

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Western Power Trading Forum)	
)	
Complainant,)	
)	
v.)	Docket No. EL99-30-000
)	
California Independent System Operator Corporation)	
)	
Respondent.)	
<hr/>		

**ANSWER OF
THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION
TO THE COMPLAINT AND REQUEST FOR EXPEDITED RELIEF
FILED BY THE WESTERN POWER TRADING FORUM**

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (1998), and the Notice of Filing issued on February 4, 1999, the California Independent System Operator Corporation ("ISO") submits this Answer in response to the "Complaint and Request for Expedited Relief" ("Complaint") filed by the Western Power Trading Forum ("WPTF") on January 20, 1999. The Complaint essentially duplicates pending requests for relief made by a prominent member of the WPTF in a pre-existing proceeding. The Commission's decision in that proceeding will either grant the relief sought by the WPTF here or determine that no such relief is appropriate. Permitting the WPTF to pursue the Complaint would waste scarce resources, forcing the parties and the Commission to pursue simultaneously the same issues in two separate proceedings. The Complaint should be dismissed.

COMMUNICATIONS

Communication regarding this matter on behalf of the ISO should be directed to the following individuals, whose names should be entered on the official service list

maintained by the Secretary for this docket:

Edward Berlin	N. Beth Emery
Kenneth G. Jaffe	Vice President and General Counsel
*Scott P. Klurfeld	*Roger E. Smith
Sara C. Weinberg	Regulatory Counsel
Swidler Berlin Shereff Friedman, LLP	California Independent System Operator
3000 K Street, NW	Corporation
Suite 300	151 Blue Ravine Road
Washington, DC 20007	Folsom, CA 95630
(202) 424-7500	(916) 351-2334

Facsimile: (202) 424-7643

Facsimile: (916) 351-2350

* Persons designated to receive service in accordance with the Commission's Rule of Procedure 203(b)(3), 18 C.F.R. § 385.203(b)(3) (1998).

BACKGROUND

WPTF's Complaint concerns the ISO's Grid Management Charge ("GMC"), which is the monthly charge assessed on all Scheduling Coordinators in order to allow the ISO to recover its startup, development, and ongoing operation and maintenance costs. The GMC was originally established pursuant to a settlement filed on April 7, 1998 ("April 7 Settlement"), which was accepted by the Commission in a letter order.¹ That settlement instituted a single bundled rate for the GMC that was to be charged to all Scheduling Coordinators, except those holding "Existing Contracts," which were assessed a charge equal to 50 percent of the GMC.

Under the settlement the ISO agreed to facilitate a study of unbundling the GMC and to file to implement a new GMC to be effective on January 1, 1999.² Because the working group reviewing the unbundling study believed the unbundling process needed more time, rather than file for a new GMC, the ISO filed a request to allow the existing

¹ *California Independent System Operator Corp., et al.*, 83 FERC ¶ 61,247 (1998).

² *California Independent System Operator Corp., et al.*, 85 FERC ¶ 61,433, 62,631 (1998) ("December 23 Order").

GMC formula to remain in effect until June 30, 1999.³ As part of that request, the ISO agreed to make a GMC rate filing to become effective July 1, 1999. Only one party, Enron Power Marketing, Inc. (“Enron”), which is a member of the WPTF,⁴ opposed the ISO’s request. On December 23, 1998, the Commission accepted the request.⁵

Responding to the arguments of Enron, the Commission, however, treated the ISO’s request as one under Section 205 of the Federal Power Act (“FPA”), 16 U.S.C. § 824d (1994). The Commission stated that its acceptance of the ISO’s request to extend the existing GMC was “subject to refund, and subject to the outcome of the proceeding in which the ISO submits a revised GMC to become effective on July 1, 1999.”⁶ Both Enron and the ISO filed requests for clarification or rehearing of the December 23 Order.

Enron’s request for clarification or rehearing sought an explicit determination of what it believed was implicit in the Commission’s Order, namely that the Commission intended to use its authority pursuant to Section 206 of the FPA, to establish an effective date of January 1, 1999, for refunds relating to the GMC charge.⁷ The ISO took the opposite view and sought rehearing to have the Commission eliminate the requirement that the extension be subject to refund or further order, and instead asked the Commission to approve it as a contested settlement. The ISO also requested in the alternative that the Commission specify that the ISO had authority to collect surcharges

³ *Id.* The proceeding established by the Commission to review this request is referred to in this Answer as the “GMC Extension” proceeding.

⁴ Exhibit 1 to this Answer includes a page from the WPTF’s web site listing its members.

⁵ *California ISO*, 85 FERC at 62,633.

⁶ *Id.*

⁷ “Request of Enron Power Marketing, Inc. for Clarification, or in the Alternative, Rehearing,” Docket Nos. ER99-473-001, ER99-418-001, filed January 22, 1999 (“Enron Rehearing”).

from customers to fund any refunds it was required to make.⁸ Both Enron's and the ISO's requests for clarification and rehearing are still pending.

In its Complaint, the WPTF seeks a determination that the existing GMC is "discriminatory, anticompetitive, imposes excessive rates on Complainants and violates [the] . . . previously approved ISO settlement in Docket Nos. ER98-211-000, *et al.* . . ."⁹ The WPTF also requests that the Commission, pursuant to Section 206 of the FPA, establish a refund effective date of January 1, 1999, or no later than 60 days after the filing of the Complaint.¹⁰ Further, WPTF asks the Commission to set this matter for hearing to (1) determine and fix a just and reasonable rate for the GMC, and (2) determine the appropriate amount of, and order, refunds.¹¹

As explained below, the relief requested by the Complaint is the same relief that Enron has already requested from the Commission in its request for rehearing of the December 23 Order, or is the type of remedy that will be available in connection with the proceeding that will be established to review the forthcoming filing by the ISO to implement a GMC to be effective July 1, 1999. Accordingly, the Complaint should be dismissed because a forum has already been established by the Commission for resolution of the issues WPTF has raised.

ARGUMENT

I. The Complaint Should Be Dismissed Because the Same Issues Are Already Pending in the GMC Extension Proceeding.

⁸ "California Independent System Operator Corporation's Request for Rehearing and/or Clarification," Docket No. ER99-473-001, filed January 22, 1999 ("ISO Rehearing"). Two parties, the Transmission Agency of Northern California and the Metropolitan Water District of Southern California filed answers, and two, the M-S-R Public Power Agency and the Cities of Santa Clara and Redding, California, jointly filed an answer to the ISO's and Enron's requests for clarification, supporting the ISO's request, except to the extent it sought surcharge authority, and opposing Enron's request.

⁹ Complaint at 1.

¹⁰ *Id.*

¹¹ *Id.* at 1-2.

The Complaint filed by the WPTF requests that the Commission initiate a proceeding under Section 206 of the FPA to determine the proper level for the GMC and the refunds that are due if the existing rate is found to be unjust and unreasonable. An examination of the issues under review in the GMC Extension proceeding demonstrates that each of the issues raised by WPTF in the Complaint is subject to resolution through that existing proceeding.

WPTF first requests that the Commission, pursuant to Section 206 of the FPA, provide refund protection for the existing GMC as of January 1, 1999.¹² This same request is pending in the GMC Extension proceeding. In that earlier case, Enron specifically asked in its rehearing that the Commission establish a Section 206 refund date of January 1, 1999.¹³ Whatever the Commission decides in the GMC Extension proceeding with respect to the Section 206 refund date will resolve this issue. Accordingly, the relief that WPTF is seeking through its Complaint is already available to it in the GMC Extension proceeding.

Second, the Complaint requests that the Commission establish a hearing to determine a just and reasonable level for the GMC.¹⁴ In the GMC Extension proceeding, however, the Commission faced the identical issue and specifically rejected holding a hearing on the GMC at this time. The Commission stated that since the

¹² *Id.* at 6.

¹³ Enron Rehearing at 1. Enron's Rehearing request was filed only two days after the Complaint was filed. As shown in Exhibit 1, Enron is a member of WPTF. Exhibit 1 also lists several other members of WPTF that were also parties in the ISO's GMC proceeding. These other members of WPTF thus had the opportunity to oppose the ISO's request for extension of the GMC or to challenge the Commission's order permitting the extension. Only Enron opposed the extension. These other members of WPTF cannot claim now that they should be permitted to raise that same challenge in the Complaint that they did not make earlier. They have waived their rights. *See, e.g., Mechanisms for Passthrough of Pipeline Take-or-Pay Buyout and Buydown Costs*, 55 FERC ¶ 61,256, 61,817 (1991); *Kings River Conservation District*, 32 FERC ¶ 61,021, 61,079 (1985).

¹⁴ Complaint at 1.

unbundling study process might lead to a different GMC proposal by the ISO and could yield a consensus among the stakeholders, it was “persuaded by the ISO and intervenors that no purpose would be served by requiring the ISO to file, and the parties to litigate, a new GMC at this time.”¹⁵ Instead, the Commission determined that it was sufficient to allow the parties to litigate the appropriate level for the GMC when the ISO files to implement a charge to be effective July 1, 1999.¹⁶ WPTF thus will be able to exercise its rights to have a hearing to determine the just and reasonable level for the GMC at the time the ISO makes that new filing. Again, the existing GMC Extension proceeding already had made available to WPTF the same relief it seeks in the Complaint.

Finally, WPTF argues that the existing GMC is not just and reasonable. As explained above, the Commission already has decided that these arguments should not be heard now, but instead the appropriateness of the existing charge should be determined by subjecting it to refund and the outcome of the proceeding that will be established to review the GMC to be effective July 1, 1999. If any member of the WPTF disagreed with the Commission’s decision on the procedure to follow concerning the evaluation of the existing GMC, it should have raised its disagreement in a request for rehearing of the December 23 Order. Having failed to do so, WPTF cannot seek the same result by instead filing a Complaint.¹⁷

Attached as Exhibit 2 is a table comparing the issues and arguments raised by WPTF in its Complaint with the issues and arguments raised by Enron in the GMC Extension proceeding.¹⁸ There is a complete overlap. Each issue raised in the

¹⁵ *California ISO*, 85 FERC at 62,633 (emphasis added).

¹⁶ *Id.*

¹⁷ *See supra* n.13 and cases cited.

¹⁸ Attached as Exhibit 4 are the cover page and excerpted pages that Exhibit 2 cites from the “Initial Comments of Enron Power Marketing, Inc. Opposing Offer of Settlement” in the GMC

Complaint has been raised or set for resolution in the earlier proceeding. The Commission does not permit “two bites at the apple,” whether through simultaneous litigation of the same issues, or relitigation of an issue previously decided.¹⁹ But that is precisely what WPTF asks the Commission to do through its Complaint. The Commission must not accept the invitation to waste its resources. It should dismiss the Complaint. If, for some reason, dismissal is not found appropriate, the Complaint should not be set for hearing separately. Instead, it should be consolidated with the proceeding that will be established to review the GMC filing the ISO will make for a charge to be effective July 1, 1999, because the proceedings involve identical issues. Where there is a similarity of issues, administrative efficiency requires consolidation.²⁰

Extension proceeding. Attached as Exhibit 5 are the cover page and excerpted pages that Exhibit 2 cites from the “Request of Enron Power Marketing, Inc. For Clarification, Or in the Alternative, Rehearing” in the GMC Extension proceeding.

¹⁹ See, e.g., *Exxon Co., USA v. Amerada Hess Pipeline Corp., et al.*, 83 FERC ¶ 63,011, 65,095-096 (1998) (citations omitted); *Gaviota Terminal Co.*, 75 FERC ¶ 63,008, 65,027-028 (1996); *Lake Murray Docks, Inc. v. South Carolina Electric & Gas Co.*, 57 FERC ¶ 61,320, 62,035, 62,037-038 (1991); *Alamito Co.*, 43 FERC ¶ 61,274, 61,753 (1988).

²⁰ See, e.g., *Sadlerochit Pipeline Co.*, 76 FERC ¶ 61,125, 61,682-83 (1996).

II. Assuming *Arguendo* that the Commission Does Not Dismiss the Complaint for Being Duplicative, the Complaint Raises Disputed Material Issues of Fact that May Require a Hearing To Resolve.

In its Complaint, WPTF alleges that the existing GMC is unduly discriminatory, anticompetitive, unjust, unreasonable or excessive. As explained below, the ISO disputes those allegations, disagreeing with the factual claims made by WPTF.²¹ The Complaint thus raises disputed material issues of fact, a conclusion not challenged by WPTF.²² (As stated above, any hearing held on such issues should be consolidated with the proceeding that will be established to evaluate the GMC to be effective July 1, 1999.)

In support of its allegations that the existing GMC is unduly discriminatory and anticompetitive, WPTF points to the different rates assessed customers with Existing Contracts and those assessed other market participants.²³ Mere differences in rates, however, are not unduly discriminatory or anticompetitive if there is a justification for that difference.²⁴ In this case, the Commission has clearly sanctioned a difference in treatment for holders of Existing Contracts.²⁵ The only question then is whether the existing GMC appropriately reflects that difference during a transition period. Every party to the GMC Extension proceeding, except Enron, concluded that it did, supporting

²¹ Exhibit 3 contains the ISO's specific admission or denial of each allegation in the Complaint.

²² Complaint at 1, 13.

²³ Complaint at 7.

²⁴ See, e.g., *St. Michaels Utilities Comm. v. FPC*, 377 F.2d 912, 915 (4th Cir. 1967); *Northwest Pipeline Corp.*, 76 FERC ¶ 61,068, 61,429 (1996).

²⁵ See *Pacific Gas and Electric Co., et al.*, 81 FERC ¶ 61,122, 61,470-471 (1997); see also, *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036, 31,663 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998).

or not opposing the request the ISO made to extend the GMC.²⁶ This conclusion is appropriate given the transitional evolution of the GMC and the fact that the study of unbundling is still under review. Moreover, the mere fact that WPTF does not approve of the proposed rates does not mean that the rates are unjust and unreasonable. Such an argument assumes that there is but one just and reasonable rate, an assertion that the Commission has repeatedly rejected.²⁷

Citing a report prepared on behalf of the ISO, which compares the California ISO's GMC with the administrative costs of four other ISOs, WPTF contends that the GMC charge is unjust or unreasonable because it may be excessive.²⁸ That report, as WPTF itself notes,²⁹ cannot be used for the comparison WPTF attempts because there are significant differences among the ISOs regarding the timing of the implementation of their services and the level of responsibility each has assumed.³⁰ Accordingly, WPTF has no basis on which to support its allegation that the GMC is excessive.

Finally, WPTF contends that extending the existing GMC violates the April 7 Settlement because the ISO did not file a revised GMC rate to be effective January 1, 1999.³¹ WPTF contends that this deprives the parties of their *quid pro quo* for that settlement. Only one stakeholder, however, opposed the GMC extension – Enron –

²⁶ *California ISO*, 85 FERC at 62,631-632.

²⁷ *See Mobil Oil Corp. v. FPC*, 417 U.S. 283, 316-17 (1974) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 796-798 (1968)); *see also Columbia Gas Transmission Corp., et al.*, 66 FERC ¶ 61,214, 61,492 (1994) (“It is well known that there is not one just and reasonable rate, but that various rates can be within a zone of reasonableness.”); *PacifiCorp Electric Operations*, 60 FERC ¶ 61,292, 62,038 (1992).

²⁸ Complaint at 9-10.

²⁹ *Id.* at 9, n.7.

³⁰ In fact the report itself notes its limitations, principally based on differences in the timelines governing the implementation of the operations of the ISOs. *See* Pages 3-4 of the Report, appended as Attachment C to the Complaint.

³¹ Complaint at 10-11.

and, in fact, many parties intervened in support of the proposal.³² Most parties thus did not see the extension as depriving them of their *quid pro quo* for the April 7 Settlement.

Moreover, even if WPTF's interpretation of the settlement were correct, its claim is premature. If on rehearing the Commission affirms that its December 23 Order in the Grid Extension proceeding requires that the GMC charged during the January 1 to June 30, 1999, period be subject to refund and the outcome of the forthcoming GMC filing, then WPTF's ability to gain the benefit of a new rate effective January 1, 1999, will be preserved. Alternatively, if the Commission reverses its December 23 Order, then the

Commission would have determined that the April 7 Settlement should not be interpreted as WPTF claims. In either circumstance the decision on rehearing in the Grid Extension proceeding will resolve the question concerning the proper interpretation of the April 7 Settlement. There is no need to resolve that question here. **CONCLUSION**

Based on the foregoing, the ISO respectfully requests that the Commission issue an order: (1) dismissing WPTF's complaint; or (2) in the alternative consolidating this proceeding for hearing with the ISO's forthcoming filing to implement a GMC to be effective July 1, 1999.

Respectfully submitted,

N. Beth Emery
Vice President and General Counsel
Roger E. Smith
Regulatory Counsel
The California Independent
System Operator Corporation
151 Blue Ravine Road
Folsom, CA 95630
(916) 351-2334
Facsimile: (916) 351-2350

Edward Berlin
Kenneth G. Jaffe
Scott P. Klurfeld
Sara C. Weinberg
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Washington, DC 20007-3851
(202) 424-7500
Facsimile: (202) 424-7643

³² *California ISO*, 85 FERC at 62,632.

Counsel for the California Independent
System Operator Corporation

Dated: March 5, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 5th day of March, 1999.

Sara C. Weinberg
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007-5116
(202) 424-7500