ISO, and that Pasadena would not

[4] The Commission has also provided a cost-of-service "safety net" for those suppliers whose prices are mitigated and who consequently fail to cover their costs by allowing them the opportunity to make this showing at the conclusion of this proceeding, if necessary. See July 25

have provided that power but for the DOE Orders. *Id*. The major deficiency in Pasadena's argument is that it is really asking that the *Secretary of Energy and DOE* be estopped from denying that Pasadena's sales were made pursuant to DOE, since it is the Secretary of Energy and DOE who promulgated the requirements under which transactions were conducted pursuant to Section 202(c). If these requirements were not met, then nothing that the ISO represented to entities such as Pasadena could change that reality. For example, if the ISO had failed to file the necessary certification with the Department of Energy and yet still directed an entity to provide under the DOE Order, there could be no legitimate claim that that transaction was made pursuant to Section 202(c), since there was no authority for either the ISO or the seller to do so. *See* Ex. No. ISO-11 at 2, ¶ D.

Putting aside this basic deficiency in Pasadena's argument, Pasadena does not, in any event, come close to meeting the legal test for equitable estoppel. As the ISO has made clear, it never represented that Pasadena's claimed transactions, which consist of sales made through the ISO's formal market, would be treated as having been made pursuant to the DOE Order. In fact, the ISO continuously represented to suppliers, through its certifications to the DOE, that it did not consider market transactions to have been entered into pursuant to the DOE Orders. *See infra* Section II.A.5; ISO Brief at 29-30.

Order at 61,518; *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, et al., 97 FERC ¶ 61,275 (2001) at 62,254 ("December 19 Order").

A. HOW, IF AT ALL, SHOULD THE FOLLOWING FACTORS APPLY TO DETERMINE WHETHER A TRANSACTION WAS CONDUCTED PURSUANT TO SECTION 202(C)?

1. Context of Transactions

Most suppliers suggest that the context in which transactions were made establishes that all of their sales to the ISO made while the DOE orders were in effect were made pursuant to Section 202(c).[5] Burbank/Glendale Brief at 3; SOC Brief at 4-9; Pasadena Brief at 6; SMUD Brief at 2-3; LADWP Brief at 5-6; MID Brief at 5; Coral Brief at 3; Pinnacle Brief at 2; PS Colorado Brief at 2; Portland Brief at 3-4. While we concur that the context is instructive, we take issue with suppliers' suggestion that context alone somehow establishes that certain sales were made pursuant to the DOE Orders, or that any of the contextual factors cited by suppliers warrants the conclusion that their sales were made pursuant to the DOE Orders. We submit that a fair reading of the record will lead to the conclusion that there were a number of reasons *other than* the existence of the DOE Order that motivated suppliers to sell to the ISO during this period. Thus, something other than context is necessary to evaluate whether certain transactions were, in fact, made pursuant to Section 202(c). The specific contextual factors discussed by suppliers are dealt with in turn, below.

A number of suppliers argue that they were unwilling to sell to the ISO because of credit concerns, and would not have sold without the mandate of the DOE Orders, and that this supports a finding that their sales were made pursuant to the DOE Orders. *See* MID Brief at 8; BPA Brief at 6-7; SMUD Brief at 2-3,5;

[5] Some entities have limited their claims to all sales that they made to the ISO on certification days, while others claim all sales made to the ISO during the entire period that the DOE Orders were in place, regardless of whether the ISO actually invoked that authority.

Pinnacle Brief at 3-4; PS Colorado Brief at 3; Portland Brief at 4; Burbank/Glendale Brief at 3-4; Pasadena Brief at 7-8. As we stated in our Initial Brief, we do not contest the fact that the credit situation in the California marketplace during this period was an important factor influencing suppliers' decision whether to sell to the ISO. ISO Brief at 8. However, the fact that many of these same suppliers provided energy to the ISO on non-certification dates, as well as immediately prior and subsequent to the issuance of the DOE Orders, strongly suggests that, in many cases, credit concerns did not rise to the level that suppliers were categorically unwilling to sell to the ISO absent the ISO's ability to compel supply under the authority granted by the DOE Orders.[6] *See* Ex. No. ISO-21 at 14:17-16:9. Thus, we believe that the fact that suppliers were concerned generally with the credit situation in the California markets does not, in and of itself, establish that any particular sales were made pursuant to the DOE Orders.

According to several entities, their fiduciary obligation to their ratepayers would have prevented them from making sales into the ISO's markets absent the DOE Orders, and this should be considered probative evidence supporting their claims of sales made pursuant to the DOE Orders. *See* Burbank/Glendale Brief at 4; MID Brief at 7-8. With respect to those entities that are inside the ISO Control Area, this argument rings particularly hollow given the fact that the reliability of those entities' systems are directly tied to the overall reliability of the ISO Control Area. *See, e.g.,* Ex. Nos. ISO-21 at 19:10-19; MID-2 at 9:6-9. While the fiduciary responsibility owed to their ratepayers probably was of concern to entities during this

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[6] BPA takes issue with the ISO's figures for sales that it made on non-certification dates. Nevertheless, BPA's own data on the sales that it made to the ISO during this period shows sales made on non-certification dates. Ex . Nos. BPA-55; BPA-56.

period, it is, at the same time, not unreasonable to presume that the uninterrupted delivery of electricity to those ratepayers would be of equal, if not greater, concern. Also, suppliers' argument in this regard is undermined by the fact that they made sales to the ISO when the ISO had determined that it did not even require the authority contained in the DOE Orders to compel suppliers to provide energy.[7] It does not logically follow that an entity that was so concerned with its fiduciary duty to its ratepayers that it actively sought to avoid selling to the ISO would, in fact, make sales to the ISO when not actually required to do so. For these reasons, this contextual factor does not support a finding that entities made sales pursuant to the DOE Orders.

Several sellers also argue that the ISO and Staff's criteria for evaluating which sales were made pursuant to Section 202(c) are merely *post-hoc* formulations to which sellers should not be held, because the ISO (and Staff) did not issue any instructions to market participants concerning compliance with the DOE Orders during the period that those Orders were in place. *See* MID Brief at 7-9; SMUD Brief at 2-3; SOC Brief at 4-5; Burbank/Glendale Brief at 5-6. However, as we explained in our Initial Brief, it is the *DOE Orders* themselves that established the criteria by which transactions can be evaluated to determine whether they were made pursuant to Section 202(c). ISO Brief at 20. Since suppliers had access to these Orders at the time they were issued, they do not, and cannot, claim that the terms of those Orders were unknown to them at the time. Moreover, the DOE Orders contemplated a process by which suppliers would inform the ISO of their anticipated excess

[7] To illustrate, Burbank made sales into the ISO's markets on 20 non-certification days, Ex. No. S-79, Glendale made sales into the ISO's markets on 20 non-certification days, Ex. No. S-80, and

energy for a trade date, the ISO would request energy from suppliers, and suppliers were then required to provide that energy, if in fact it was excess to that needed to satisfy their own load. *See* Ex. No. ISO-11 at 1-2. Suppliers claiming sales made through the ISO's markets or through deliveries of uninstructed energy, for instance, have failed to even show that those transactions were made in response to a *request* by the ISO for certain amounts identified to it as excess energy. *See infra* Section III.A.5, III.A.8. Numerous other entities have failed to show that they came to terms with the ISO, or even tried to do so, as required by the DOE Orders, since the ISO was unaware that the sales were being made because of the DOE Orders.

SMUD argues that the DOE Orders do not need to be the sole factor motivating a supplier to sell to the ISO in order to qualify as a 202(c) transaction. SMUD Brief at 5-6. Specifically, SMUD contends that the desire to maintain reliability is not inconsistent with selling under the DOE Orders. *Id*. SMUD misses the point. The fact that other motivations existed for suppliers to provide energy to the ISO during this period is not necessarily demonstrative of what suppliers, in fact, believed with respect to certain transactions, but that the ISO was warranted in not *assuming*, absent some indication otherwise, that all energy was being transacted pursuant to the DOE Orders, and that the Commission should not assume so now. Thus, while SMUD claims that "selling energy to the ISO under the DOE Orders was the primary and overriding motivation," SMUD Brief at 6, SMUD acknowledges the critical fact -- that other rationales did exist for sellers to provide energy to the ISO. *Id*. at 6 (noting that "SMUD certainly was concerned during this period with keeping the lights on in Northern California"). It is certainly reasonable to conclude that a

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MID made sales into the ISO's markets on 7 non-certification days, Ex. Nos. MID-3; MID-4; MID-6.

supplier might well have provided energy to the ISO during this period without any consideration as to the DOE Orders. Thus, it is entirely reasonable for the Commission to insist on some sort of contemporaneous evidence that the ISO had been made aware of the fact that supplies were being provided due to the DOE Order, rather than for other reasons.

For similar reasons, Anaheim/Riverside's contention that the "ISO and Staff have failed to contradict the testimony of Anaheim and Riverside that compliance with the DOE Orders was a compelling motivation for these Cities to provide their energy to the ISO," SOC Brief at 6, fares no better. Again, while compliance with the Orders *may* have been a motivation, there were certainly other motivations for sellers, including these Cities, to provide to the ISO during this period, and absent some sort of contemporaneous indication that suppliers were providing only because of the DOE Orders, it would be remiss of the Commission to simply assume such. Thus, it is appropriate to insist on some contemporaneous evidence that transactions were, in fact, made pursuant to the DOE Orders.[8] Moreover, it is suppliers that bear the burden of showing that they were transacting pursuant to the DOE Orders rather than for some other reason. *See supra* Section II; ISO Brief at 5-7.

Based on these various contextual factors, some suppliers suggest that the ISO and the finder of fact should simply acknowledge that all transactions made by suppliers during this time period were made pursuant to the DOE Orders, without any showing that they were actually made in conformance with those Orders. *See*

[8] Anaheim/Riverside also mistakenly state that a sale made by NCPA and acknowledged by the ISO was made through the ISO's markets. SOC Brief at 11, n.2. The record is perfectly clear that this transaction was, in fact, an Out-of-Market transaction. Ex. No. NCP-9.

SMUD Brief at 3 ("all sales to the ISO on Certification Days qualify as Section 202(c) transactions"); SWC/MWD Brief at 10 ("The ISO's failure to establish procedures for DOE Order transactions and the context in which such transactions occurred support the finding that all transactions on ISO certification days were pursuant to the DOE Order."(citation omitted)); MID Brief at 7, 12. This effort should not be permitted to prevail. Although the record is completely devoid of any statements suggesting such a conclusion, from the ISO or DOE, the record does establish that the ISO constantly emphasized to both market participants and the DOE its preference to use existing mechanisms to procure power, and to treat the DOE Orders as a tool of last resort. This is apparent from a number of sources, including the ISO's 34 certification letters and accompanying Load Forecast analyses,[9] the letters written to DOE requesting extension of the emergency order authority, and the various notices to market participants during this period, none of which suppliers can or do deny knowledge of. *See, e.g.,* Ex. No. JE-3 at Tab "ISO Request 12/20/00," Tab "ISO Request 1/5/01." In fact, several entities claiming 202(c) sales cite Ms. O'Neill's oral testimony that the ISO was always encouraging entities to bid into the ISO's markets,[10] but, predictably, ignore the companion testimony that it was through these market mechanisms that the ISO sought to avoid the need to use the authority granted to it by the DOE Orders. While suppliers' opportunism is unsurprising, their post hoc effort to wrap all transactions in the protective cloak of the DOE orders cannot be permitted to prevail over the facts.

[9] The full title of these analyses is "Analysis of Load Forecast, Resource Availability Forecast, and Transmission System Conditions that Call for Certification." *See, e.g.*, Ex. No. ISO-13 at 3-8.

[10] *See* BPA Brief at 13; Pasadena Brief at 11.

2. Attachment "A" Entity

While the restriction of DOE sales to Attachment A entities has proved uncontroversial, several entities, most notably SMUD, attack the ISO for allegedly seeking to "impugn the compliance of Attachment A entities with the DOE Orders because the ISO 'erroneously' included some potential sellers in the list of entities that became Attachment A." SMUD Brief at 7; *see also* MID Brief at 13; Pasadena Brief at 16-17. SMUD claims that the inclusion of a supplier on Attachment A "should be given the full weight that and credit for what it clearly means – that if an entity is listed on Attachment A, it was de facto required to provide energy to the ISO as requested per the DOE Orders." SMUD also states that by including entities on Attachment A, the ISO "creat[ed] the logical belief that all sellers on Attachment A made sales pursuant to Section 202(c)." SMUD Brief at 8.

SMUD's first conclusion is uncontroversial and has never been disputed by the ISO – an Attachment A entity that the ISO required, pursuant to the DOE Orders, to deliver energy would have been obligated to comply. Ms. O'Neill never suggested otherwise. However, SMUD's second conclusion, that all suppliers made sales pursuant to Section 202(c) by mere virtue of their inclusion on Attachment A, is ludicrous. The implication of this contention is that every pre-existing mechanism and obligation through which the ISO could obtain energy was rendered utterly null and void at the time that the ISO requested the issuance of the DOE Orders because an entity was *subject* to DOE authority. This argument ignores both reality and common-sense. As is clear by now, the ISO consistently and publicly represented that it viewed its authority under the DOE Orders as a last resort mechanism, to be used when all other methods of obtaining supply, such as the

formal markets and existing contractual obligations, had failed. Tr. at 2289:11-12, 2445:1-4; Ex. No. JE-3 at Tab "ISO Request 12/20/00." Thus, it would have been unreasonable for all entities on Attachment A to believe that sales were made to the ISO pursuant to 202(c), ipso facto as a result of being on Attachment A. Inclusion on Attachment A merely subjected an entity to the *possibility* that the ISO might request excess energy from it pursuant to the DOE Orders. If an entity voluntarily chose to provide energy to the ISO without the necessity of an actual request, then its appearance on Attachment A becomes irrelevant.

3. ISO Certification Day

Several suppliers continue to claim that transactions made on days for which the ISO did not file a certification with the DOE should be considered as made pursuant to the DOE Orders. These arguments are entirely without merit. Some entities contend that sales made on non-certification days should be treated as 202(c) sales because the ISO did not inform market participants that it was imposing this "criterion" at the time that the DOE Orders were in place. See MID Brief at 13-14; Burbank/Glendale Brief at 7. For example, Burbank/Glendale states that "[w]ithout an express criteria, suppliers had no way of knowing how to comply with the DOE Orders, other than to sell into the ISO markets during the entire period when the DOE Orders were in effect." Burbank/Glendale Brief at 7. However, as we, along with the California Parties and Staff, explained in our Initial Brief, this "criterion" was not imposed by the ISO. Instead, this limitation on the scope of the authority granted by the Secretary of Energy was explicitly set forth in the two Orders and amendments thereto. Ex. Nos. ISO-11; ISO-12; *see also* ISO Brief at 16-17; Staff Brief at 10; Cal Parties Brief at 16. Therein, the Secretary of Energy made the

unequivocal statement that "the entities in Attachment A are *not required* to deliver energy or services *under the terms of this order* until [8 or] 12 hours after the ISO . . . has filed with the [DOE] a signed certification that it has been unable to acquire in the market adequate supplies of electricity to meet system demand." Ex. No. ISO-11 at 1 (emphasis added). None of these entities claims that it was unfamiliar with the terms of the Orders when they were issued. Thus, sellers' suggestion that they had no knowledge of how to comply with the clear terms of these orders simply defies belief, and should be rejected.

In a similar vein, Coral argues that treating its sales made to the ISO on December 14, 2000 as not having been made pursuant to Section 202(c) because of the fact that the ISO had not filed a certification for that date would "impose the certification day standard on Coral on a retroactive basis, in violation of the well-established principle that market participants must have advance knowledge of the market rules to which they are subject." Coral Brief at 8. Coral's logic is backwards. There was no imposition of any "standard" on a retroactive basis, because the standard *was* the Order, which applied at the time it was issued, and not before. Coral's actual argument is that because it engaged in transactions based on certain assumptions about the Order before it had actually obtained a copy, those transactions should be exempted from mitigation. This argument has nothing to do with the application of legal standards, which must be the sole consideration in judging which transactions were made pursuant to Section 202(c).

Suppliers' additional arguments concerning this issue are equally unconvincing. In their Initial Brief, Burbank/Glendale contend that the ISO "for all intents and purposes" invoked the DOE Order on non-certification dates because the ISO "still had to call on suppliers and order them to sell it power." Burbank/Glendale

Brief at 7. Of course, Burbank/Glendale provide absolutely no support for the proposition that the ISO *ordered* any entity to provide it power on non-certification dates. *See id.* It is certainly true that the ISO *procured* energy from numerous Attachment A entities on non-certification dates; however, that revelation, in and of itself, establishes nothing more than the already obvious fact that load existed in the ISO's Control Area on those dates for which energy had to be obtained. What this argument does demonstrate, however, is the misconception that entities such as Burbank/Glendale have with respect to the DOE Order regime. As explained above, the authority provided in those Orders was intended by both the ISO and DOE to be used as a last resort mechanism. It was never intended that the ISO would use the DOE Order authority to obtain supplies to meet all of the load in its Control Area during this period. Tr. at 2289:11-17, 2445:1-12; Ex. No. JE-3 at Tab "ISO Request 12/20/00."

Pasadena makes a similar argument, that the ISO's markets gave it flexibility and options it would not have had without the DOE Orders, and provided a cushion on non-certification dates that made it unnecessary for the ISO to certify. Pasadena Brief at 10. While this may be true, it does not serve to magically re-write the language of the DOE Orders, which make clear that entities were obligated to provide energy under those Orders only at the ISO's request on days for which the ISO had filed the necessary certification. *See* Ex. No. ISO-11 at 1.

PS Colorado offers an interesting, though misguided, interpretation of the DOE Orders on this issue: it claims that "[t]he conditions in the DOE Orders provided certain safeguards to assure that the [ISO] would not abuse the authority vested to it in the DOE Orders," but that suppliers could still choose to make sales pursuant to Section 202(c) on non-certification days. PS Colorado Brief at 8. Coral makes a

similar argument, claiming that limiting 202(c) sales to certification days would "convert what was intended to be a shield to protect sellers into a sword to be used against them." Coral Brief at 13.

Putting aside the lack of support for these suppliers' interpretations of the provisions of the DOE Orders, this argument is based on a misunderstanding of the scope of the 202(c) authority granted by the Secretary of Energy. The Orders did not contemplate a voluntary process; instead, suppliers were *required* to provide energy to the ISO "when, as, and in such amounts" as requested by the ISO, *but only after* the ISO had first filed the necessary certification with the DOE. Ex. No. ISO-11; *see also* ISO Brief at 3-4. The Orders contained no provisions for suppliers to voluntarily transact with the ISO under 202(c) in situations when the ISO did not compel them to provide energy. On non-certification dates, suppliers without separate contractual obligations to the ISO were free to choose whether they would supply energy to the ISO or not.

PS Colorado also argues that the ISO's "failure to abide by the requirements of the DOE Orders should not be held against PS Colorado and does not prevent the sales made by PS Colorado during this time period from being subject to Section 202(c) of the FPA." PS Colorado Brief at 8. This suggests that the ISO was somehow flatly prohibited from entering into transactions with Attachment A entities without first invoking the DOE Order authority, a suggestion that is utterly without basis. First, the Orders themselves make no mention of, and cannot be fairly read as containing, a requirement that the ISO transact with Attachment A entities *only* under Section 202(c) during this period. Moreover, such a conclusion would be flatly inconsistent with the desire of both the ISO and DOE to limit the ISO's use of the Section 202(c) authority. *See* Ex. No. JE-3 at Tab "ISO Request 12/20/00" (noting

the ISO's commitment to "use the emergency powers sparingly"), Tab "ISO Request 1/5/01" (stating that "the ISO has been judicious in its use of the [DOE] authority"). Finally, such a conclusion would render the Commission's direction to separate sales made pursuant to 202(c) from sales made pursuant to other means during this period entirely irrelevant, July 25 Order at 61,516, since all sales would be *prima facie* 202(c) sales. Clearly, the Commission did not intend such an outcome.

Coral also argues that limiting 202(c) transactions to days on which the ISO filed a certification with the DOE would be "particularly inappropriate" given the fact that the ISO's certifications were based on forecasted load for the following day and "not actual conditions on the grid" and that the ISO's forecasts were not "accurate." Coral Brief at 12. It is of course true that the ISO did not base its decision on whether to seek certifications on the real-time status of the grid on the day for which it was seeking, or not seeking, certification. Absent flawless prescience or the ability to travel forward in time, such an analysis would have been impossible, given the fact that the ISO was required to file certifications several hours in advance of actually acquiring energy pursuant to the DOE Orders. Moreover, as demonstrated by the Load Forecast analyses accompanying each certification letter, the ISO did base its decision as to whether to seek certification on grid conditions in addition to expected load and supplies, including planned and unexpected generation outages, congestion constraints, and creditworthiness issues. *See, e.g.,* Ex. JE-3 at Tab "ISO Certification 12/27/00," pp. 4-5. However, as the ISO made clear in these analyses, the sheer number of variables in play during this period made it difficult to predict with certainty the situation that the ISO would face during the upcoming operating day. *See id*. In any event, none of this modifies the legal obligations set forth in the DOE Orders. Thus, Coral's derision of the ISO's forecasting accuracy is

little more than mud-slinging, and should be accorded the weight that it deserves: none.

4. "DOE Order" Reference

- **Staff's Criteria Do Not Adequately Distinguish Between Transactions Made Pursuant to Section 202(c) and Those Made Pursuant to Section 205.**

As stated in our Initial Brief, the ISO believes Staff's four criteria are a useful starting point in the determination of which transactions were made pursuant to Section 202(c), but they do not tell the whole story. ISO Brief at 2. With respect to those criteria, two are simple and merit little debate. First, only Attachment A entities were even potentially obligated to provide energy pursuant to the DOE Orders, and thus, only those entities could possibly have entered into transactions pursuant to those Orders. Ex. Nos. ISO-11 at 1; S-1 at 13:26-14:11. Second, the DOE orders only required Attachment A entities to provide energy to the ISO (pursuant to ISO request) on days for which the ISO had filed the necessary certification with DOE, and thus, only transactions made on those days are even potentially eligible for designation as "made pursuant to Section 202(c)." Ex. No. ISO-11 at 1; ISO Brief at 16-19. This requirement absolutely excludes one type of transaction – sales made into the ISO's Day-Ahead Markets – because those markets closed prior to the time at which the ISO filed its certification for the subsequent operating day. Ex Nos. S-33 at 64:17-65:9; SWC-8 at 7:8-19; Tr. at 2630:2-18, 2633:12-2634:2; ISO Brief at 27-28; Staff Brief at 13-15.

It is with respect to Staff's "market/non-market" criteria that the analysis become more complicated. Originally, Staff's position appeared to be that market transactions were de facto excluded from eligibility for designation as having been

made pursuant to Section 202(c). Ex. No. S-1 at 12:21-13:2. However, Staff's witness, Ms. Patterson, subsequently indicated that she might consider such transactions eligible for designation as 202(c) sales if a supplier could demonstrate that the ISO specifically requested that a supplier bid into the ISO's markets. Ex. No. S-33 at 37:18-38:5. In fact, in its Initial Brief, Staff proposed a finding that "There has been no showing by any party in this proceeding that transactions bid into the Hour-Ahead and Real Time Markets were done at the ISO's request pursuant to the DOE Orders." Staff Brief at 18.

Thus, Staff, like the ISO, insists on some "proof" from suppliers that the ISO was directing entities to engage in market transactions before acknowledging that such transactions were made pursuant to the DOE Orders. Staff acknowledges that the ISO was, during this period, actively encouraging entities to bid into its markets. Staff Brief at 18-20. However, Staff, and rightly so, does not consider this to be sufficient proof that the ISO requested energy from entities pursuant to the DOE Order, based on the fact that the ISO continually represented that it wished to rely on market mechanisms to avoid the need to use the authority available under DOE Order to compel suppliers to deliver energy. *Id*. Instead, Staff states that a showing would have to be made that "the ISO contacted an Attachment A entity after it had received that entity's information on available excess energy provided in response to the ISO's issuance of a notice of certification, and requested that the entity bid its excess energy or Ancillary Services into the ISO's Hour-Ahead or Real Time Markets." *Id*. at 19-20. Thus, Staff's requirement with respect to market transactions looks much like the ISO's criteria applicable to *all* transactions – the need for some contemporaneous evidence establishing that a transaction was actually entered into pursuant to the process established by the DOE Order.

However, Staff's analysis with respect to OOM transactions is less rigorous than the ISO's. Staff eschews the use of the DOE Order notations on the ISO's OOM Sheets to identify OOM sales made pursuant to Section 202(c). Instead, Staff's position is that "OOM sales on certification days qualify for exemption if the Attachment A entity was not already obligated to provide the excess energy under the ISO's tariff." Staff Brief at 12. No further "showing" that the energy was delivered pursuant to Section 202(c) is apparently necessary.[11] In this respect, Staff is mistaken. As the ISO has explained, the process envisioned by the DOE Order required that an understanding exist between the supplier and purchaser that energy was, in fact, being made available pursuant to the DOE Orders. Ex. No. ISO-21 at 7:1-10. Otherwise, the Order's mandate that the ISO and sellers come to terms with respect to these arrangements would be meaningless, since, as the Commission itself has acknowledged, a different process existed with respect to such arrangements under Section 202(c) than under Section 205. July 25 Order at 61,506. It strains the bounds of common sense to expect that the ISO could have come to terms with suppliers under the provisions of 202(c) if it was not even aware that energy was being offered pursuant to the DOE Orders. Thus, just as Staff recognizes with respect to market transactions, OOM suppliers should be required to show that the ISO was aware, contemporaneously with the sales, that their transactions were made pursuant to Section 202(c).

[11] At minimum, it seems reasonable that Staff should require that in order for OOM transactions to qualify as having been made pursuant to the DOE Orders, that the entity claiming such transactions have at least provided to the ISO some forecast of excess energy for that operating day.

?? **Sellers Misunderstand the ISO's Position With Respect to the Significance of the OOM Sheet Notations**

Many of sellers' arguments as to this issue are based on a fundamental misunderstanding of the ISO's position; they characterize the ISO as contending that a "DOE" notation on the ISO's OOM Sheets is a necessary prerequisite for a transaction to be found to have been made pursuant to Section 202(c). *See, e.g.,* Portland Brief at 12 (characterizing the OOM Sheet notations as a "transaction prerequisite"); SMUD Brief at 9; MID Brief at 14. The ISO has never adopted such a restrictive position. In her Direct Testimony, Ms. O'Neill testified that the ISO's view of the universe of 202(c) transactions was based on the information available to it at the time, *i.e.*, the OOM Sheets, on which ISO operators were instructed to note "DOE Order" in two situations: (1) when ISO operators were contacted by suppliers who offered to sell energy to the ISO and indicated that such energy was being made available because of the DOE Orders; and (2) when ISO operators contacted suppliers requesting that they deliver energy they stated was available as "excess" pursuant to the DOE Orders. Ex. No. ISO-10 at 10:9-18, 11:10-17. When several suppliers presented evidence that the OOM Sheets had not perfectly captured this set of transactions, the ISO modified its position appropriately. Thus, as made clear in its Initial Brief, the "DOE" notations on the ISO's OOM Sheets are not themselves the critical issue. Instead, what is important is the nature of the transactions that they reflect, *i.e.*, that it was clear that energy was being provided based on the DOE Orders. *See* ISO Initial Brief at 23-24.

?? **Inconsistencies Between the OOM Sheets and the ISO's Certification Letters Do Not Establish that Suppliers Made Particular Sales Pursuant to Section 202(c)**

Another common argument advanced by suppliers is that the ISO's OOM Sheet notations are inaccurate and unreliable because the ISO represented to the DOE, in its certification letters and requests for extension of the DOE Orders, different quantities as having been obtained pursuant to the DOE Orders than those indicated on the OOM sheets. Burbank/Glendale Brief at 10-11; SOC Brief at 10-12; Portland Brief at 10-13; BPA Brief at 9-10; LADWP Brief at 10-12. For example, one party states that the OOM sheets were "not critical to the ISO's categorization of the transaction at the time of the transactions." BPA Brief at 9. Suppliers are incorrect for several reasons. First, as Ms. O'Neill explained at hearing, the ISO was providing the OOM Sheets with the DOE notations to the DOE shortly after each day for which it filed a certification, in response to a specific DOE request that the ISO provide information on what it was obtaining pursuant to the Orders. Specifically, Ms. O'Neill testified:

> As one of the requirements that was made by Paul Carrier of the Department of Energy to the ISO, there were three documents within 48 hours of every certification that the ISO had to provide after the fact to the Department of Energy. I was the person who did it, so I'm very clear on this. The three pieces of documents were, it was a QF trend graph which showed the operating day and two days prior to that. The second one was the forecasted excess energy sheets, and then the third one was the OOM sheet.
>
> On the OOM sheet, what they wanted to see was the universe of OOM transactions.

Tr. at 2208:22-2209:13. Paul Carrier, was, in fact, the same person at the DOE to whom the ISO was providing its certification letters and attached Load Forecast analyses. *See* Ex. No. ISO-13 at 1. Thus, suppliers' contention that the ISO was representing to the DOE one set of transactions as being made pursuant to Section

202(c), while recording for its own purposes a second set of transactions, is absolutely false.

Moreover, with respect to certain suppliers, the numbers represented in the certifications not only fail to support their claims as to 202(c) sales, but actually contradict them. In the Load Forecast analysis accompanying the ISO's January 8, 2001 certification letter, for example, the ISO stated that:

> On a daily basis, the ISO narrowly avoids curtailment of firm customers by *arranging adequate deliveries* of electricity. The ISO would not be able to secure such supplies absent the Section 202c authority. For example the certification of 01/01 for operating day 01/02 allowed the ISO operators to *arrange for import deliveries* between 473 MW and 2,798 MW to address the deficiencies reported for the same period.

Ex. No. JE-3 at Tab "ISO Certification 1/08/01" (emphasis added). This exact language (with the exception of the dates and MW quantities) was contained in each of the ISO's Load Forecast analyses commencing with the certification filed for December 25, 2000. Ex. No. JE-3. The statements in the letters sent by the ISO to the Department of Energy are virtually identical to the quoted passage from the Load Forecast analyses. *See id*. at Tab "ISO Request 12/20/01."

Regardless of the discrepancy in *quantities* between these reports and the ISO's OOM Sheets, it is apparent that the ISO was consistently representing to the DOE and market participants the *type of arrangements* for which it was using its 202(c) authority; that is, the ISO was compelling suppliers to deliver through *out-of-market arrangements*. Thus, sales made by suppliers such as Burbank/Glendale (market transactions) and Anaheim/Riverside (uninstructed energy) were not part of the universe of transactions that the ISO was representing as sales made pursuant to the DOE Orders.

Anaheim/Riverside attempt to spin this discrepancy to their advantage, opining that this discrepancy "might, in fact, be accounted for by the inclusion of the transactions of 'in Control Area' sellers in the representations to the DOE." SOC Brief at 12. However, the record in this proceeding simply does not support Anaheim/Riverside's theory. Again, using the example of the Load Forecast analysis attached to the January 8, 2001 certification, the total transactions accounted for on the OOM Sheet for that date match exactly the figures reported in the Load Forecast analysis. *See* Ex. No. PGE-20 at 3. None of the sales made by Anaheim/Riverside to the ISO are included on the OOM Sheet for that date, or, for that matter, on any of the OOM Sheets. *See* Ex. No. JE-3 (OOM Sheet attachment).

?? **The Omission of Certain 202(c) Sales from the ISO's OOM Sheets Does Not Warrant the Assumption that Other Sales as to Which Suppliers Have Provided No Contemporaneous Evidence Were Made Pursuant to Section 202(c)**

Suppliers make much of the fact that the ISO's OOM Sheets did not reflect all of the transactions for which two suppliers, PPL Montana and Portland, indicated to the ISO were being made pursuant to the DOE Orders. *See, e.g.,* Pinnacle Brief at 7; PS Colorado Brief at 6; Portland Brief at 11; LADWP Brief at 8. Suppliers maintain that it would be unreasonable to believe that such errors were confined to transactions between those two entities. This argument is a non-starter. For one, no entity other than those for which the ISO has acknowledged DOE transactions has come forward with *any* contemporaneous evidence demonstrating that the ISO omitted from its OOM Sheets sales for which the seller indicated to the ISO that the energy was being provided pursuant to the DOE Orders. In fact, not a single one of these entities, other than PPL Montana and Portland, has so much as even *alleged*

that its operators did, in fact, indicate to the ISO that the energy being provided was pursuant to the DOE Orders.

Recognizing that the OOM Sheets did not necessarily capture all of the transactions that might qualify as 202(c) sales, the ISO has repeatedly expressed its willingness to agree that additional transactions were made pursuant to the DOE Orders if shown evidence indicating that a contemporaneous understanding had been reached that energy was being provided pursuant to the ISO's request under the DOE Orders. Ex. No. ISO-21 at 16:11-21; Tr. at 2207:17-21, 2311:22-2312:1. Several suppliers have presented such evidence. However, if it is unreasonable to assume that there are no other errors with respect to the OOM Sheet notations, it is equally unreasonable to presume that suppliers that have provided *no* evidence that they indicated to the ISO that their sales were made pursuant to the DOE Orders, did, in fact, do so. Thus, what emerges is, admittedly, an imperfect record. While not the most desirable outcome, the alternative is even less appealing: that is, to simply assume that all energy that suppliers were selling to the ISO was being transacted pursuant to the DOE Orders. As we explained in detail in our Initial Brief, such an assumption is, for a number of reasons, simply unwarranted. ISO Brief at 8-15. Moreover, accepting that assumption is inconsistent with suppliers' bearing the burden of proving their claims as to which of their sales were made pursuant to Section 202(c).

?? **Other Arguments Concerning this Issue**

A number of sellers also take issue with the manner in which the ISO established and implemented the procedure of noting DOE transactions on its OOM Sheets. For instance, PS Colorado and Pinnacle claim that the ISO had no "formal" method of notifying operations personnel of management's requirement that those operators make these notations on the OOM Sheets. Pinnacle Brief at 6; PS Colorado Brief at 5. It is not clear what Pinnacle and PS Colorado mean by "formal." Nevertheless, Ms. O'Neill testified that she and Bob Sullivan, an ISO manager, personally delivered instructions to the ISO's real-time operators that they were to make these notations on the OOM Sheets. Tr. at 2218:11-14. Suppliers also allege that Ms. O'Neill did not verify that these instructions were followed, either by contacting the operators or listening to *all* of the tapes. Pinnacle Brief at 6-7; PS Colorado Brief at 6; Portland Brief at 12. Again, suppliers mischaracterize the facts. Ms. O'Neill specifically testified that "[p]rior to sending [the OOM Sheets] to DOE, I would come out on the floor and go okay, *I would show whichever operator was on at that time*, and I also would talk with Bob Sullivan, and I would go okay, these are the notations that were made. Was anything missed? What I was told was no." Tr. at 2220:24-2221:4.

Pinnacle West maintains that the ISO is "in possession of better evidence of the intent of the sellers and the context of the sales in its tapes of the telephone conversations during which the sales transactions were entered and confirmed" which, according to Pinnacle, the ISO has "refused to provide sellers." Pinnacle Brief at 8. It is true that the ISO has resisted undertaking a review of all of the conversations that occurred between its operators and suppliers during the DOE

Period. The ISO has done so for a number of good reasons. First, as explained to the Presiding Judge at the oral argument on Pinnacle's motion to compel, this process would place an extreme burden on the ISO, as it would require hundreds of man-hours of effort. *See e.g.*, Tr. at 629:7-630:4. It also inappropriately places the ISO in the position of responsibility with respect to other suppliers' record-keeping practices. During the oral argument, Pinnacle admitted that it had, in fact, made its own recordings of these conversations, but was unable to locate them. *Id*. Most importantly, there is no suggestion that such a review would even be a productive use of the ISO's limited resources. No entity with which ISO operators arranged OOM deliveries during this period, other than Pinnacle, has claimed that it was unable to retain its own records as to these transactions. In fact, several entities have introduced into the record transcripts from their own recordings of telephone conversations between their operators and the ISO. *See* Ex. Nos. PGE-6; PGE-8; PGE-9; PGE-13; PGE-16; BPA-6 through BPA-54. Moreover, Pinnacle itself has provided no evidence, nor even the bare allegation, suggesting that its operators ever indicated to the ISO during this period that it was selling energy pursuant to the DOE Orders. To require the ISO to commit to a process this burdensome without any suggestion that it might even hope to discover useful information would be to countenance a wild goose chase.[12]

Portland asserts that the "DOE notation" is meaningless, because "[t]here was never any need for or requirement of explicit phone reference once the formal

[12] Based on this point and on its erroneous argument that Ms. O'Neill never verified whether the DOE notation procedure was followed, Pinnacle proposes a finding that Ms. O'Neill "is not a credible witness on the issue of DOE Order notations on the OOM sheets." Pinnacle Brief at 9. This proposed finding is baseless. As the record indicates, Ms. O'Neill personally directed operators to make this notation, at the behest of the DOE, and before providing the OOM Sheets

certification and Portland General responses were in hand." Portland Brief at 6 (quoting Ex. No. PGE-1 at 7:12-15).[13] However, the record indicates, contrary to Portland's assertion, that Portland did in fact believe it was necessary to make explicit reference to the DOE Orders when – and if -- it sold to the ISO pursuant to those Orders. In a telephone conversation between operators for Portland and operators for the ISO on February 1, 2001, included in the record as Exhibit PGE-16, a Portland operator contacted the ISO and offered to sell 200 MW of energy. *Id*. at 15. The ISO operator then asked the Portland operator whether they were "doing this under the DOE Order" to which the Portland operator responded "Right." *Id*. The ISO operator inquired as to Portland's willingness to deal with CDWR, noting that Portland was providing energy to the ISO, but "making a point to mention it was per the DOE order." *Id*. Evidently, Portland did consider it important that its operators make clear to the ISO when it was transacting pursuant to the DOE Orders.[14] When it did so, as evidenced by the ISO's OOM Sheets and the

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to the DOE, interviewed individual operators to determine whether the notations were accurately made. Tr. at 2218:11-14, 2219:10-2220:4.

[13] Portland also alleges that the OOM Sheets constitute evidence "tainted with the ISO's incentive to minimize the number of DOE Transactions." Portland Brief at 11, 14-15. Portland fails to provide any evidence whatsoever to support this allegation. This position is also illogical, given the fact that the ISO is a non-profit entity, and would derive no financial benefit from the characterization of these transactions one way or the other. Moreover, any incentive on the part of the ISO to minimize the number of 202(c) transactions would certainly be no greater than the incentive of suppliers, who have significant financial interests at stake, to maximize the number of transactions found to have been made pursuant to the DOE Orders.

[14] In the same conversation, the Portland operator noted that they "always mention [the DOE Order], and even if we don't, we are supposed to." *Id*. This further supports the conclusion that Portland considered it important, when it wanted to transact pursuant to the DOE Orders, to make the ISO aware of that fact. This statement was made on February 1, 2001, only six days prior to the expiration of the last DOE Order. Therefore, it should not be taken to mean that all Portland transactions made previously, for which no mention of the DOE Orders was made, were made pursuant to those Orders, as it does not constitute a contemporaneous record establishing that Portland made the ISO aware on those previous occasions that energy provided was being provided to the DOE Orders.

transcripts provided by Portland, the ISO has been more than willing to recognize those sales as 202(c) transactions. *See* Ex. ISO-21 at 16:11-21.

Several other of Portland's arguments rely on misstatements or exaggerations of the record, and bear correction. First, Portland maintains that the ISO's DOE notation "requirement" violated ISO Operating Procedure S-318, because the ISO did not inform sellers that it was making those notations. Portland Brief at 12. Raising this argument in its brief as it does is entirely inappropriate given the fact that this Operating Procedure is not even in the record of this proceeding, and thus, neither parties nor the Presiding Judge has the opportunity to verify Portland's argument. Even worse, Portland relies on its own *counsel's* representation, rather than the testimony of a witness, to establish the contents of that Operating Procedure. This blatant attempt to back-door evidence into the record through the briefing process should not be permitted.[15]

Portland also attempts to discredit the ISO's OOM Sheet notations by reference to Project X. Portland Brief at 13. Portland fails to establish any link between Project X and the OOM Sheets whatsoever. Moreover, when questioned as to this issue by counsel for Portland, Ms. O'Neill stated that she was not aware whether the OOM Sheets were included in Project X. Tr. at 2229:23-2230:6.

BPA, in its Initial Brief, find's fault with the ISO's position as to what evidence is sufficient to make a finding that a sale was made pursuant to Section 202(c).

[15] Burbank/Glendale also contends that it was the ISO's responsibility to communicate the fact that its operators were making the "DOE" notation on its OOM Sheets pursuant to Operating Procedure S-318 (Burbank/Glendale mistakenly cites it as Operating Procedure "SB-18"). Burbank/Glendale Brief at 8-9. Burbank/Glendale also blatantly misquotes Ms. O'Neill in an attempt to establish that she somehow admitted that it was the ISO's responsibility to provide guidance on the DOE Orders. *Id.* at 9 (citing Tr. at 2224:7-11). In point of fact, in the response cited by Burbank/Glendale, Ms. O'Neill stated that the ISO's responsibility was to provide guidance to its own operators, and that other parties had a responsibility to provide guidance to their own operators. Tr. at 2224:6-14.

First, BPA maintains that the ISO's "convincing proof" standard is not objective, because the ISO has not explained what might constitute such "convincing proof." BPA Brief at 7-8. BPA also alleges that the ISO has continued to modify its position, stating that until Ms. O'Neill's declarations, filed at the request of the Presiding Judge just prior to the filing of Initial Briefs, the ISO had "never acknowledged that calls by the ISO in response to a notice of available excess energy qualify as Section 202(c) transactions." *Id*. at 8. BPA's arguments are unconvincing.

With respect to the "convincing proof" standard, Ms. O'Neill explained in her Rebuttal Testimony that it was the ISO's view that only those transactions with respect to which it was clear that a seller, at the time the transaction was entered into, was providing energy based on the ISO's request for excess energy pursuant to the terms of the DOE Order should be classified as 202(c) transactions. Ex. No. ISO-21 at 7:3-10. It is true that the ISO chose not to paint itself into a corner by limiting its position as to what *evidence* might meet this standard. However, because the ISO has been willing to accept that more than one particular form of *evidence* might establish that its criteria has been met does not suggest that the criteria itself is less than objective. Moreover, BPA's insistence that the ISO arbitrarily limit its consideration as to the types of evidence that might meet its proposed standard ignores the factually diverse nature of this proceeding.

With respect to BPA's second argument, that the ISO, previous to the filing of Exhibits ISO-35R and 36, never acknowledged that calls by the ISO in response to a notice of available excess energy qualify as Section 202(c) transactions," BPA is simply incorrect. Ms. O'Neill was clear in her Direct Testimony that:

> there were occasions when ISO real-time operators contacted suppliers requesting they deliver the Energy they stated was available as "excess" Energy pursuant to the DOE Order in a facsimile delivered to the ISO the

night prior to the operating day. The supplier would then respond that the Energy was available and state the price at which it was willing to sell the Energy to the ISO. These transactions were noted as being provided pursuant to the DOE Order on the OOM sheet by the ISO real-time operator.

Ex. No. ISO-10 at 11:10-17.

5. Market or Non-Market Transactions

In its Initial Brief, the ISO proposed a finding that sales made to the ISO through its formal markets for Energy and Ancillary Services (Day-Ahead, Hour-Ahead, and Real Time), should not be found to have been made pursuant to Section 202(c).[16] The ISO explained that these markets "represented the mechanism on which the ISO was relying in order to *avoid* the need to use the authority granted to it under the DOE Orders." ISO Brief at 28. The ISO also explained that it relied on data as to what had been or was expected to be bid into its markets to determine whether or not it was even necessary to file a certification with DOE in order to invoke the authority provided in the Orders. Finally, in practice, the ISO limited its use of the DOE Orders to OOM transactions, and that there is no evidence suggesting that the ISO ever compelled an entity to bid into its markets pursuant to the DOE Orders. ISO Brief at 30-31.

?? **The ISO "Requested" Energy Under the DOE Orders via Individual Requests Made to Attachment A Entities, and Not Through Some Other Means**

In spite of the convincing evidence presented by the ISO (as well as Commission Staff), several suppliers maintain nevertheless that the ISO did, in fact,

[16] ISO Brief at 26. Similar findings of fact were proposed by Staff and the California Parties in their respective Initial Briefs. Staff Brief at 12-13, 19-20; Cal Parties Brief at 22-23.

"request" excess energy from suppliers in the form of market bids.[17] For instance, BPA argues that the "request" by the ISO "does not refer to calls by the ISO's real-time operators, but rather refers to the request for energy contained in the request for available resources sent prior to the certification day" as set forth in Ordering Paragraph E of the December 14 DOE Order. BPA Brief at 11.

The problem with BPA's specific argument is that it is built on a non-existent factual foundation. Contrary to BPA's assumption, the ISO never did "inform [entities] of the amount and type of energy and service requested" prior to delivery of energy, for the very good reason that the requirement that it do so was removed by the December 20 Amendment to the DOE Order.[18] Ex. No. S-4 at 2. Thereafter, in lieu of the requirement to inform entities in advance of the energy that the ISO was requesting, the ISO was required, at the time it filed its certifications, to seek information on the "*availability*" of resources from entities subject to the terms of the Orders and entities were required to respond within six hours. *Id*. Then, "in making *requests* for power," the ISO was directed to allocate those requests among the entities listed in Attachment A in proportion to the available excess power reported to the ISO by those entities. Ex. No. ISO-12 at 2. Clearly, the ISO could not allocate its requests until it knew, based on information provided by suppliers, what was actually available as excess, which could only occur *after* the ISO filed its certifications. Thus, the DOE Orders specified a process by which the ISO would

[17] One entity, Avista Energy, argues for the first time that its sales of Ancillary Services made to the ISO during this period should be treated as having been made pursuant to Section 202(c). Avista Energy filed no testimony on this issue suggesting that it even believed that these sales were made pursuant to the DOE Orders at the time they were entered into. As to the sales that it claims as 202(c), Avista cites to the ISO's settlement rerun results, which are not in the record in this proceeding. This obvious and egregious attempt to jump on the bandwagon after the record as to this issue has closed should be ignored.

request energy only *after* suppliers provided their forecasts of excess energy, and this is precisely the process that the ISO followed. *See* Ex. No. ISO-10 at 9:16-18.

Several suppliers also argue that the ISO's certification letters themselves constituted a "request," pursuant to the DOE Orders, that entities bid into the ISO's markets. BPA Brief at 11-12; Pasadena Brief at 15; Burbank/Glendale Brief at 15; SOC Brief at 16. Specifically, BPA contends that this is the case based on a statement in the certification letters alluding to an identification of "specific additional resources requested" in the Load Forecast analyses that accompanied those certifications. BPA Brief at 12. However, those Analyses did not specifically identify the resources that the ISO would need to alleviate forecasted deficiencies. Instead, as stated in the introductory paragraph, those Analyses only contained information concerning: "(1) the forecasted components and the values expected for each component; (2) the magnitude and duration of the resource deficiency, [and] (3) the conditions that give rise to this deficiency and motivates this certification in order to obtain the necessary resources." Ex. No. ISO-13 at 3. Contrary to suppliers' arguments, there is nothing in these certifications that can be fairly read as an actual request for energy. Indeed, it would be strange to expect to find a request for energy in a document that the ISO was required to file before it could even make such a request.

Pasadena claims that the "ISO certainly 'requested' Pasadena's excess power (a) by sending the DOE orders and their amendments to Pasadena and (b) by sending each and everyone of the 34 certifications to Pasadena." Pasadena Brief at 15. This argument is equally unconvincing. The ISO was required by the terms of

[18] December 20, 2000, is the first day for which the ISO invoked the authority contained in the DOE Orders. See Ex. No. JE-3 at 5.

the DOE Orders to provide copies of its certifications to each entity listed on Attachment A at the time that it filed those certifications. Ex. No. ISO-11 at 1. Therefore, the fact that Attachment A entities (including Pasadena) received those certifications and the Orders themselves proves nothing more than that the ISO complied with the requirement that it provide them.

?? **The ISO Provided Attachment A Entities with Ample Notice That It Did Not Enter Into Section 202(c) Sales Through Market Transactions**

Sellers also contend that the ISO never informed market participants that it did not consider market transactions to have been made pursuant to the DOE Orders. Pasadena Brief at 11; MID Brief at 15. This is certainly not true, given the fact that the ISO, in both its certifications and requests for extension of the DOE Orders, continued to emphasize that it viewed the energy and capacity bid into its markets as the means by which it could *avoid* the need to invoke the authority granted to it under the DOE Orders. *See* Ex. JE-3 at Tab "ISO Request 12/20/00," pg. 3 (stating that the ISO "has endeavored to obtain needed supplies, to the maximum extent possible, through existing market mechanisms"); ISO Brief at 28-30. It is an undisputed fact that market participants received these communications at the time that they were provided to the DOE. Therefore, market participants were on notice that the ISO was using the DOE Order in order to compel the delivery of energy beyond that which was already being made available to it through existing market mechanisms. *See* ISO Brief at 29-30.

Pasadena characterizes the ISO's position on market transactions as a "*post hoc* rationalization" based on the fact that the ISO did not address market transactions in its Direct Testimony. Pasadena Brief at 12. However, our decision not to address market transactions in Direct Testimony is entirely consistent with the

position that the market represented a pre-existing mechanism by which the ISO could meet load and avoid compelling suppliers to provide energy under the DOE Orders. Because the ISO, as explained herein and in our Initial Brief, provided ample notice to market participants as to this fact, and because the ISO had received no indication that parties would attempt to claim such transactions as 202(c) sales, Ms. O'Neill did not consider it necessary to address this point in her Direct Testimony. The ISO just did not predict the zeal with which certain suppliers that bid into the ISO's markets during this period would attempt to "cash in" on the Commission's 202(c) exemption, regardless of the clear evidence that the ISO never compelled such entities under the DOE Orders to bid into the ISO's markets.

Burbank/Glendale claims that statements made by the President and CEO of the ISO, Terry Winter, to DOE, establish that "the ISO used its 202(c) authority to force suppliers to bid into its markets." Burbank/Glendale Brief at 13-14. However, the statements that Burbank/Glendale cite do not support such a conclusion. The first statement cited[19] was made in a December 14, 2000 letter *requesting* that the Secretary of Energy issue an emergency order, before the terms of that order were

[19] The passage cited by Burbank/Glendale reads:

> If suppliers have not submitted a bid and have not been scheduled with the ISO in the Day-Ahead Market, the ISO will forecast the amount of capacity it anticipates it will need and direct the necessary resources to bid into the Hour-Ahead and real-time markets. Such resources would then be compensated according to the provisions of the ISO tariff, as approved in Amendment No. 33. For those entities that do not have a contractual or business relationship with the ISO, the ISO will negotiate appropriate compensation. Therefore, the ISO will ensure that it has procured the necessary capacity at rates that will ultimately be subject to a FERC just and reasonable review.

Ex. No. JE-3 at Tab "ISO Request 12/14/00" (citation omitted). Burbank/Glendale omits in its Brief the portion of this passage that conditions the ISO's actions on an entity's not having first bid into the Day-Ahead Market. This omission is not suprising, given the fact that most of sales that Burbank and Glendale claim as made pursuant to Section 202(c) were made through that market. *See* Ex. Nos. S-79 (Burbank's itemized claimed 202(c) sales); S-80 (Glendale's itemized claimed 202(c) sales).

even known. Moreover, it does not follow from the fact that the ISO *intended* to follow a certain course of action prior to the issuance of the Orders themselves, that the ISO actually did so. There is no evidence in the record that the ISO ever actually "directed [suppliers] to bid into its Hour-Ahead and real-time markets." *Id*.

The second statement cited by Burbank/Glendale is taken from a January 5, 2001 letter by Terry Winter requesting that the Secretary of Energy extend the DOE Order. Including the language omitted by Burbank/Glendale, the passage tells an entirely different story than the fiction suggested by Burbank/Glendale:

> Even given these challenges, the ISO has been judicious in its use of the authority you have given it. During the eleven day period covered by your last order, the ISO issued certifications for only three days . . . , when conditions were particularly dire. Our success in meeting these challenges, however, does not obviate the need for extension of your emergency order. The mere existence of your order has encouraged suppliers, who otherwise would not be so inclined, to bid into the California markets, *thus allowing the ISO, to the maximum extent possible, to use existing market mechanisms to meet its requirements*. Moreover, a number of suppliers, because of credit concerns surrounding the California utilities (even before the recent rating reductions), have expressed an unwillingness to sell into the California Market absent a certification under your order.

Ex. No. JE-3 at Tab "ISO Request 1/5/01" (italicized emphasis added). This passage demonstrates that the ISO was not compelling entities to bid into its markets. Instead, it believed that the *mere existence* of the order was *encouraging* entities to bid into the ISO's markets, and thus, the ISO was able to utilize existing mechanisms to meet its energy needs without having to force entities to provide energy, and as a result, was using the authority granted in the DOE orders judiciously and sparingly. This statement is similar to one contained in the December 20, 2000 letter sent to the Secretary of Energy by Charles Robinson, Vice President and General Counsel of the ISO, who stated that, prior to the ISO actually

having certified in order to compel supply, "the mere issuance of the Order resulted in enough supply such that the ISO did not have to make use of the authority contained in the Order." *Id*. at Tab "ISO Request 12/20/00," pg. 1.

?? **Other Arguments Concerning this Issue**

Several suppliers argue that the ISO's and Staff's position regarding market transactions is illogical, as it would have created incentives for suppliers to withhold capacity until they were called on by the ISO in real-time. *See* Burbank/Glendale Brief at 16; Pasadena Brief at 12; BPA Brief at 13.

Such an argument is sheer speculation on the part of suppliers. To reiterate, the ISO always encouraged suppliers to bid into its markets. Those that chose to do so did so at their own behest. Hypothetically, the ISO may have had the authority under the DOE Orders to compel suppliers to bid into its markets. Nevertheless, this was not how the ISO actually chose to exercise the authority granted to it under the DOE Orders. Instead, the ISO concluded that it was most appropriate to use that authority sparingly, only as a last resort mechanism, when existing market avenues had failed. This was the reality of the situation, a reality that was abundantly clear to market participants, and a reality that is clearly documented in the record. Ex No. J-3 at Tab "ISO Request 12/20/00," p. 3; Tr. at 2375:19-21, 2437:10-11; 2445:1-4. While suppliers' "what if" might provide for an interesting academic diversion, it is ultimately irrelevant to determining what transactions were actually entered into pursuant to Section 202(c).

6. E-516, Emergency Service Agreement, or Interconnected Control Area Operating Agreement

Under this issue heading, SMUD proposes a finding of fact that there were no sales during the DOE Period that were conducted under Operating Procedure E-516. SMUD Brief at 13. As the ISO explained in its Initial Brief, SMUD's conflicting testimony and evidence as to the transactions that it claims as made pursuant to Section 202(c) have made it exceptionally difficult to determine what SMUD is claiming.[20] Nevertheless, SMUD attempts to establish that E-516 could not have applied to the sales that SMUD claims as 202(c) transactions because, according to SMUD, the ISO would presumably have exhausted all other options, including E-516, prior to issuing a certification. SMUD Brief at 14. This argument is nonsensical, because it presumes that energy obtained under E-516 would necessarily have been arranged a number of hours in advance of real-time. In fact, E-516 specifically contemplates that the ISO's request for excess energy pursuant to that procedure would only take place when the ISO had exhausted all generation bid into its markets and needed to resort to Out-of-Market calls to alleviate a Stage 1 or greater Emergency. *See* Ex. S-20 at 8.

SMUD also contends that because the transactions that it claims were made pursuant to Section 202(c) were settled with the California Power Exchange ("PX") as the Scheduling Coordinator, they cannot have been made pursuant to E-516.

[20] ISO Brief at 33-34. In its Initial Brief, SMUD continues to fail to consistently articulate the nature of its sales. In arguing that it made sales to the ISO pursuant to the Restated Interim Agreement ("RIA"), SMUD notes that sales made under the RIA are treated by the ISO as *Instructed* Imbalance Energy. SMUD Brief at 12 (citing Ex. SMD-9 at 4:7-10). However, faced with evidence at hearing that SMUD's sales were actually treated as *Uninstructed* Energy by the ISO, SMUD engages in an elaborate argument that these sales could have been requested by the ISO but still be treated by the ISO for bill settlement purposes as Uninstructed Imbalance Energy. Id. at 11-12. Nevertheless, if the sales were treated for "bill settlement purposes" as *Uninstructed* Energy, then they would not have been treated as *Instructed* Energy.

SMUD Brief at 15. However, as Ms. O'Neill explained in her declaration concerning this issue (Exhibit ISO-36), all amounts of energy that are delivered by SMUD to the ISO that are not scheduled in advance are deemed delivered at the Lake intertie, including those that the ISO arranged through PG&E. Ex. No. ISO-36 at ¶ 5. SMUD counters that "E-516 is not satisfied by PG&E acting as a go-between but *not* as the ISO-recognized SC for the SMUD Lake transactions at issue here." SMUD Brief at 16-17. SMUD is incorrect. The process set forth in E-516 specifies that when the ISO dispatches energy pursuant to that procedure, it does so by contacting *PG&E* and notifying *PG&E* of the amount of energy requested and the municipal entity from which it wishes to obtain that energy. PG&E, in turn, relays this request to the relevant municipal entity. Ex. No. S-20 at 10. Both SMUD's testimony and its exhibits confirmed that the energy it provided to the ISO, allegedly pursuant to Section 202(c), was transacted in exactly this manner. *See* Ex. Nos. SMD-1 at 12:22-13:4; SMD-3 at 4-5, ¶ 7. Thus, the ISO was justified in believing that SMUD's excess energy was being provided pursuant to E-516, and the fact-finder and the Commission should therefore not assume that SMUD's transactions were made pursuant to the DOE Orders.

SMUD next argues that because E-516 does not apply, the only other avenue for SMUD's sales through the Lake intertie is "under DOE Orders pursuant to the authority for SMUD to deal directly with the ISO per the [Restated Interim Agreement], with the PX in the role of SC for SMUD." SMUD Brief at 17. This argument is misleading, because the RIA is an agreement that substantially pre-dates the issuance of the DOE Orders. Ex. No. SMD-10 at 1. Thus, even if SMUD was using the RIA as the mechanism by which it provided energy to the ISO, it does

not inherently follow that the energy was provided pursuant to the DOE Orders.

Nevertheless, neither the ISO nor SMUD disagrees that there was some pre-existing mechanism by which SMUD could make sales of energy to the ISO. This, coupled with the other possible motivations that SMUD may have had for providing energy to the ISO during this time period (not the least of which being the fact that the health of SMUD's system was closely tied to the health of the ISO's system), suggests that it would be unreasonable for the ISO to have assumed then, and the Commission to assume now, that all of SMUD's sales were made pursuant to the DOE Order, absent some indication from SMUD at the time of transactions were entered into. Regardless of the volume of ink spilled concerning the applicability of E-516 and the RIA, it is this fundamental difference that separates the ISO and SMUD.[21]

LADWP claims that the ISO knew, based on certain communications, that LADWP was selling to the ISO pursuant to the DOE Orders, and not under Schedule 13 of the Interconnected Control Area Operating Agreement. LADWP Brief at 14. In particular, LADWP points to an email in which an ISO operations staff member stated that LADWP wanted to be "included in future Certifications" and could not commit to providing additional resources beyond their current commitments until receiving such a Certification. *Id*. The information conveyed in this email only reflects the uncontroverted reality that LADWP was an entity subject to the terms

[21] SMUD did attempt to provide some evidence that its transactions were made pursuant to Section 202(c) by producing a February 6, 2001 letter to SMUD from Terry Winter at the ISO thanking SMUD for its assistance in helping to meet the challenges being faced by the ISO at that time. Ex. No. SMD-13. This letter does not mention the DOE Order. In fact, Mr. Winter refers to the "spirit of cooperation" that characterized SMUD's transactions with the ISO during this period. This suggests that the ISO did not perceive SMUD as providing energy to the ISO based on the authority contained in the DOE Orders, since, had the ISO had been required to "force" SMUD to provide energy pursuant to the those Orders, it certainly would not have lauded its assistance as

and authority of the DOE Orders. It does not, however, demonstrate that LADWP ever made any *particular* sales pursuant to the DOE Orders, in response to an ISO request for energy under those Orders.

7. PGA

In its Initial Brief, the ISO explained that entities that had entered into Participating Generator Agreements with the ISO were under a contractual obligation, separate and apart from the DOE Order authority, to provide energy Out-of-Market in response to ISO dispatch instructions. ISO Brief at 37-39. With respect to the entities claiming 202(c) transactions in this proceeding that have PGAs, the ISO distinguished between two entities (Anaheim and Pasadena) for which there was no direct evidence that the ISO actually did dispatch in this manner, and CDWR, for which there is convincing evidence in the record that the ISO did dispatch Out-of-Market pursuant to it's Tariff authority, made applicable to CDWR through the PGA. *Id*.

SWC/MWD now claims that "no evidence was introduced to permit a finding that the ISO instructed the operation of CDWR/SWP's generation pursuant to the terms of the Participating Generator Agreement on ISO certification days." SWC/MWD Brief at 14-15. SWC/MWD is incorrect. Exhibit SWC-4, Schedule F contains a number of transactions with the notation "Adjustment for Out-of-Market dispatch based on Bid Price or Option A/B." Ex. No. SWC-4 at Schedule F. As Ms. Patterson explained during cross-examination, based on her reading of the ISO Tariff, this adjustment relates to the pricing of energy provided pursuant to dispatch instructions issued under the authority contained in the ISO Tariff. Tr. at 3009:22-

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"demonstrating a spirit of cooperation."

3010:5. Even more convincing is Mr. Jones' own testimony on this issue. In his Direct Testimony he stated that SWC-4 Schedule L is an extraction of the ISO's "OOS.csv" file showing OOM and OOS transactions from entities inside the ISO's Control Area. Ex. No. SWC-1 at 14:10-17. As Dr. Hildebrandt explained, and Mr. Jones acknowledges, these OOM transactions are entered into pursuant to the ISO's authority, set forth in Section 5.6.1 of the ISO Tariff, to dispatch a unit with a PGA if that unit has not already bid into the ISO's Real Time Market. Ex. Nos. SWC-1 at 14:1-13; SWC-6 at 13.

SWC/MWD next argues that "the ISO never contacted CDWR/SWP, or any other Attachment A entity that is also a Participating Generator, to inform it that compliance with the forecasting requirements under the DOE Order would not be required by the ISO due to the Participating Generator Agreement," and that "[t]he DOE Order and the ISO's certifications thereunder put Participating Generators such as CDWR/SWP on notice that they would be subject to the requirements of the DOE Order, regardless of their Participating Generator Agreement." SWC/MWD Brief at 15. Indeed, SWC/MWD was technically subject to the requirements of the DOE Orders. Nevertheless, it is also true that SWC/MWD, as well as other Participating Generators, continued to be *contractually bound* to respond to ISO dispatch instructions pursuant to the terms of their PGA and the ISO Tariff during the DOE Period. Nothing in the ISO's certifications or other communications during this period indicated that the ISO was abandoning any pre-existing rights it had with respect to market participants by virtue of requesting the DOE Orders, and nothing in the Orders themselves required it do to so. Therefore, it would have been

unreasonable for market participants to assume that the issuance of the DOE Orders somehow magically erased all pre-existing obligations such as the PGAs.

SWC/MWD also claims that the ISO's and Staff's position on this issue is erroneous because the ISO did not declare a Stage 1,2, or 3 Emergency on several days for which SWC/MWD provided energy to the ISO. SWC/MWD states that because no Emergency was declared on these dates "the ISO has no authority to instruct the operation of CDWR/SWP under Section 5.6.1. of the ISO Tariff." Again, SWC/MWD gets the facts wrong. Section 5.6.1 gives the ISO authority to call on Participating Generators if "reasonably necessary to prevent an *imminent or threatened* System Emergency." Ex. ISO-21 at 20:15-21:4 (emphasis added). Thus, the actual declaration of a System Emergency is not a necessary predicate to the ISO invoking its authority under Section 5.6.1.

8. Other Sellers in Control Area

In their Initial Brief, Anaheim and Riverside contend that the record establishes that they had permission from the ISO to use overscheduling as a means of providing energy to the ISO. To support this claim, Riverside relies upon the testimony of Mr. McCann, who states that, during the summer of 2000, an individual in charge of scheduling at the ISO had agreed that over-scheduling "was the only means by which [Riverside] could provide requested energy to the ISO." Ex. No. SOC-8(R) at 5:4-10. Mr. McCann also noted that Riverside has "regularly used over-scheduling as a means of providing energy into the imbalance energy market." *Id*. at 5:8-10. Additionally, in response to an ISO data request, Riverside provided an operating log reflecting a notation Mr. McCann made reflecting this conversation. Ex. No. S-91. Anaheim, for its part, produced transcripts of

conversations between operators for Anaheim and the ISO, during which the Anaheim operator states that "because with the Stage 3 . . . our management has been kind of having us overgenerate, you know, to help out and to try keep stuff to you . . ." and to which the ISO operator replies "Right – Yeah." Mr. Sciortino, testifying on behalf of Anaheim, also states that "Anaheim has, from time to time, used over-scheduling as a means of providing energy into the imbalance energy market . . . ." Ex. No. SOC-8(R) at 5:16-17.

This evidence is hardly compelling. In particular, an offhanded remark of "Right –Yeah" made by an ISO operator on one occasion hardly constitutes a sufficient basis for a market participant to conclude that it had explicit ISO permission to engage in overscheduling. Nevertheless, even accepting, for the sake of argument, the dubious proposition that the ISO approved the practice of overscheduling on the part of Anaheim and Riverside, they have still failed to show, and the record contains no indication, that either made sales pursuant to an ISO *request* for excess energy under the DOE Orders.

In an attempt to explain away this fact, Anaheim/Riverside provide several unconvincing explanations. First, Anaheim/Riverside fall back on the claim, without further explanation, that the ISO's certifications themselves constituted the requests for energy from Anaheim and Riverside, an argument already rebutted in Section III.5.A above. Next, Anaheim/Riverside claim that because overscheduling "'requires no interaction between the parties involved' and does not involve transaction-by-transaction communication" that these sales, by their nature, did not generate documentation of the sort that "[Staff] now requires." SOC Brief at 16-17. Anaheim/Riverside are both right and wrong. The ISO certainly does not dispute the fact that the overscheduling that Anaheim and Riverside engaged in during the DOE

Period did not involve interaction between the parties – which is precisely the reason why these sales should not be treated as a transactions made pursuant to Section 202(c). Nevertheless, the implicit contention that no direct communication between the ISO and these entities could have been possible in order to arrange 202(c) sales is clearly incorrect. As reflected in Anaheim's logs, on January 21, 2001, a phone conversation occurred in which an ISO operator contacted Anaheim *specifically requesting* excess power pursuant to the DOE Order, to which Anaheim responded that it had "everything scheduled full right now." Ex. No. S-91 at 3. If such a sale had been made, the ISO would have treated the energy provided as *Instructed* Energy, rather than Uninstructed Energy, as it would have been delivered pursuant to the ISO's request. See Ex. No. JE-4 at 38 (defining "Instructed Imbalance Energy" as the "real time change in Generation output . . . which is *instructed* by the ISO to ensure that reliability of the ISO Control Area is maintained in accordance with Applicable Reliability Criteria") (emphasis added). This transcript also confirms the manner in which the ISO entered into sales pursuant to section 202(c) – by specific request as a last-resort mechanism.

It is also telling that later in the same transcript, a conversation occurs in which the ISO advises Anaheim to "back off," indicating that the ISO did not, at that time, need or even want the energy that Anaheim was delivering. Ex. No. S-91 at 5. This conversation illustrates the point made by Staff in its Initial Brief – not only is overscheduling not done at the ISO's request, but can also cause problems on the system. Staff Brief at 25-28. To summarize, the sales of uninstructed energy claimed as 202(c) transactions by Anaheim and Riverside were made at the sole discretion of these entities, inconsistent with the schedules they provided to the ISO,

and there is no evidence that the ISO requested or required any particular amount of energy that Anaheim/Riverside delivered.

9. $64 or Less on January 9, 2001

The ISO stands on its Initial Brief as to this matter. Additionally, the ISO notes its support for the findings of fact and arguments advanced by FERC Staff in its Initial Brief on this issue.

B. WHICH SPECIFIC SALES WERE CONDUCTED PURSUANT TO SECTION 202(C) OF THE FEDERAL POWER ACT?

The ISO stands on its Initial Brief as to this issue.

III. CONCLUSION

For the reasons stated above, we request that the Presiding Judge adopt the proposed findings in our Initial Brief and not any inconsistent proposed findings in the initial briefs of the other parties or Staff.

Respectfully submitted,

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