

arguments until its Reply Brief, and thus “sandbagged” Enron. The facts and the Commission’s Rules of Practice and Procedure, however, belie both these arguments.

First, the ISO has participated in this proceeding from the time of its intervention, attending settlement conferences and all proceedings in which it considered its interests involved. During settlement discussions, counsel for the ISO clearly stated the ISO’s position on distribution-only service.

More importantly, even if Enron’s assertions were true, which they are not, they provide no basis for striking the ISO’s Reply Brief. Enron apparently would rewrite the Commission’s Rules of Practice and Procedure to meet its own purposes. When the ISO was granted intervention in this proceeding, it became a party with all rights attendant on that status. 18 C.F.R. § 385.214. *Every party has a right to file post-hearing briefs. 18 C.F.R. § 385.704.* The Commission does not condition that right on a party’s conduct of discovery, its presentation of testimony, or its cross-examination of witnesses. Under Enron’s theory, the ISO – in order to preserve its right to argue its position – would need to burden the other parties and the Presiding Judge with duplicative discovery, additional paper testimony, and superfluous cross-examination even though it had concluded that other parties were very competently presenting a position congruent with its own. Wisely, the Commission does not require such behavior.

Second, there was no “sandbagging.” The ISO’s Initial Brief clearly stated its argument against distribution-only service, relying upon its responsibility for ensuring the reliability of the ISO Controlled Grid, including transactions that occur on Edison’s distribution system. The ISO cited the Commission’s statements of the ISO’s responsibilities, the ISO Tariff’s descriptions of the ISO’s responsibilities, and the only competent factual evidence in the record regarding the impact of distribution-only

service on the ISO Controlled Grid – i.e., the admissions of Enron’s witness Mara on cross-examination.¹ In particular, the ISO noted:

Even if the path from resource to load does not involve the transmission system, transactions on the Companies’ distribution systems directly implicate these responsibilities of the ISO because the distribution systems are connected to the ISO Grid. If generation or load increases or decreases on the distribution system, the effects are felt on the ISO Controlled Grid. As Enron’s witness has acknowledged, the ISO is responsible for ensuring that there are adequate resources to serve load that is located on the distribution as well as on the transmission system (Tr. at 222) and for all reliability needs and Ancillary Services for the distribution system (Tr. at 223). To fulfill these responsibilities, the ISO must use the ISO Controlled Grid and must acquire capacity and Energy to satisfy reliability requirements and to balance loads, whether that load is served off of transmission or distribution facilities. (Tr. at 236.)

ISO Initial Br. at 6-7.²

The ISO’s Reply Brief does not raise new arguments, but simply and properly responds to arguments made by Enron and New Energy Ventures, Inc. (“New Energy Ventures”). In their Initial Briefs, Enron and New Energy Ventures attempted in various contexts to establish an entitlement to distribution-only service, i.e., an entitlement to avoid the responsibilities imposed on participants in the California market who benefit from the ISO Controlled Grid. Enron argued that requiring transactions involving Generation and Load on the same distribution system to take service under the ISO Tariff subjected the transactions to charges unrelated to services received and imposed unnecessary requirements on Generators.³ Enron further contended that distribution-only service should not be scheduled with the ISO because Generators on the system

¹ See n. 4, *infra*.

² The ISO is at a loss to understand the basis for Enron’s statement that the ISO “made no affirmative argument of its own on this matter.” Enron Motion at 8.

³ Similarly, New Energy Ventures argued that “distribution-only” transactions do not make use of the ISO Grid.

are not dependent on the ISO to maintain reliability related to their output. Enron made this argument separately for large units and small units. The ISO's Reply Brief is addressed specifically to these arguments and to a separate argument made by New Energy Ventures. The Reply Brief makes no arguments other than these responses. As a result, it is strictly within the bounds of Rule 706 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.706.

Thus, despite the importance that Enron attaches to the number of pages included in the ISO's response to Enron's and New Energy Venture's arguments, that fact is irrelevant to the propriety of the ISO's arguments. Indeed, in light of the twenty-one pages of argument on distribution-only service in the Initial Briefs of Enron and New Energy Ventures, the ISO's twelve-page response is hardly excessive. The ISO cannot have been expected in its Initial Brief to anticipate all the arguments of Enron and New Energy Ventures, based as they were on insubstantial evidence⁴Tr. at 161. Thus, while the Perez affidavit might properly be used to impeach Mr. Cuillier's testimony, it is not, with two exceptions, direct evidence that the parties can cite in support of arguments in this proceeding. (The only statements of Mr. Perez with which Mr. Cuillier affirmatively agreed were that a change in load of system conditions occurring outside a subsystem ordinarily does not affect flows on the subsystem, Tr. at 161, and that all of Edison's 66kV lines exiting the radial substation lead to a dead end, and do not normally provide

⁴ Enron and New Energy Ventures rely heavily upon statements in a document (the Perez Affidavit, Exh. EMP-5) cited by Edison's witness Cuillier, but regarding which he generally disavowed affirmative knowledge. As the Presiding Judge noted:

[T]his document will speak only to the extent that you are going to ask Mr. Cuillier specific questions about what Mr. Perez said and ask him if he has any reason to dispute it. . . . That does not necessarily mean that he has sufficient knowledge to form his own views or interpret it, only that he does not have any reason to dispute what Mr. Perez has said.

paths to other portions of the subtransmission system. Tr. at 163.) and misplaced inferences from the ISO Tariff.

II. THE ISO'S REPLY BRIEF COMPRISES SOLELY ARGUMENTS BASED UPON THE RECORD IN THIS PROCEEDING

Enron also asserts that the ISO's Reply Brief is evidentiary in nature, "pure testimony that purports to describe factual conditions on the ISO system." Enron Mo. at 8. To the contrary, the "testimony" to which Enron refers is simply argument, for which a Motion to Strike does not lie. See *Boston Edison Co.*, 61 FERC ¶ 61,026 at 61,147 n. 115 (1992).

Enron provides only two examples to support its assertion. First, it points to the following paragraph from the ISO's Reply Brief:

If the ISO calls upon Generators on the distribution system under Section 5 of the ISO Tariff to increase or decrease Generation for reliability reasons, those normal operating conditions may not exist. If the ISO directs such a Generator to increase or decrease Generation in response to a change in Load on the same distribution system, the ISO is preventing unscheduled flows into or out of the ISO Controlled Grid that could affect reliability. Similarly, If the ISO directs a Generator to increase or decrease Generation in response to a change in Load outside of the same distribution system, it will be scheduling additional flows into or out of the distribution system. In either case, the ISO would receive reliability benefits from these units.

Enron Mo. at 8, citing ISO Reply Br. at 7-8.

Ms. Mara recognized, however, that the ISO is responsible for ensuring that all load on the Edison distribution system is served reliably, Tr. at 220, and that those responsibilities include balancing generation and load within a distribution system, Tr. at 222, 231. She acknowledged that the ISO would be responsible for increasing generation to serve a load whose supplier failed to perform, *id.*, and would have to reduce generation somewhere in the ISO Control Area to address dropped load on a

distribution system, Tr. at 228. She also admitted that the ISO uses the ISO Controlled Grid to balance generation and load on the Edison distribution system. Tr. at 235-36.

It is simply a logical corollary of these facts recognized by Ms. Mara that, as argued in the quotation from ISO's Reply Brief, the ISO may control Generation within a distribution system so as to prevent an imbalance from affecting the rest of the ISO Control Area, that the ISO may address excess load by moving energy into the distribution system from Generators elsewhere in the ISO Control Area, and that the ISO may address excess Generation by using the Generation to serve load outside the distribution system. The ISO in its Reply Brief thus presented arguments based on inferences that could fairly be drawn from Ms. Mara's testimony, which is unquestionable part of the record in this proceeding. Enron would apparently limit the ISO to repeating Ms. Mara's concessions, without advising the Presiding Judge and the Commission of the logical implications of those concessions. The Commission's Rules, however, place no such limit on post-hearing briefs for the obvious reason that such limits would turn the briefing process into an empty exercise.

Moreover, the Presiding Judge drew similar conclusions. As he stated in questioning Ms. Mara:

How, for instance, can Edison ensure that their customers' electric needs are going to be met if the generator goes down? If it goes down, the load on the system remains exactly the same, and the generator somewhere else has to go up.

Now, we don't know where that generator is. It's possible it's on the same radial arm. It's possible, but more likely that it isn't, because all of these loads are electrically interconnected.

Or, if the customer loses a major load, if it's a municipality, and a major industrial is sitting in there that it's serving and that industrial goes down, the transmission line goes down to the distribution line in this case, what happens to the output of that generator? Is that going to be put back down or reduced, or is it going to be system-wide, somewhere, some generation is going to be reduced, and how do you do it?

Tr. at 262-63. In short, the argument included in the ISO's Reply Brief is simply based on testimony in the record and common sense.⁵ It is not "unsupported factual statements" that should be stricken.

The other portion of the ISO's Reply Brief cited by Enron is the following statement: "[T]he vast majority of load, however, is located off the ISO Controlled Grid on the distribution system. In addition, Generation located on the distribution system, unless perfectly balanced with its Load, will affect the balance on the ISO Controlled Grid." Enron Motion at 9 n.4, citing ISO Reply Br. at 9. Yet Ms. Mara herself testified that most load is served off of the distribution system. Tr. at 221. She also testified that if a load goes down, generation in the ISO Control Area may potentially be reduced to accommodate the loss of load. Tr. at 228, 231. Again, the ISO has not asserted anything in its Reply Brief that does not follow from the many concessions made by Ms. Mara.

Enron may legitimately argue that the ISO should have provided citations for these self-evident propositions. The assertion, however, that these arguments, which can be inferred directly from the statements of Enron's own witness, are new "testimony" that should be stricken is baseless. Moreover, there is no cause to allow Enron a supplemental brief to "rebut" that which it has already admitted.

⁵ Indeed, the principle that an imbalance of load and generation in a system will cause energy flows into or out of the system (absent a constraint preventing such flows) is so commonsensical in a proceeding involving an energy regulatory body that the Presiding Judge's comments are functionally equivalent to his taking official notice of that principle. See 18 C.F.R. § 385.508; Fed. R. Evid. 201.

CONCLUSION

Wherefore, Enron's Motion to Strike the ISO's Reply Brief and its alternative Motion for Leave to File Supplemental Brief should be denied.

Respectfully submitted,

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April 28, 1999

David P. Boergers, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: Pacific Gas & Electric Company
Docket Nos. ER97-2358-002, et al.

Dear Secretary Boergers:

Enclosed for filing are an original and fourteen copies of the Answer of the California Independent System Operator Corporation to Motion to Strike Reply Briefs or Alternatively for Leave to File Supplemental Reply Brief of Enron Power Marketing, Inc., in the above-cited proceedings. An additional copy of the filing is also enclosed. I would appreciate your stamping the additional copy with the date filed and returning it to the messenger.

Yours truly,

Michael E. Ward
Counsel for the California Independent System
Operator Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the Restricted Service List compiled by the Presiding Judge in this proceeding.

Dated at Washington, D.C. on this 28th day of April, 1999.

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