

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

Critical Path Transmission, LLC)	
and Clear Power, LLC)	
Complainants,)	
)	
v.)	Docket No. EL11-11-000
)	
California Independent System)	
Operator Corporation,)	
Respondent)	

**MOTION FOR LEAVE TO FILE ANSWER AND
ANSWER OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR
CORPORATION TO COMPLAINT**

The California Independent System Operator Corporation (“ISO”) hereby submits a Motion for Leave to File an Answer and Answer to the Motion for Leave to Answer and Answer (“Complainants Answer”) filed in this proceeding by Critical Path Transmission, LLC (“Critical Path”) and Clear Power, LLC (“Clear Power”) (together, “Complainants”).¹ On December 14, 2010, Complainants filed a complaint (“Complaint”) arguing that the ISO has violated its tariff by failing to study Complainants’ proposed projects under the ISO tariff rates, terms, and conditions that were in effect prior to the implementation of the ISO’s revised transmission planning process (“RTTP”) and that the evaluation of their proposed projects under the RTTP violates the filed rate doctrine. Following the ISO’s January 11, 2011, answer to the Complaint (“ISO Answer”), Complainants filed Complainants Answer.

¹ The ISO submits this filing pursuant to Rules 206(f), 212, and 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.206(f), 385.212, and 385.213 (2010).

Complainants Answer includes a number of new mischaracterizations and baseless arguments. The ISO therefore requests leave to address these items in an answer. Because these, and Complainants' initial arguments, lack merit, the Commission should deny the Complaint.²

The background of the Complaint is set forth in the ISO Answer. The ISO respectfully refers the Commission to the ISO Answer for that information.

I. Motion to File Answer

Rule 213(a)(2) of the Commission's Rules of Practice and Procedures generally prohibits answers to answers.³ The Commission has accepted answers that are otherwise prohibited if such answers clarify the issues in dispute.⁴ Answers have also been accepted where the information assists the Commission in making a decision.⁵ Complainants seek permission to file an answer to an answer. The ISO does not believe they have met the Commission's criteria for granting a waiver of its regulation.

Nonetheless, if the Commission grants Complainants' request, the ISO moves for waiver of Rule 213(a)(2) to the extent necessary to allow the ISO to answer Complainants Answer. As stated above, the ISO believes that Complainants Answer includes a number of new mischaracterizations and baseless arguments and that the ISO's response to these matters will assist the Commission in reaching its ultimate determination with respect to the substantive

² Complainants also ask that, if the Commission finds that the ISO's deferral of the evaluation of their projects was permissible under the previous ISO tariff, then the Commission should set the justness and reasonableness of the tariff provisions for hearing. That request has been rendered moot by the Commission's approval of tariff revisions implementing the RTPP in *Cal. Indep. Sys. Operator Corp.*, 133 FERC ¶ 61,224 (2010) ("RTTP Order").

³ 18 C.F.R. § 385.213(a)(2) (2010).

⁴ See *Southwest Power Pool, Inc.*, 89 FERC ¶ 61,284 at 61,888 (2000).

⁵ See *El Paso Electric Co.*, 72 FERC ¶ 61,292 at 62,256 (1995).

issues raised by the Complaint. The ISO notes that, under the Commission's regulations, the respondent to a complaint will have the final opportunity to respond to opposing argument. Moreover, under the Commission's regulations, if a respondent fails to answer a complaint, facts alleged in the complaint may be deemed admitted.⁶ Complainants Answer is essentially a supplement to their Complaint. The Commission should not allow Complainants to alter the right of the ISO as the respondent to that Complaint to address all factual assertions and allegations made by Complainants. Good cause therefore exists to permit this answer.

II. Answer

1. **Contrary to Complainants' Assertion, the ISO's Request for a Waiver of the Submission of Economic Project Proposals in the 2010 Request Window Is Irrelevant.**

In their summary, Complainants argue:

The CAISO's Answer defends its actions based almost entirely on a theory of discretion that is unsupported by any reasonable interpretation of the tariff – an especially remarkable argument in light of the fact that the CAISO recently saw fit to file a Petition for Tariff Waiver of Section 24.2.3(a) – the provision dealing with the evaluation of Economic Projects *and the same exact tariff provision at issue in this Complaint* – for the 2010 Request Window.⁷

In its later argument, in an attempt to discredit the ISO's arguments related to the ISO's discretion regarding the timing of the evaluation of economically-driven project under the former transmission planning process, Complainants assert:

[T]he CAISO itself all but settled this question when it filed, just a few months ago in Docket No. ER10-2191, a petition for a

⁶ 18 C.F.R. § 385.213(e)(1) (2010).

⁷ Complainants Answer at 3.

temporary waiver of Section 24.2.3 to suspend consideration of Economic Projects for the 2010/2011 planning cycle.⁸

Both these statements are incorrect. As an initial matter, Complainants claim that the tariff provision that was the subject matter of the ISO's Petition for Tariff Waiver -- namely former Section 24.2.3—Request Window is "*the exact same tariff provision at issue in this Complaint*" is incorrect. Indeed, at page 6 of their Complaint -- the same page where they make this claim -- they indicate that their objections are to the ISO's actions under former Section 24.2.3.1 -- CAISO Assessment of Request Window Proposals. These are not the same tariff sections, and they address different activities.

In Docket No. ER10-2191, the ISO requested a waiver of former section 24.2.3(a), which provides for the *submission* of economically driven projects through a request window. Section 24.2.3(a) is mandatory; the ISO could not avoid a request window for economically driven projects without a waiver. The then-pending tariff revisions to implement RTPP modified how the ISO identifies projects to address economic needs and eliminated the request window for economic projects. The Commission found that the requested waiver was justified and would "avoid potentially unnecessary expenditure of resources associated with the development and evaluation of economically-driven transmission projects."⁹

⁸ *Id.* at 5.

⁹ *Cal. Indep. Sys. Operator Corp.*, 133 FERC ¶ 61,020 at P 7 (2010)

In its Petition for Waiver, the ISO did not request a waiver “to suspend *consideration of Economic Projects.*”¹⁰ The ISO’s assessment of project proposals submitted in the request window was governed by the-then effective section 24.2.3.1 of the ISO tariff, not 24.2.3(a). Section 24.2.3.1 is the provision that provided the ISO with discretion, and it is this provision that is at issue in the complaint. The ISO did not seek waiver of section 24.2.3.1. There was no inconsistency between the discussion in the ISO Answer of the ISO’s discretion under section 24.2.3.1 of the ISO tariff and the waiver petition.

2. Complainants Provide No Support for Their Interpretation of “As Appropriate.”

Complainants challenge the ISO’s assertion that the words “as appropriate” provide it with discretion. Complainants contend:

[T]he phrase “as appropriate” appears throughout the CAISO Tariff (in the body of the tariff alone, the phrase “as appropriate” is used as a qualifier well over thirty times). In none of these instances is a grant of “broad discretion” a reasonable interpretation. The CAISO Tariff very consistently uses that phrase to set off an either/or proposition.¹¹

The phrase “as appropriate” must be interpreted within the context of each tariff provision. Moreover, whether “as appropriate” refers to an either/or determination is not relevant to whether the use of that phrase in a particular tariff section provides the ISO with discretion. For example, under former section 24.1.1.1 of the ISO tariff, the ISO, in developing the Unified Planning Assumptions and Study Plan, is to include regulatory initiatives “as appropriate.” This could be seen as an “in or out” either/or proposition, but nonetheless, the

¹⁰ Complainants Answer at 5 (emphasis added.) Of course, because there was no 2010 request window for such projects, there were no projects to consider.

¹¹ *Id.* at 7.

ISO must be able to exercise discretion in making the judgment. Under Complainants' reading, the ISO would be forced to make only a binary decision whether to include or exclude every regulatory initiative.

Similarly, in section 24.2.3.1 of the ISO tariff in effect during the period covered by the Complaint, the ISO had to determine, based on its preliminary analysis, whether to study a proposal as part of the then-current planning cycle. As described in the ISO Answer, the ISO determined that it could not study economically driven project proposals in light of the unanswered questions regarding how the ISO would enhance its transmission planning process to achieve the California 33 percent renewable portfolio standard ("RPS").

At pages 14-16 of its Answer to the Complaint, the ISO explained specific transmission planning process inputs and assumptions that created uncertainty and which needed to be addressed before the ISO could effectively evaluate the 2008 and 2009 request window proposals. The ISO also attached, as Attachment A to the ISO Answer, a letter to Phil Harris (one of Critical Path's general partners), which also specified these issues as needing to be addressed and resolved to some degree of certainty before the ISO could properly evaluate the 2008 and 2009 request window projects and develop a cost-effective transmission plan for the future.¹² Although Critical Path and Clear Power makes several general and conclusory remarks regarding the ISO's use of its discretion regarding the evaluation of their projects, their answer to the ISO Answer does

¹² As the ISO indicated in its Answer to the Complaint, the ISO also explained these reasons in previous pleadings filed with the Commission. See Reply Comments of The California Independent System Operator Corporation, Docket No. RM10-23 at 45-47 (Nov. 12, 2010); Reply Comments of The California Independent System Operator Corporation at 9-10, Docket No. AD09-8 (Dec. 18, 2009).

not say one word regarding the specific reasons that the ISO gave or even object to one of the reasons the ISO gave. Their utter failure – either in their Complaint or in their answer -- to address even one of the reasons the ISO gave in support of the decision to defer consideration of their projects must result in rejection of the Complaint.

Moreover, as also discussed in the ISO Answer, the ISO's authority to study large projects, such as Complainants', over multiple cycles is explicit in section 24.2.4(c) of the tariff. This provision is discussed further below.

3. The Question of Whether Section 24.2.3.1 Is Just and Reasonable Is Moot.

Complainants assert that, if the ISO had discretion whether to study a project proposal in the then-current planning cycle, such discretion was unjust and unreasonable.¹³ As indicated in the preceding section, Critical Path and Clear Power have not even attempted to address the explanations the ISO has consistently provided as to why the ISO's exercise of its discretion was not unjust and unreasonable. They rely instead on conclusory allegations that do not even acknowledge, let alone address, the reasons provided by the ISO. Such reliance on bald assertions requires rejection of the Complaint.

In any event, while the ISO believes that such discretion is just and reasonable unless exercised in a manner that is unduly discriminatory or arbitrary, that issue is moot. As the Cities of Anaheim, *et al.*, pointed out in their protest to the Complaint, under section 206 of the Federal Power Act, the Commission can only direct tariff revisions prospectively, and the provisions

¹³ *Id.* at 8-9.

alleged to be unjust and unreasonable are no longer in effect. Section 24.2.3.1 has been superseded by the revisions to section 24 of the ISO tariff implementing the RTPP accepted by the Commission in the RTPP Order.

4. Complainants Have Made No Showing of Discrimination.

Complainants continue to argue that the ISO discriminated by treating sponsors of economically driven projects differently from sponsors of reliability-driven projects and from Large Generator Interconnection Procedure Network Upgrades.¹⁴ The ISO explained in the ISO Answer that these groups are not similarly situated, and Complainants makes no effort to demonstrate they are.

The ISO also explained that it treated independent developers and Participating Transmission Owners identically with regard to economically driven proposals. Yet Complainants asserts, “[T]he fact that one of the suspended projects was submitted by PG&E does not cure the problem.”¹⁵ In fact, while the ISO used the Pacific Gas & Electric project as an example in the complaint, it was, as was apparent in the ISO Answer, only one of a number of project proposals submitted by various Participating Transmissions Owners for which the ISO deferred study.¹⁶ The ISO established that it treated all similarly situated project sponsors – *i.e.*, those that proposed economically driven projects – in the same manner.

¹⁴ *Id.* at 10.

¹⁵ *Id.*

¹⁶ Footnote 23 of the ISO Answer provided a reference to the list of 2008-2009 projects which are being considered in the 2010/2011 planning cycle. This list is available at: <http://www.caiso.com/2853/285387e16d5b0.pdf> .

5. The ISO's Treatment of Complainants' Projects Is Consistent with the Treatment of Large Projects Under the ISO Tariff.

As noted above, the ISO Answer pointed out that former section 24.2.4(c) of the ISO tariff provides that large projects, such as Complainants' project, may be studied over multiple cycles. Complainants point out that former section 24.2.4(c) also stated, "Large Projects will be identified in the Transmission Plan for each cycle, but will be presented to the CAISO Governing Board for approval in accordance with the study and public participation schedule." Complainants state that this, and representations to the ISO Board, established that the ISO's ability to study a large project over multiple cycles does not permit the ISO to omit the project from the transmission plan all together or to refuse to study the project.¹⁷

As an initial matter, Complainants' comments ignore the fact that the tariff does not state the point at which a large project would be included in the transmission plan. That information was provided in the Business Practice Manual. Section 2.1.2.4 of the Business Practice Manual in effect when the 2010 Transmission Plan was issued stated:

If consistent with the agreed upon schedule in the Study Plan, the Transmission Plan also may include the results of other specific technical studies involving Large Projects or other identified planning evaluations. Otherwise, the results of Large Projects and other projects requiring Board approval will be presented independently of the Transmission Plan.

Complainants' interpretation of the tariff is thus in conflict with the application of the tariff documented in the then-effective Business Practice Manual. If Complainants felt the Business Practice Manual was inconsistent with the ISO

¹⁷ Complainants Answer at 14-15.

tariff, it should have complained in the stakeholder process which led to this provision of the Business Practice Manual.

More importantly, the ISO did not refuse to study Complainants' projects. It deferred study of these projects until it had the necessary information about the infrastructure necessary to meet California's 33 percent RPS. The ISO informed stakeholders of that intention in December 2009.¹⁸ It was thus not possible to establish a schedule for consideration until such determinations were made. The ISO Board was made fully aware of this deferral in the ISO's presentation of the 2010 Transmission Plan.¹⁹

6. Complainants Misstate the ISO's Filed Rate Arguments.

Complainants also criticize the ISO's discussion of the filed rate doctrine in the ISO Answer. Complainants state:

As the CAISO well knows, Section 205 can only change rates on a prospective basis, and does not speak to, much less absolve, the CAISO's failure to follow the rate on file from the time the 2008 Request Window opened to the effective date of the CAISO's Revised Transmission Planning Process ("RTPP"), a period of years.²⁰

Complainants completely mischaracterize the argument. The ISO never stated that the filed rate doctrine would excuse a tariff violation. Considering that the ISO has explained why it did not violate its tariff, the ISO would have no reason to make such an argument. Rather, the ISO was responding to Complainants' argument, which they do not renew in their Complainants' Answer, that the filed rate doctrine compels consideration of their projects under the prior

¹⁸ *ISO Renewable Energy Transmission Planning Process (RETTP): Second Revised Straw Proposal*, at n.3 (Dec. 2, 2009). This document is available on the ISO's website at <http://www.caiso.com/2478/2478f34d3a6d0.pdf>.

¹⁹ See <http://www.caiso.com/2765/276565e82a240.pdf> at 6.

²⁰ Complainants Answer at 15.

ISO tariff rather than under the RTPP tariff provisions. Complainants' creation and rebuttal of a straw man argument which was not advanced in the ISO Answer does not change the fact that in this instance the filed rate doctrine requires consideration of its project under the RTPP.

7. That the Complaint Was Filed Prior to the RTPP Order Does Not Obviate the Fact that It Now Constitutes a Collateral Attack on the RTPP Order.

Complainants contend that their Complaint cannot be considered a collateral attack on the RTPP Order because it was filed prior to the issuance of the RTPP Order.²¹ Although it may not have been a collateral attack when filed, the continued prosecution of the Complaint can only be considered a collateral attack. As the ISO Answer noted, the Commission has stated:

Historically, the Commission's policy against relitigation of issues is not constrained by the limits of the judicial doctrine of collateral estoppel. The Commission's position on relitigation of issues is one where in the absence of new or changed circumstances requiring a different result, "it is contrary to sound administrative practice and a waste of resources to relitigate issues in succeeding cases once those issues have been finally determined."²²

Complainant knew that the treatment of the 2008 and 2009 request window projects, including their projects, under the RTPP was at issue in the RTPP proceedings. Complainants also knew that there were multiple opportunities – before, during, and after the technical conference in the RTPP proceedings – to raise the arguments made in their Complaint. They knew that the Commission needed to issue an order by January 3, 2011, when the RTPP tariff provisions were to go into effect. Rather than litigating the issue in the RTPP proceeding,

²¹ *Id.* at 18.

²² *Alamito Co.*, 41 FERC ¶ 61,312 at 61,829 (1987), *citing Central Kansas Power Co.*, 5 FERC ¶ 61,291, at 61,621 (1978).

Complainants waited until December 14, two days before the Commission's scheduled meeting which included in the RTPP proceedings on the agenda, to file the Complaint. There can be no question that continued prosecution of the Complaint is an attempted "relitigation of issues . . . in the absence of new or changed circumstances."

8. Complainants' Arguments About the Large Generator Interconnection Procedures Have No Place in this Proceeding.

Complainants argue that the treatment of the 2008 and 2009 project proposals under the RTPP, while approval of interconnections under the Large Generator Interconnection Procedures ("LGIP") moves forward, amount to piecemeal, rather than comprehensive, planning and will be detrimental to California ratepayers.²³ Complainants once again ignore the fact that the LGIP are separate and distinct from the transmission planning process,²⁴ and that interconnection requests are initiated by generators.

The ISO is obligated to provide generation interconnection service to customers in accordance with its Commission-approved interconnection procedures. This obligation includes a requirement that the ISO and the applicable Participating Transmission Owner enter into a large generator interconnection agreement that obligates the Participating Transmission Owner to build upgrades necessary to facilitate a generator interconnection where the interconnection customer has completed all milestones and requirements of the LGIP.

²³ Complainants Answer at 18-20.

²⁴ See RTPP Order at P 105.

Complainants apparently would have the Commission suspend the LGIP until the ISO evaluates their projects. There is no precedent or justification for such action. Indeed, the Commission has expressly found that the approach to which Complainants object is just and reasonable:

. . . we find CAISO's proposal strikes a reasonable balance between the objectives of the LGIP, i.e., accommodating the generators' need to interconnect to the grid in a timely manner, and the benefits that can flow from evaluating the larger projects in the comprehensive transmission planning process.²⁵

This is just another instance in which the Complainants are trying to relitigate issues in contravention to Commission policy.

III. Conclusion

For the foregoing reasons and the reasons set forth in the ISO Answer, the Commission should deny the Complaint submitted in this proceeding.

Respectfully submitted,

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²⁵ RTPP Order at P 103.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each party listed on the official service list for these proceedings, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Folsom, California on this 9th day of February, 2011.

As/ Anna Pascuzzo

Anna Pascuzzo
California Independent System
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