

105 FERC ¶ 61,284
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

California Independent System
Operator Corporation

Docket Nos. ER03-942-000
ER03-942-001

ORDER ACCEPTING IN PART, MODIFYING IN PART,
AND REJECTING IN PART TARIFF AMENDMENTS

(Issued December 15, 2003)

1. In this order, the Commission accepts in part, modifies in part, and rejects in part the California Independent System Operator Corporation's (ISO) proposed Tariff Amendment No. 53 to its Open Access Transmission Tariff (Tariff). This order benefits market participants by clarifying the procedures by which the ISO will distribute late market payments to ISO market participants that it is late paying or owes past due amounts to, what the ISO terms Creditors.

Background

2. On June 10, 2003, the ISO proposed Amendment No. 53 to its Tariff for the express purpose of making revisions to address instances of late payments, bankruptcies and defaults that have already occurred or that may occur in the future. In this regard, this amendment modifies the ISO's Settlement and Billing protocol (SABP) with respect to market payments by revising the manner in which late payments or what it terms "defaulted receivables" are disbursed to Creditors. Specifically, the proposed revisions address: (1) the distribution to ISO Creditors of amounts owed to the ISO by market participants paying late – termed by the ISO as Debtors (*i.e.*, defaulted receivables); (2) the ISO's disbursement methodology for instances both in which no ISO Debtors are in Default and in which an ISO Debtor is in Default; and, (3) the impact of the resolution of the bankruptcies of several market participants, as well as any future bankruptcies, on any unpaid Settlement balances. In addition, the ISO proposes other miscellaneous Tariff revisions.

Notice, Interventions, Protests and Answer

3. Notice of the ISO's June 10, 2003, filing was published in the Federal Register, 68 Fed. Reg. 38,709, with interventions and protests due no later than July 1, 2003.

4. Modesto Irrigation District, Exelon Corporation, Reliant Energy Services, Inc., the State of California Electricity Oversight Board and the California Department of Water Resources (CDWR) State Water Project filed timely motions to intervene. Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero LLC filed a timely joint motion to intervene. The California Public Utilities Commission (CPUC) filed a timely notice to intervene. Dynegy Power Marketing, Inc. and Williams Energy Marketing & Trading Company (Williams) filed timely motions to intervene and comments. Powerex Corp., Southern California Edison Company (SCE), Pacific Gas and Electric Company (PG&E), PacifiCorp, Public Utility District No. 2 of Grant County, Washington (PUD), Duke Energy North America, LLC, and Duke Energy Trading and Marketing LLC (collectively Duke), and the City of Santa Clara, California, Silicon Valley Power and the City of Redding, California (collectively California Cities), filed timely motions to intervene and protests.

5. On July 16, 2003, the ISO filed a motion for leave to file an answer to the comments and protests.

6. On August 7, 2003, a Delegated Director's Deficiency Letter Order (Deficiency Letter) was issued to the ISO requesting clarification of certain provisions contained in Amendment No. 53. On October 16, 2003, the ISO filed an amendment to their filing in response to the Deficiency Letter.

7. Notice of the ISO's October 16, 2003, filing was published in the Federal Register, 68 Fed. Reg. 61,802, and with interventions and protests due no later than November 6, 2003. PG&E filed timely comments and protests to the ISO's amendment to the filing. Williams and Dynegy, and Duke filed timely, joint protests to the ISO's amendment to the filing.

8. On November 21, 2003, the ISO filed a motion for leave to file an answer to the comments and protests.

Discussion

A. Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(c) (2003), the CPUC's timely filed notice of intervention makes it a party to this proceeding. The timely, unopposed motions to intervene the remaining parties filed serve to make them parties to this proceeding.

10. Although the Commission's Rules prohibit answers to comments or protests, 18 C.F.R. § 385.213(a)(2) (2003), we may, for good cause, waive this provision. We find good cause to do so in this instance because the ISO's answers provide information that clarifies the issues and aids us in our decision-making. Accordingly, the ISO's motions for leave to file an answer are accepted.

B. Payment of Existing Late Amounts due from ISO Debtors (i.e., Default Receivables)

11. The ISO has proposed three revisions to its existing disbursement protocols in its Tariff to clarify its procedures for disbursing past due amounts or what the ISO terms default receivables. First, ISO proposes to use pro-rata allocations for amounts received and owed in the applicable month of the short fall. Second, the ISO proposes, once it has resolved the applicable month issues, to consolidate all of the past monthly period obligations and again utilize a pro-rata application to those periods irrespective of any aging sequence for some specified disbursements. And, three, it proposes to use the pro rata approach for disbursing any excess funds received to market participants. Because the ISO acts only as an intermediary for the exchange of payments to and from Scheduling Coordinators (SC), Participating Transmission Owners (PTO), and other market participants some participants may from time to time be either owed money (creditor) or owe money (debtor) to the ISO. These are discussed more fully below.

12. The ISO explains that, under the existing Tariff and Protocols, if the ISO is unable, for a particular trade month, to fully pay all ISO participants due to the insufficiency of payment made by the ISO participants (debtors) for that month, the ISO reduces payments to all ISO participants owed money by the ISO (creditors) pro rata in proportion to the net amounts payable to them. The ISO then accounts for these reductions as amounts due and owing by the non-paying ISO debtor(s) to each ISO creditor whose payment was reduced.

1. ISO Proposal

13. According to the ISO, the current ISO Tariff and SABP do not contemplate the situation in which the ISO receives a payment from an ISO Debtor who defaulted in a month in which there are no ISO Creditors remaining. This situation exists in several trade months due to, for example, the re-settlement of energy exchange transactions, the carrying forward of offsets, and the collection and disbursement of interest from the CDWR related to the payment for the net short positions of PG&E and SCE. Thus, the ISO has proposed revisions to the Tariff and its SABP to revise the methodology by which late paid amounts due from ISO Debtors (*i.e.*, defaulted receivables) are disbursed. The ISO states that under its proposed changes (Tariff Section 11.16.3), ISO market participant Creditors will be treated equally by receiving payments pro rata **for all unpaid trade months**. The ISO states that proposed pro rata changes will be implemented in cases of bankruptcies and defaults that have already occurred or that may occur in the future.

a. Section 11.16.2

14. For payments of default amounts owed for months during which no ISO Debtor is in bankruptcy, the ISO proposes new Section 11.16.2 to the Tariff which provides that the collection of defaulted receivables, excluding default interest, will be distributed to ISO creditors pro rata for the month of default. The provision states that if all ISO creditors for the month of default have been paid, then the proceeds will be paid pro rata to the ISO creditors in the oldest unpaid trade month, unless the provisions of Section 11.16.3 (described below) are in effect.¹ Section 11.16.2 is also applicable to the amounts netted against ISO creditor balances related to prior defaulted receivables and contains a provision for processing funds related to the past due trade month that amount to less than \$5,000.

b. Section 11.16.3

15. For payments of default amounts owed for months for which: (1) there is at least one ISO Debtor in bankruptcy proceedings in which no full and final distribution has been made and (2) the default receivable is from a trade month for which all ISO

¹ The ISO states that the provisions of Section 11.16.3 are in effect as of the date of its filing due to the bankruptcies of the California Power Exchange and other ISO debtors.

Creditors for that trade month have been paid - the ISO also proposes new Section 11.16.3 to the Tariff. Under Section 11.16.3, the ISO creditor balances will be combined for the purpose of calculating the pro rata distribution of default collections. Section 11.16.3 is applicable to collection of defaulted receivables by means of netting against ISO creditor balances and contains a provision for processing funds related to the past due trade month that amount to less than \$5,000.

c. Section 11.16.4

16. In addition, proposed new Section 11.16.4 to the Tariff contains a provision for the disbursement of excess funds, which could arise from accruing interest. The provision states that excess funds will be distributed to the ISO creditors with the oldest unpaid receivables unless the conditions described in Section 11.16.3 exist, in which case the proceeds will be distributed pro rata as described in Section 11.16.3. The ISO states that the funds collected for charges that are payable in the future are set aside and that any remaining funds after all ISO creditors have been paid are distributed to the ISO market.

2. Comments and Protests

17. Generally, the protestors argue that the provisions for default receivables lack clarity and therefore, it is impossible to determine the implications of these provisions. Several protestors assert that further information from the ISO is necessary to determine the impact of the proposal. PG&E asserts that the time period that these provisions will encompass is unclear. SCE argues that while the ISO's proposal is that all creditor balances shall be combined for the purposes of calculating the pro rata distribution of default collections, the time period over which the ISO will make the pro rata distribution is unclear.

18. Powerex argues that the interpretation of these provisions remains difficult because the ISO has not defined several terms included in the proposed changes. Similarly, PG&E and Williams argue that the ISO has not meaningfully defined what excess funds are, where they originate, or whether the ISO should have the discretion to distribute them or roll them into the reserve market account for retention by the ISO.

19. The protestors contend that the proposed changes in Section 11.16.3 have not been explained, are inadequately supported and thus may not be just and reasonable. SCE and PacifiCorp assert that the ISO has not provided justification or adequately explained the proposed allocation methodologies which deviate considerably from that which is currently in the ISO Tariff. California Cities argue that the pro rata distribution of default collections should be calculated based upon the portion of the ISO creditor's claim

attributable to the ISO's claim against the debtor in bankruptcy. PG&E contends that the results of Section 11.16.3 could be discriminatory against the market participants in the earlier period. Powerex argues that the ISO has not supported the proposal with precedent and the proposed allocations are inconsistent with similar Power Pools and ISOs such as NEPOOL/ISO-NE.

20. Many protestors argue that the proposed changes may conflict with the bankruptcy code and bankruptcy court orders or prematurely reduce settlement balances of entities in bankruptcy. Additionally, PG&E argues that the proposed changes are premature because the outcomes of related proceedings, such as the California refund proceeding (Docket No. EL00-95), remain unknown and may affect the ISO's proposed allocation methodology. PUD argues that, due to the uncertainties surrounding bankruptcies, the ISO Tariff should specify that the bankruptcy court's rulings would be controlling to the extent that such rulings conflict with the Tariff.

21. PUD further argues that the amendment does not clarify how entities such as PUD, that are not a Scheduling Coordinator (SC) or a Participating Transmission Owner (PTO), will receive payment. PUD notes that the current ISO Tariff definition of an ISO creditor is limited to an SC or PTO to which amounts are payable. PUD contends that it is neither a SC nor a PTO; however the ISO owes it a considerable amount of money for bilateral sales. PUD argues that the ISO should expand the definition of ISO Creditor to include entities that are not currently included in the Tariff definition of ISO Creditor.

3. ISO Answer

22. In its answer, the ISO provides helpful context for its proposal. ISO reminds market participants that under the ISO market structure, individual buyers and sellers are not matched. Rather, each ISO Creditor is a creditor against all ISO Debtors in the ISO Market, and all ISO Debtors are debtors of all ISO Creditors in the market. Therefore, all ISO Creditors have an interest in the bankruptcy of an ISO Debtor. ISO offers that, under the existing Tariff and Protocols, if the ISO is unable, for a particular trade month, to fully pay all ISO creditors due to the insufficiency of payment made by the ISO debtors for that month, the ISO reduces payments to all ISO creditors pro rata in proportion to the net amounts payable to them. The ISO then accounts for these reductions as amounts due and owing by the non-paying ISO debtor(s) to each ISO creditor whose payment was reduced. When a payment is made by an ISO debtor who has an unpaid liability for a past period, the amount is first attributed to the oldest month in which the debtor has an unsatisfied default. The ISO then disburses the amount pro rata to the ISO creditors for that month.

23. The ISO states that its proposed Section 11.6.2 tracks the existing Tariff provisions for disbursement of defaulted receivables. ISO states that the proposal is designed to allow payments received from ISO debtors who have defaulted during months when all ISO Creditors have already been paid to be applied pro rata to the ISO creditors in the oldest month for which there still exist unpaid balances for ISO creditors.

24. ISO offers that when these same circumstances exist and there is at least one ISO debtor in bankruptcy proceedings, proposed Section 11.16.3 provides that the ISO will disburse the amount received by combining all ISO creditor balances over all trade months and making a pro rata distribution based on the proportion of that total balance attributable to each ISO creditor. The ISO contends that the proposed pro rata disbursement is fair because it is more consistent with bankruptcy principles. It emphasizes that the proposal does not pre-decide the issue of distribution of bankruptcy funds but, rather, seeks to ensure fairness in the disbursement of non-bankruptcy funds where there is an ISO debtor in bankruptcy and those funds relate to a month in which no ISO creditors remain.² With regard to PG&E's claim that the proposal is premature and that distributions should be consistent with the resolution of the California refund proceeding, the ISO answers that, although substantial amounts of money will flow once the results of the refund proceeding are invoiced, this fact does not justify a delay in disbursing payments received from default debtors and, in any case, such money would be disbursed pursuant to existing Tariff provisions (i.e., pro rata for the oldest unpaid trade month) if not for changes proposed in Amendment No. 53. The Tariff amendments change only the manner in which disbursement is made.

4. ISO Amendment to the Filing

25. The ISO's amendment demonstrates how the proposed provisions in Sections 11.16.2 and 11.16.3 would be utilized by applying hypothetical default payment amounts to hypothetical participant balances. The ISO provided demonstrations using both the

² ISO answer at 9. The ISO explains that it will follow the Commission's directive as to the mechanism for allocation of funds received from a bankrupt ISO debtor. However, in absence of specific guidance from the Commission, the ISO would distribute such funds to creditors consistent with the existing payment provisions of the ISO Tariff, as modified by proposed Sections 11.16.2 and 11.16.3. ISO answer at 10.

current Tariff provisions and the proposed provisions. The demonstrations provided guidance on how the default payments are cleared and offset throughout various participant accounts over varying time periods.³

26. The ISO further clarified that there had been no excess funds to date. The ISO stated that all ISO Creditors must be paid in full before excess funds could occur. Further, the ISO stated that excess funds could arise from interest accruing on funds pending their distribution. Additionally, excess funds would arise in the Market Clearing Account and would be deposited into the Market Reserve Account.

5. Commission Determination

27. As discussed in more detail below, we agree with the concept of pro rata distribution in the oldest trade month when there are no remaining Creditors for a specific month in which there remains no outstanding debt by the ISO. However, we are not persuaded that the combining of all past time periods is necessary, nor does it benefit all market participants equally. Additionally, the ISO proposal for disbursing excess funds contains both methodologies previously mentioned, and therefore, we are not persuaded that this proposal is equally beneficial to all participants. Furthermore, the ISO has not clarified what funds constitute excess funds.

a. Disbursement Of Defaulted Receivables (Section 11.16.2)

28. The ISO has provided sufficient detail, definitions and examples to allow us to conclude that proposed Section 11.16.2 will clarify, for market participants, the ISO's current practice of disbursing default receivables. In principle, this provision is an extension of the current SABP provisions that provide for the settlement of the oldest outstanding obligations first. Accordingly, we find that this provision is acceptable with one modification discussed below.

29. We agree with SCE that it is unclear from the filing when the ISO intends to actually distribute the receivable payments. The proposed language in Section 11.16.2 seems to indicate that the distributions will occur once the calculations are completed; however, the ISO has not specifically articulated this in the proposed language. The ISO has responded in its supplement to the filing that the distribution will occur as dictated in Section 11.13 (discussed below in Section "D" of the order). We will require the ISO to articulate in the proposed language that the distribution of these funds will occur in

³ ISO amendment at 2-16.

accordance with Section 11.13.

b. Disbursement Of Defaulted Receivables For Months In Which All ISO Creditors Have Been Paid (Section 11.16.3)

30. The ISO did not support the combined creditor allocation methodology proposed in Section 11.16.3 in its initial filing or in its answer to the protests, and therefore, further clarification was requested by Commission staff. However, the ISO's amendment to the filing, combined with the aforementioned submittals has provided sufficient information for us to evaluate proposed Section 11.16.3.

31. The ISO's proposal complicates the distribution methodology employed by the ISO by establishing two procedures for disbursement of default receivables without adequate explanation for the different distribution methodologies. Specifically, when a participant is in bankruptcy and no full and final distribution has occurred, and a default receivable is received (by the ISO) that is attributed to a month in which no creditors remain, the funds are distributed pro rata to all creditors over all time periods. In contrast, default receivables collected for a period in which there is an ISO debtor in bankruptcy and the default receivable is for a month in which there are unpaid ISO creditors, the ISO creditor balances will not be combined but, rather, the default receivables will be applied to the balances for the particular month in an aging sequence of oldest to most recent. The ISO takes the position that, while a participant is in bankruptcy, the ISO should treat all creditors equally. However, this provision does so only when there are no remaining creditors for a particular time period. The ISO has not adequately explained this unequal application of the pro rata methodology.

32. Further, the proposal will not benefit all market participants equally. If default payments are disbursed pro rata to all ISO Creditors pursuant to proposed Section 11.16.3, ISO creditors that are owed amounts for earlier months may receive a lesser pay-out than they would under the existing methodology (pro rata from the oldest month with outstanding payments due). In contrast, ISO creditors that are owed amounts for more recent months, may receive payment sooner than they would have expected under the existing methodology. The ISO has not justified this disparate treatment. Accordingly, we will reject the provision.

33. Consistent with PUD's concerns, we find that the ISO's definition of "ISO Creditor" appears to exclude entities that are not Participating Transmission Owners or Scheduling Coordinators. In the ISO's amendment to its filing the ISO claims that, in

practice, it routinely includes such entities in these processes.⁴ We will require the ISO to revise the definition of ISO Creditor to include such entities. Specific inclusion of these parties in the Tariff language will clarify for the market all entities rights and reduce the need to address this issue in the future.

c. Excess Funds (Section 11.16.4)

34. Additionally, we find that the ISO has not meaningfully defined or explained the provisions in Section 11.16.4. The ISO states in its initial filing that “If there are excess funds and also unpaid ISO creditors, then excess funds will be distributed...”.⁵ The ISO then states in its amendment to the filing that no excess funds have occurred to date and that “only when all ISO Creditors for all trade months have been paid in full could excess funds occur”.⁶ Accordingly, we find that the provision is unclear. The Commission finds these statements contradictory. The ISO has stated that there cannot be excess funds and ISO Creditors at the same time, and therefore, we will reject it.

C. Bankruptcy Distributions and Discharges

35. In light of the protests and the ISO's request to defer Commission action, the Commission will treat this provision as withdrawn. The ISO may re-file this provision at its discretion without prejudice.

36. The ISO states that proposed new Section 11.20.3 is designed to reflect the impact of distributions and discharges made pursuant to bankruptcy law on unpaid settlement balances. It states that the proposal will protect the ISO from further action from market participants whose bankruptcy claims were not completely discharged through the bankruptcy proceeding. Specifically, proposed Section 11.20.3 would: (1) clarify that settlement balances will be reduced to reflect the face value of any distribution from the bankruptcy estate of an ISO Debtor; (2) require that upon any discharge pursuant to applicable portions of federal bankruptcy law of debt owed by an ISO debtor, any unpaid settlement balances will be reduced dollar for dollar to reflect the amount of the discharge; and (3) explicitly state that Section 11.20.3 does not eliminate the ISO creditors' rights to receive pro rata collections of any other ISO debtors for that month.

⁴ ISO Amendment at 19.

⁵ June 10 Initial Filing at 5.

⁶ October 16 ISO Amendment at 17.

37. PG&E argues that the proposal appears to address only a specific type of bankruptcy distribution and fails to recognize that there are other options to resolve issues within a bankruptcy context, such as settlement or set off. PG&E further notes that the provision does not recognize that a discharge does not invalidate security or collateral interests. SCE makes a similar point, stating that it is premature to adopt the ISO's proposal to reduce the settlement balances of defaulting participants until it is determined how to apply the collateral at the PX. SCE also offers that the issue of how to allocate any shortfall is an issue for resolution in the Chargeback Proceeding.⁷

38. In its answer, the ISO acknowledges the protestors' concerns and asks that the Commission refrain from making a determination on proposed Section 11.20.3. The ISO asks that it be permitted to file a revised version of this section.

39. Accordingly, we will defer action pending a new filing by the ISO. ISO, in its compliance filing on Amendment No. 53, is hereby directed to remove proposed Section 11.20.3 and any related provisions.

D. ISO Proposed Timetable for Payments

40. The ISO proposes a revision to Tariff Section 11.13 to provide that, where an ISO debtor who is in default makes a payment on the amount in default, the ISO shall distribute the payment to ISO creditors within five days of the receipt of the default payment. Currently, the ISO must distribute payments within 5 hours of receipt of payment from an ISO debtor; however, complications to the ISO's bookkeeping process, in situations where defaults have occurred, make the distribution on the current schedule impossible.

41. The ISO has provided an affidavit by the ISO Controller that explains in detail the complications to the ISO's bookkeeping process in situations where defaults have occurred, such as: (1) amounts attributable to bankruptcies may need review by legal counsel before distributions can be made; (2) collections must be allocated to the proper invoice, for the proper month, for the proper priority; and (3) collections continue to come in after the stated time and payment date.

42. Powerex asserts that the ISO has not explained why it requires such a lengthy period of time to make payments after the initial default. Powerex contends that this provision is too broad and may always be applicable since there may always be an ISO

⁷ Pacific Gas & Electric Co., *et al.*, 95 FERC ¶ 61,020 (2001).

debtor in default. Further, Powerex argues that if this provision is accepted, the provision should apply to payments at the time of default and not to subsequent months.

43. The ISO has provided an affidavit by the ISO Controller that explains in detail the complications to the ISO's bookkeeping process in situations where defaults have occurred, such as: (1) amounts attributable to bankruptcies may need review by legal counsel before distributions can be made; (2) collections must be allocated to the proper invoice, for the proper month, for the proper priority; and (3) collections continue to come in after the stated time and payment date. Accordingly, the ISO has adequately demonstrated that the proposal to distribute payments to ISO creditors within five days of the receipt of a default payment is just and reasonable

E. Priority of Grid Management Charge

44. Section 6.10.2 of the SABP has been modified to clarify that funds will be applied first to the current month Grid Management Charge (GMC) and then to other ISO creditors. Section 6.10.4 of the SABP has also been modified to specify that the order of payments under the SABP is subject to the provisions of Section 11.16.

45. Dynegy comments that, pursuant to bankruptcy law, if an ISO debtor is in bankruptcy, the ISO's claim to pay its GMC cannot be superior to other creditor claims. Dynegy contends that it is not clear whether the ISO's proposal would give the ISO priority with regard to GMC that is senior to other creditors in situations where the ISO debtor has sought bankruptcy protection.

46. The ISO answers that current SABP Section 6.3.1.3 provides a priority for payment of GMC over any other payment. It contends that the language concerning the GMC priority does not substantively change the existing payment mechanism but simply provides clarity with respect to the priority.

47. As noted by the ISO, the current ISO Protocols provide a priority for GMC payments, and the proposed revision of SABP Section 6.10.2 does not substantively change the mechanism for payments that currently exist in the ISO Tariff. We agree with the ISO that the proposed revision helps clarify the existing provisions. Accordingly, we accept the ISO's proposed revisions on this issue.

F. Interest on Default Payments

48. The ISO proposes to revise SABP Section 6.10.5 to provide that, if an ISO debtor fails to make timely payment (on the designated Payment Date),⁸ the ISO debtor must pay interest on the default amount until the later of the Payment Date or the next Payment Date after a payment is received. In other words, if an ISO debtor misses an invoiced Payment Date, it must pay the interest that would accrue until the next Payment Date, regardless whether it pays the amount one day or fourteen days late.

49. PG&E protests that the ISO's proposal is actually a discriminatory penalty. Dynegy comments that the ISO has not adequately explained whether the proposed change will conflict with bankruptcy law, and notes that the Section 502(b)(2) of the Bankruptcy Code proscribes interest on unsecured claims and that the "automatic stay" provision limits discretion regarding the computation of interest.

50. In its answer, the ISO cites to the mounting problem of late payments by Scheduling Coordinators, and explains that the late payments prevent the ISO from timely paying creditors. It states that the proposed revision is justified since some additional penalty should be borne by those who caused the delay. With regard to Dynegy's concern, the ISO explains that the proposal is aimed at Scheduling Coordinators that are not in bankruptcy.

51. The ISO has proposed using the Commission's methodology for the calculation of interest (which is not protested, and accepted below in Section G of this order) as set forth in 18 C.F.R. §35.19(a)(2)(iii). This methodology provides incentive for timely payment. The ISO has not provided a convincing argument for an additional penalty, as it has requested in its proposed revision to SABP Section 6.10.5. Further, a penalty provision should be clearly indicated as such, and not characterized as a revision to the interest methodology. Therefore, we will reject this provision. However, if untimely payments to the ISO by market participants are a persistent problem, this determination is without prejudice for the ISO to file a request to revise the tariff to include a separate penalty provision together with a justification for the need for such penalty provision.

⁸ The ISO states that Payment Dates on the ISO Payments Calendar occur every two weeks. ISO answer at 15.

G. Other Provisions

52. In addition to the previous Tariff changes, the ISO proposes: (1) the elimination of invoices due to or from any market participant under \$10.00 (proposed Tariff Section 11.6.2.1); (2) a change in the timing of FERC Annual Charges invoicing to Scheduling Coordinators (proposed Tariff Section 7.5.1.2); and (3) elimination of the definition of ISO Default Interest Rate and use of the Commission's methodology for the calculation of interest.

53. These provisions are not protested. The Commission finds that these provisions are just and reasonable and accepts them.

Mirant Bankruptcy

54. On September 12, 2003, the Bankruptcy Court for the Northern District of Texas issued a "Temporary Restraining Order Against the Federal Energy Regulatory Commission" ("TRO") in *In re Mirant Corp. (Mirant Corp. v. FERC)*, Adversary Proceeding No. 03-4355, which enjoins the Commission "from taking any action, directly or indirectly, to require or coerce the [Mirant] Debtors to abide by the terms of any Wholesale Contract [to which a Mirant Debtor is a party] which Debtors are substantially performing or which Debtors are not performing pursuant to an order of the Court unless FERC shall have provided the Debtors with ten (10) days' written notice setting forth in detail the action which FERC seeks to take with respect to any Wholesale Contract which is the subject of this paragraph."

55. Should the TRO be converted into a preliminary injunction, an action that the Commission opposes, the Commission will appeal that order. Despite the Commission's disagreement with the validity of the TRO and its expectation that the TRO (or a preliminary injunction) will be vacated on appeal, the Commission must comply with it until vacated. The TRO requires ten days' written notice before the Commission takes a proscribed action with respect to a covered Mirant Wholesale Contract. Accordingly, to the extent that this Order requires Mirant to act in a manner proscribed by the TRO, the Order will provide written notice to Mirant of the action that FERC will take with respect to a covered Mirant Wholesale Contract, which action will not become effective until ten (10) days after issuance of this Order. In all other respects, this Order is effective immediately.

The Commission orders:

(A) The ISO's proposed changes are hereby accepted in part, modified in part, and rejected in part without prejudice to re-filing, subject to refund, as discussed in the body of this order.

(B) The ISO must submit, within 30 days, a compliance filing that contains amended Tariff sheets as discussed within the body of this order.

(C) The provisions of Amendment No. 53 that are hereby accepted, are effective August 9, 2003, except that Tariff Section 11.6.2.1 (regarding the elimination of invoices due to or from any market participant under \$10.00) is effective upon notice after the software necessary to implement the change is completed.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.