

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**California Independent System) Docket No. EL04-133-000
Operator Corporation)**

**MOTION FOR LEAVE TO FILE ANSWER AND ANSWER OF THE
CALIFORNIA INDEPENDENT
SYSTEM OPERATOR CORPORATION TO MOTIONS TO INTERVENE,
MOTIONS TO CONSOLIDATE, COMMENTS, AND PROTESTS**

Pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.213, the California Independent System Operator Corporation ("ISO")¹ hereby requests leave to file an answer, and files its answer, to the motions to intervene, motions to consolidate, comments, and protests concerning the ISO's Petition to Modify the Transmission Control Agreement, or, in the Alternative, Complaint ("TCA Filing").² In support whereof, the ISO states as follows.

I. BACKGROUND

On September 7, 2004, the ISO filed the TCA Filing in the above-captioned docket. The purpose of this filing is to modify the Transmission

¹ Capitalized terms not otherwise defined herein have the meaning set forth in the Master Definitions Supplement, Appendix D to the TCA.

² To the extent necessary, the ISO requests waiver of Rule 213(a)(2) (18 C.F.R § 385.213(a)(2)) to permit it to make this answer to protests. Good cause for this waiver exists here because the answer will aid the Commission in understanding the issues in the proceeding, provide additional information to assist the Commission in the decision-making process, and help to ensure a complete and accurate record in this case. See, e.g., *Entergy Services, Inc.*, 101 FERC ¶ 61,289, at 62,163 (2002); *Duke Energy Corporation*, 100 FERC ¶ 61,251, at 61,886 (2002); *Delmarva Power & Light Company*, 93 FERC ¶ 61,098, at 61,259 (2000).

Control Agreement (“TCA”) to allow Western Area Power Administration – Sierra Nevada Region (“Western”) to become a partial Participating Transmission Owner (“Participating TO”) and to accommodate the transfer by Western of Western’s interest in the upgrade of Path 15 to the ISO’s Operational Control. On that same day, the ISO also filed Amendment No. 63 to the ISO Tariff (Amendment No. 63”) in Docket No. ER04-1198-000. The purpose of Amendment No. 63 is to modify the ISO Tariff to accommodate the transfer by Western of Western’s interest in the upgrade of Path 15 to the ISO’s Operational Control, and to provide clarifications regarding cost recovery for this interest.

A number of parties submitted motions to intervene, motions to consolidate, comments, and/or protests concerning the TCA Filing.³ Several parties state their support for some or all of the TCA Filing.⁴ The ISO does not oppose any of the motions to intervene. As explained below, however, the protests are without merit and the Commission should accept the TCA filing as submitted.

³ The following parties submitted motions to intervene, motions to consolidate, comments, and/or protests concerning the TCA Filing: the California Department of Water Resources State Water Project (“SWP”); California Electricity Oversight Board (“CEOB”); Cities of Redding and Santa Clara, California, and the M-S-R Public Power Agency; City of Vernon, California; The Metropolitan Water District of Southern California; Modesto Irrigation District; Northern California Power Agency; Pacific Gas and Electric Company (“PG&E”), which also submitted a request for hearing; Sacramento Municipal Utility District (“SMUD”); San Diego Gas & Electric Company (“SDG&E”); Southern California Edison Company (“SCE”); Trans-Elect NTD Path 15, LLC; Transmission Agency of Northern California; Western; and Williams Power Company, Inc. In addition, the Public Utilities Commission of the State of California filed a notice of intervention.

Parties also submitted filings in response to Amendment No. 63. The ISO submitted an answer to those filings on October 13, 2004.

⁴ See CEOB at 2; PG&E at 2-3; SMUD at 3; SWP at 1-2; Western at 3-8.

II. ANSWER

A. The Commission has the Right to Modify the TCA

SCE argues that the “public interest” standard described in the *Mobile-Sierra* cases (i.e., the “*Mobile-Sierra* doctrine”) applies to the TCA, asserting that “[t]he Commission may not abrogate or modify the TCA, a multi-party agreement that contains a bar on unilateral amendments unless the public interest so requires.” SCE at 10.⁵ The TCA, however, contains no such bar. Therefore, the *Mobile-Sierra* doctrine does not apply to it.

Section 26.11 of the TCA states that the TCA may be modified in any of three circumstances: “(1) by mutual agreement of the Parties, subject to approval by FERC; (2) through the ISO ADR Procedure set forth in Section 13 of the ISO Tariff; or (3) upon issuance of an order by FERC. (Emphasis added.) The TCA clearly is not subject to the *Mobile-Sierra* doctrine: the doctrine only applies “absent contractual language ‘susceptible to the construction that the rate may be altered while the contract[] subsists.’” *Texaco Inc. v. FERC*, 148 F.3d 1091, 1096 (D.C. Cir. 1998) (quoting *Appalachian Power Co. v. FPC*, 529 F.2d 342, 348 (D.C. Cir. 1976)). Here, the language of Section 26.11 of the TCA is not only “susceptible to the construction” that the terms of the TCA may be altered, it *explicitly permits* such alteration upon Commission order.

Moreover, the section does not make any distinction between a modification of the TCA made *sua sponte* by the Commission or at the request of a party such as the ISO. Therefore, regardless of whether the Commission

⁵ SDG&E makes a similar argument. See SDG&E at 5.

modifies the TCA on its own or at the request of a party, the language of Section 26.11 permits that modification.

It was surely the Commission's intent to permit the TCA to be modified upon Commission order, even without mutual agreement of all the parties. In its October 30, 1997 order concerning the establishment of the ISO, the Commission directed the ISO to include in Section 26.11 of the TCA the very language that exists there today; the Commission stated that "[w]e require that the Transmission Control Agreement clearly provide that the agreement can be amended by order of the Commission." *Pacific Gas and Electric Company, et al.*, 81 FERC ¶ 61,122, at 61,572 (1997).

The language in the TCA clearly permitting modification upon order by the Commission may be contrasted with language in other agreements plainly barring such modifications. For example, some agreements to which SCE is a party each state that "It is the Parties' intention that, except as otherwise expressly provided, this [agreement] is a fixed rate contract and may be changed only in accordance with the standards established by and under the decisions of the United States Supreme Court in [the *Mobile-Sierra* cases]."⁶ Those agreements thus contain so-called *Mobile-Sierra* provisions and therefore are certainly subject to the *Mobile-Sierra* doctrine, unlike the TCA.

⁶ See, e.g., Amended and Restated Edison-Colton Pasadena Firm Transmission Service Agreement Between Southern California Edison Company and City of Colton (First Revised), FERC Electric Rate Schedule 363 (filed in Docket No. ER03-301-000) (Dec. 20, 2002), at § 2.8; Amended and Restated Edison-Banning Hoover Firm Transmission Service Agreement Between

B. The Commission Should Modify the TCA

SCE and SDG&E argue that the ISO has failed to justify the changes proposed in the TCA Filing with regard to Western. SCE at 3-4; SDG&E at 4. The Commission should reject these arguments. The ISO has explained in detail that: the Path 15 upgrade is critical to reducing Congestion on a critical transmission path in California; Western has a 10 percent interest in the upgrade (approximately 150 MW of transfer capacity); and Western would agree to transfer Operational Control only of its 10 percent interest in the upgrade and none of its other transmission assets, in exchange for Congestion revenues and ISO Tariff-defined Firm Transmission Right ("FTR") auction revenues associated with its interest in the upgrade. Transmittal Letter for TCA Filing at 11-12, 13-15, 17. Western explained the same things in the filing submitted in the present proceeding. Western at 2-5.

As the ISO stated in an earlier filing (quoted by SCE), "it is *generally* appropriate" – as opposed to universally appropriate – to make TCA modifications applicable to all Participating TOs. Answer of the ISO to the Complaint of the City of Vernon, California, Docket No. EL01-14-000 (Nov. 29, 2000), at 3 (emphasis added) (quoted in SCE's filing at 3-4). SCE, however, ignores the fact that Western is a special case, due to the nature of the Path 15 upgrade as a new transmission facility addition to a transmission path already under ISO Operational Control, the multi-party agreements that were necessary for the development, ownership, and operation of the Path 15 upgrade, and the

terms on which Western has agreed to turn over Operational Control of its interest in the Path 15 upgrade, and therefore different treatment from other Participating TOs is justified.

C. Other Clarifications and Changes to the TCA that are Suggested by Parties are Unnecessary

TANC contends that Section 8.1 and 8.2 of the TCA should be clarified, and Section 8.3 should be rejected, on the ground that the sections as written go beyond what is necessary for the assumption of Operational Control over Western's share of Path 15. TANC at 6-9. TANC's arguments in this regard are echoed by Cities/M-S-R (at 7-8) and MID (at 6-7). The ISO clarifies that Sections 8.1 and 8.2 are only intended to apply to all transmission facilities of Participating TOs, including the portion of the Path 15 upgrade financed by Western, but that those sections are not intended to apply to any of Western's facilities other than the portion of the Path 15 upgrade that it turned over to ISO Operational Control. Section 8.3, however, would apply to all of Western's transmission facilities. The only reason that TANC, Cities/M-S-R, and MID provide for rejecting Section 8.3 is that it "exceeds the appropriate reach of the ISO." However, these parties provide no explanation why the provisions of the section are inappropriate. Section 8.3 simply provides that "[c]hanges to non-ISO controlled RAS, UFLS, UVLS schemes or protective relay systems that result in changes to the normal or emergency rating of an ISO Controlled Grid transmission facility shall be coordinated with the ISO prior to implementation of the changes." This section is necessary in order to prevent unexpected changes in the ratings of transmission

facilities within the ISO Controlled Grid, which could impact grid reliability. The changes in the section are intended to better reflect current practices.

Transmittal Letter for TCA Filing at 28. Moreover, none of the Participating TOs, including Western – which are the only entities to which this provision currently applies – have offered any objection to the provision; it is only entities to which the provision currently does not and may never apply that have protested it.

Therefore, the changes are appropriate.

The CEOB expresses concern about what is characterizes as “the expansive scope of the proposed confidentiality provisions” in Section 26.3.1 of the TCA, and suggests a revision to allow information to be shared with the CEOB. CEOB at 2-4. The changes to Section 26.3.1 are simply intended to provide greater specificity as to which materials are covered by the section and to provide for such materials to be marked as “Confidential Data.” The changes are not intended to affect the extent of the CEOB’s rights, or for that matter any third party’s rights, to obtain information. Indeed, the ISO has not proposed to alter the provisions toward the end of the section that describe the circumstances in which the ISO will not keep information confidential. Moreover, the ISO has not proposed to alter Section 26.3.3, which contains provisions relating to the disclosure of information that is otherwise required to be maintained in confidence pursuant to Section 26.3. Therefore, the ISO believes that the CEOB’s concern is unfounded.

III. CONSOLIDATION IS UNNECESSARY

SCE and SDG&E argue that the captioned proceeding should be consolidated with the proceeding concerning Amendment No. 63. SCE at 22-23; SDG&E at 5-6. PG&E requests that the Commission institute hearing procedures with regard to Amendment No. 63. PG&E at 5. Consolidation is unnecessary and the Commission should not grant it. The Commission has before it all of the information that is needed to render a decision concerning the TCA Filing (and Amendment No. 63). Further, the fundamental issue that SCE and SDG&E have raised in this regard concerns revenue allocation, and the TCA does not address revenue allocation.

Moreover, consolidation is unnecessary and should not be granted because, as the ISO has explained, the TCA Filing (and Amendment No. 63) should be made effective on an expedited basis. The ISO has requested that the changes contained in the TCA filing be made effective upon no less than ten days' notice after November 1, 2004, in order to ensure that Operational Control over Western's interest in the Path 15 upgrade can be transferred to the ISO prior to energization of the upgrade, which may occur as early as mid-November 2004. The ISO explained that it requested expedited treatment of the filing because the ISO, Western, the other Participating TOs, and the ISO's other Market Participants will need to know the treatment of this capacity prior to the line being energized. Transmittal Letter for TCA Filing at 28-29. Absent this clear determination of Operational Control, the operational issues associated with

150 MW on a critical regional transmission interface will be thrown into a needless limbo.

IV. CONCLUSION

Wherefore, for the foregoing reasons, the ISO respectfully requests that the Commission accept the TCA Filing in its entirety.

Respectfully submitted,

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Date: October 14, 2004

CERTIFICATE OF SERVICE

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

Dated at Folsom, CA, on this 14th day of October, 2004.

/s/ Anthony J. Ivancovich
Anthony J. Ivancovich