

Petition. In the letter accompanying the errata, the ISO noted that its initial filed Petition failed to comply with the recently promulgated revisions to Rule 203 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.203, contained in Order No. 663.¹ In order to bring the filing into compliance with the rule, which requires a section setting forth a Statement of the Issues, the ISO retitled and made minor revisions to a section of the original filing.

On November 21, 2005, the Sacramento Municipal Utility District, the Modesto Irrigation District, the City of Redding, and the Transmission Agency of Northern California (collectively "Intervenor-Movants") moved to intervene in the proceeding. The motion to intervene remains pending. Intervenor-Movants also moved to reject the ISO's filing on the basis that the filing, as corrected, did not comply with Rule 203 and that the ISO did not seek a waiver of Rule 203. Intervenor-Movants assert at page 9 of their motion that the ISO "does not list each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the ISO is relying."

II. Statement of Issues.

1. The Statement of Issues in the ISO's Petition for Review complies with the intent of paragraph (a)(7) of Rule 203 of the Commission's Rules of Practice and Procedure as added by Order No. 663. It is also in substantial compliance with paragraph (a)(7) of Rule 203(a). There is no relevant Commission or court precedent upon which the ISO relies, other than Rule 203 and Order No. 663 themselves. Does the ISO's Petition for Review, as corrected, include a Statement of Issues "as appropriate," as required by Rule 203(a)?

¹ *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663, FERC Stats. & Regs., Regs. Preambles ¶ 31,193, 70 Fed. Reg. 55273 (Sept. 23, 2005).

2. Rule 203 provides that a failure to identify an issue in the Statement of Issues results in waiver, and a specific sanction is controlling over a general sanction. See *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957). The only appropriate sanction for noncompliance of with Rule 203(a)(7) is thus a disregard of the ISO's recommendations for procedures because the ISO has waived the issue regarding the appropriate procedures to be established. Is rejection of the ISO's Petition for Review an appropriate sanction for any noncompliance with the requirements of Rule 203 regarding a Statement of Issues, if the Commission determines such noncompliance exists?
3. If there is a legal basis to reject the ISO's Petition for Review, the Commission could in the alternative grant a waiver of Rule 203(a)(7) to the extent necessary to bring the ISO's Petition for Review into compliance with Commission rules and deny the motion. The ISO does not rely on any specific Commission or court precedent regarding this issue. Should the Commission grant a waiver if it finds noncompliance?

III. Argument

A. The ISO's Petition Complies with Rule 203(a).

The ISO's Statement of Issues complies with Rule 203 in that it fully complies with the purpose of paragraph 203(a)(7) and complies with the technical requirements of paragraph 203(a)(7) in all significant manners. In Order No. 663, the Commission stated that it was revising Rule 203 to ensure that other parties will know with certainty which issues to address in any responsive pleadings and that the Commission will know with certainty the issues being raised and the legal support cited as supporting that issue, enabling the Commission to respond promptly and thoroughly to such issues. Order No. 663, P 3. The Commission noted that by placing particular challenges squarely before the Commission for resolution, parties will avoid the potential for waiving the opportunity to raise that challenge on appeal. *Id.* at PP 3-4.

It is important to note that the Rule 203(a) provides that pleadings and tariff and rate filings must meet certain requirements, such as the inclusion of a Statement of Issues, “*as appropriate.*” The ISO’s Petition for Review is simply an initial filing that requires the resolution of no substantive issues, but only the establishment of procedures. The degree to which the Commission was concerned with such filings in Order No. 663 is unclear. There is no indication that the Commission considered a complete Statement of Issues with every detail specified in paragraph 203(a)(7) to be appropriate in cases where it serves little purpose. Indeed, there is no indication that the Commission has required a Statement of Issues in routine filings, such as rate schedules and compliance filings, that raise no substantive issues.

In light of these factors, there can be little question that the ISO’s filing fulfills the purpose of paragraph 203(a)(7) in that it informs the Commission and the potential parties of the only issue that the Commission needs to resolve in acting on the Petition. Moreover, the ISO’s filing complies with paragraph 203(a)(7) “*as appropriate*” because it substantially fulfills the technical requirements. The Petition contains a separate section entitled “Statement of Issues.” It explains the relevant controlling provisions of the ISO Tariff. It does not identify relevant Commission and court precedent because there is no controlling precedent for such a procedural issue, and the Statement of Issues so informs the Commission. The Statement of Issues does, however, inform the Commission that the ISO is proceeding analogously to Rule 15 of the Federal Rules of Appellate Procedures. Indeed, the only arguable failing of the

Statement of Issues is that rather than describing the single issue in a single enumerated paragraph, the Statement of Issues describes the single issue in four paragraphs under a single enumerated heading. This is at most a technical failing that should be regarded as *de minimis* by the Commission.

B. Rejection of the Petition Is Not A Contemplated Remedy for a Noncompliant Statement of Issues.

Even if the Commission were to conclude, contrary to the ISO's belief, that the ISO's Statement of Issues did not substantially comply with Rule 203, rejection of the ISO's Petition for Review would not be the appropriate remedy. Although Intervenor-Movants point to Rule 2001 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2001, under which the Commission may reject a filing that does not comply with the Commission regulations, Rule 203(a)(7) states that a failure to include an issue constitutes a waiver of the issue. It is a standard rule of statutory construction that the specific controls over the general. *See Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957).² The Commission would not have specified waiver of an issue as a sanction for noncompliance if it intended rejection to be the sanction. Moreover, rejection would certainly be an extreme sanction for what the Commission has identified as a formatting rule. The ISO notes that PG&E, which also filed a Petition for Review of the same arbitration, did not consider it necessary to

² "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" 353 U.S. 228-29, quoting *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944), quoting *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932).

include a Statement of Issues. The ISO, however, believes it would be silly to reject PG&E's Petition on that basis.

As the ISO has noted, the ISO's Petition is merely a procedural filing. The issue is solely the procedures to be established. Thus, if the Commission determines the ISO has waived the issue, the consequence would be that the Commission would disregard the ISO's proposed procedures and establish procedures without regard to the ISO's recommendations.

C. The Motion to Reject Is Misuse of Order No. 663.

As described above, the purpose of Order No. 663 was to assist parties and the Commission in responding to issues and to ensure the resolution of issues. Nowhere in the Order did the Commission evince an intent to provide parties, armed with a technical failure to comply with the letter of paragraph 203(a)(7) and in the absence of any showing of harm, with a vehicle to eviscerate the substantive rights of their opponents. Yet that is how Intervenor-Movants would use Order No. 663.

In the spirit of Order No. 663, the ISO, despite the simple nature of the Petition for Review, included even in its initial version a separate section alerting the Commission to the substantive issues that would be at issue in subsequently filed briefs. Although this section was not necessary, the ISO felt it would be helpful to the Commission and the parties in evaluating the necessary time for a briefing schedule. That section, although purporting to be not exhaustive, listed each error separately and then provided an explanation of the issue.

Before and after the application of the label "Statement of Issues," the ISO fully and explicitly explained the need to establish procedures and recommended

a schedule. Inasmuch as the Intervenor-Movants have made a counter-proposal, there is no question that they understood the ISO's position. There is no allegation that they have in any manner been prejudiced by the ISO's alleged violation of Rule 203.

When the ISO recognized that it had not included a section specifying a Statement of Issues, the ISO in good faith attempted to modify its Petition to comply with Rule 203 in a manner that would be least likely to occasion a challenge to the ISO's revision to the Petition. Now, despite the fact that there has been no harm and that all parties are aware of not only the procedural issue in the filing but also the substantive issues to be raised in the briefs, the ISO must file yet another pleading defending that good faith effort. The Commission should not allow Intervenor-Movants to transform the Commission's salutary reforms in Order No. 663 into another tool to be used to waste legal and administrative resources in efforts to avoid addressing substantive issues.

IV. Alternative Request for Waiver

To the extent that the Commission disagrees with the ISO's arguments presented above, the ISO requests a waiver of Rule 203(a) to the extent necessary to bring the ISO's Petition for Review into compliance with Commission Rules. For the reasons discussed above, no party would be prejudiced by such a waiver and, if the Commission disagrees with the arguments presented above, such a waiver is necessary in order to resolve the important issues discussed in the Considerations Warranting Review portion of the Petition of Review.

V. Conclusion

For the reasons discussed above, the ISO requests that the Commission deny the Motion to Reject.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this day served a copy of this document upon all parties listed on the official service list compiled by the Secretary in this proceeding, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated this 6th day of December in the year 2005 at Folsom in the State of California.

/s/ Daniel Shonkwiler

Daniel Shonkwiler