THE UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

North Star Steel Company,	)	
Complainant	)	
	)	
v.	)	**Docket No. EL06-68**
	)	
Arizona Public Service Company,	)	
California Independent System Operator Corporation,	)	
Enron Power Marketing, Inc.	)	
Nevada Power Company,	)	
PacifiCorp,	)	
Powerex Corp.,	)	
Public Service Company of New Mexico,	)	
Tucson Electric Power Company,	)	
Respondents	)	

ANSWER OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR TO THE COMPLAINT OF NORTH STAR STEEL COMPANY, AND MOTION FOR SUMMARY DISPOSITION

Even under the best of circumstances, the Commission should be reluctant to re-open issues that have been litigated previously. Here, a retail purchaser of electricity seeks, for the first time, refunds from the CAISO markets for alleged overcharges during the crisis of 2000-01. The complainant did not transact with the CAISO, and thus lacks privity or any other standing to pursue claims against it. And even if the complainant stood in the shoes of the CAISO Scheduling Coordinator, its claims against CAISO must fail as impermissible collateral attacks on four years of Commission orders in the California Refund Case.[1]

[1] San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, *et al*., Docket Nos. EL00-95, *et al*.

Each of these defects is independently fatal to the complaint.[2] Because it is entitled to prevail as a matter of law, the CAISO respectfully requests summary disposition of all claims against it pursuant to 18 C.F.R. 385.217(b).

I. FACTUAL BACKGROUND

A. Allegations in the Complaint

The complainant, North Star Steel Company, operated a steel recycling facility in Arizona that received electric service under a three-party contract with AEPCO and the Mohave Electric Cooperative, Inc. *See* Complaint ¶¶ 2, 5. Under this contract, North Star paid AEPCO the wholesale price at which AEPCO bought the electricity, plus a markup and expenses. *See* Complaint ¶ 7. The agreement, which is referred to interchangeably as the "NFES Agreement," "NFESA," and "Non-Firm Electric Service Agreement," is attached to the Complaint as Exhibit 1.

North Star is seeking refunds based AEPCO's wholesale purchases from the Respondents from January 1, 2000 through June 21, 2001. The Complaint alleges that these transactions violated Section 205 of the Federal Power Act because the rates exceeded the "market clearing price," meaning the "hourly market clearing price established by the Commission in . . . the California Refund Proceeding . . . Docket EL00-95-000." *See* Complaint ¶¶ 27, 28 & Exhibit 2 ¶ 6. North Star seeks refunds as detailed in Exhibit 2D, including:

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[2] In addition, the underlying premise of the Complaint does not apply to CAISO. The Complaint alleges that the FPA time limitations on seeking refunds, which are now long-expired, do not apply because the Respondents sold energy at market-based rates that were not filed with the Commission. *See* Complaint ¶ 28. The CAISO itself, however, does not sell electricity, at market-based rates or otherwise. The Commission does need not to reach this issue because the claims against CAISO can be rejected for the other reasons stated above. Therefore it is not further briefed.

1) the amount by which AEPCO's purchase price exceeded the mitigated market clearing price established in the California Refund Proceeding;

2) plus, the markup that North Star paid to AEPCO under the NFES Agreement.

See Complaint ¶ 26, Exhibit 2 ¶ 6.

B. The CAISO Transactions At Issue

The Complaint does not allege that CAISO is a party to the NFES Agreement, or any other contract with North Star. The CAISO market purchases referenced in the Complaint (Exhibit 2D) could only have been made by AEPCO. A prerequisite to buying energy in the CAISO markets is certification as a Scheduling Coordinator. AEPCO is a Scheduling Coordinator;[3] North Star is not.

It is common for Scheduling Coordinators to re-sell electricity to their own customers. But absent some other agreement, it is the Scheduling Coordinator, not its customers, that is financially responsible in the CAISO markets. By the terms of the Scheduling Coordinator Agreement, the Scheduling Coordinator "shall have the primary responsibility to the ISO, as principal, for all Scheduling Coordinator payment obligations under the ISO Tariff." SCA, Section 2(E); *see also* CAISO Tariff 22.13 (formerly § 2.2.1; in procuring energy, the CAISO acts as agent for the relevant Scheduling Coordinators).

[3] AEPCO executed a Scheduling Coordinator Agreement ("SCA") with CAISO on January 18, 2000, which was filed with the Commission in Docket No. ER00-1568-000. The *pro forma* SCA is available on the CAISO website at http://www.caiso.com/docs/2005/10/28/2005102815281216540.html.

C. The California Refund Proceeding

As the Commission must be painfully aware, there is a proceeding that concerns refunds from all sellers in the CAISO and PX markets during California's electricity crisis. In the EL00-95 docket, the Commission has issued a series of orders that establish procedures for calculating just and reasonable rates for the California markets from January 1, 2000 through June 21, 2001. Both North Star and AEPCO are parties. *See* Complaint ¶ 13 (North Star intervention) and January 17, 2002 AEPCO Request for Rehearing (one of many AEPCO pleadings). In brief, the Commission's determination was that the rates should remain as initially settled for Trade Dates January 1 through October 1, 2000. For the remainder, the Commission has ordered the CAISO to resettle its markets based on a mitigated market clearing price, as referenced in the Complaint, and other adjustments. *See, e.g.,* Order Establishing Evidentiary Hearing Procedures, Granting Rehearing in Part, and Denying Rehearing in Part, 96 FERC ¶ 61, 120 (July 25, 2001); Order on Proposed Findings on Refund Liability, 102 FERC ¶ 61, 317 (March 26, 2003).

II. ARGUMENT

CAISO IS ENTITLED TO SUMMARY DISPOSITION BECAUSE THE COMPLAINT FAILS TO ASSERT A LEGALLY VIABLE CLAIM FOR RELIEF AGAINST IT

A. North Star Has No Contractual Relationship With CAISO

North Star's purchases from AEPCO are governed by the NFESA. See Complaint ¶ 5 and Exhibit 1. As the CAISO is not a party to that agreement, North Star has no contractual rights against CAISO.

The CAISO transactions that are the subject of the Complaint were with AEPCO, not North Star. Those transactions are governed by the CAISO Tariff, to which AEPCO is bound as a Scheduling Coordinator. North Star's relationship with AEPCO does not give it the right to a separate accounting under the CAISO Scheduling Coordinator Agreement. The Commission affirmed this fundamental contractual principle in *La Paloma Generating Company, LLC v. CAISO*, 110 FERC ¶ 61, 386; 2005 FERC LEXIS 791 (March 29, 2005) (pending rehearing). In that matter, the customer of a Scheduling Coordinator requested an order directing CAISO to hand over cash collateral that was posted by the Scheduling Coordinator. The customer argued that it had supplied the cash to cover its portion of the Scheduling Coordinator's portfolio. The Commission granted summary disposition in favor of CAISO, holding that the customer lacked a contractual relationship with the CAISO with respect to the collateral. The Commission emphasized: "It is the Scheduling Coordinator, not its clients, that has the primary responsibility to the CAISO, as principal, for all Scheduling Coordinator payment obligations under the CAISO tariff." *Id.* ¶ 13, 2005 FERC LEXIS at ** 7-8. North Star's alleged connection to the CAISO markets is even less tenable.

Although AEPCO would have standing to seek refunds from the CAISO markets, North Star does not allege that it is rightfully asserting AEPCO's rights under the Scheduling Coordinator Agreement. Nor has there been a request to CAISO for consent to an assignment, as required in Section 4 of the agreement, which requires consent to any assignments.

Lacking any contractual relationship to CAISO, North Star has no legal basis for recovering refunds from it. The claims against CAISO should be summarily rejected for this reason alone.

B. Any Claims On Behalf Of AEPCO Would Be Barred By Collateral Estoppel

Even assuming that North Star has standing to assert the rights of AEPCO under the CAISO Tariff, North Star's claims are improper collateral attacks on the Commission's final orders in the California Refund Case.

Collateral estoppel, or issue preclusion, bars the relitigation of issues that were actually adjudicated in previous litigation between the same parties. *E.g.*, *Kamilche Co. v. United States*, 53 F.3d 1059, 1062 (9th Cir. 1995).[4] The policy against relitigation applies even more broadly at the Commission than in the courts. *E.g.*, *Alamito Co.,* 43 FERC ¶ 61,274 (1988). In *Alamito*, a utility asserted it was not subject to collateral estoppel because it was not a party to the previous case – an element that would have been required by federal courts. Notwithstanding that fact, the Commission responded that its "long standing" policy against relitigation of issues disposed of the dispute:

> The basis for this position is not the doctrine of res judicata, collateral estoppel, stare decisis, or law of the case, but the fact

[4] This rule applies with even greater force to administrative proceedings. The Supreme Court has "long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality." *Astoria Federal S. & L. Ass'n v. Solimino*, 501 U.S. 104, 107 (1991). The Commission has applied preclusion doctrines to several matters. *E.g.*, *Lake Murray Docks, Inc. v. South Carolina Electric & Gas Co.*, 57 FERC ¶ 61,320, at 62, 035 (1991) (noting that it had previously ruled on the subject matter of the complaint and consequently dismissing it "on the basis of res judicata" because the complaint had "presented no new information warranting a new complaint proceeding . . . ."); *Central Kansas Power Co., Inc.*, 5 FERC ¶ 61, 291, at 61, 621 (1978) ("In the absence of new or changed circumstances requiring a different result, there appears to be no reason why substantive ratemaking principles, once established, should not continue to be applied").

> that it is contrary to sound administrative practice and a waste of resources to relitigate issues in succeeding cases once those issues have been fully determined. Absent a showing of significant change in circumstances, the relitigation of an issue is simply not justified. Sound public policy reasons support the Commission's policy against relitigation of issues. Regulatory proceedings before the Commission frequently involve numerous parties and issues. Finality could never be achieved if a single party could avoid litigation of an issue by not actively participating in the development of a record and thereby preserve its right to litigate the issue in subsequent proceedings.

Id. at 61, 753.

The rate for AEPCO's crisis-era transactions in the CAISO markets has been litigated exhaustively. The Commission has established a framework for calculating the ultimate rate. As a party to the proceeding, AEPCO is bound by these orders, and is barred from relitigating them outside the ongoing process of appellate review.[5] (The same would be true of North Star, which is also a party in Docket No. EL00-95, if it were asserting its own rights.)

And relitigation for the benefit of North Star is unnecessary. Once refunds are ultimately processed, AEPCO will receive any refunds to which it is entitled for CAISO transactions. At that point, AEPCO and North Star can settle their contract.

For these reasons, North Star's claim against the CAISO – even if it were entitled to assert the rights of AEPCO – is barred by collateral estoppel as well.

[5] Exhaustion of appellate review is not a prerequisite for collateral estoppel. To be "final" for purposes of collateral estoppel, a previous decision need only be immune, as a practical matter, to reversal or amendment. "Finality" in the sense of a final judgment (28 U.S.C. § 1291) is not required. *E.g.*, *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961) (Friendly, J.); *Zdanok v. Glidden Co.*, 327 F.2d 944, 955 (2d Cir. 1964).

III. CONCLUSION

Given the undisputed facts, the Complaint is defective as a matter of law. Accordingly, the CAISO respectfully requests that the Commission grant summary disposition in its favor or otherwise deny the Complaint. The Commission should also provide any other relief it deems appropriate.

Respectfully submitted,

/s/ Daniel J. Shonkwiler
Daniel J. Shonkwiler
The California Independent
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Dated: May 23, 2006

California Independent
System Operator Corporation

May 23, 2006

The Honorable Magalie Roman Salas
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Re: North Star Steel Company v. Arizona Public Service Company, et al.
Docket No. EL06-68-000

Dear Secretary Salas:

Enclosed please find an electronic filing of the Answer of The California Independent System Operator to the Complaint of North Star Steel Company, and Motion for Summary Disposition.

Thank you for your attention to this filing.

Respectfully submitted,

/s/ Daniel J. Shonkwiler
Daniel J. Shonkwiler
Counsel for the California Independent
System Operator Corporation

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 the above-captioned 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 this 23rd day of May, 2006 at Folsom in the State of California.

/s/ Daniel J. Shonkwiler
Daniel J. Shonkwiler