

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

California Independent System )  
Operator Corporation )  
)

Docket No. ER00-2019-006,  
ER01-819-002 and  
ER03-608-001

**MOTION OF THE  
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION  
TO STRIKE PORTIONS OF THE BRIEF ON EXCEPTIONS OF  
THE CALIFORNIA DEPARTMENT OF WATER RESOURCES—  
STATE WATER PROJECT**

Pursuant to Rule 212 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2003), the California Independent System Operator Corporation ("ISO") respectfully submits this motion to strike certain portions of the Brief on Exceptions of the California Department of Water Resources—State Water Project ("SWP") ("Brief") filed in this docket as referring to and relying upon extra-record evidence. SWP's submittal of such material constitutes an egregious violation of Commission regulations and due process. Specifically, the ISO requests that the Commission strike the following:

1. On page 12, the words "which has in recent weeks" and everything that follows through "run out of options," inclusive of footnotes;
2. Footnote 19;
3. On page 13, the words "Indeed, it is now clear" and everything that follows through footnote 26 on page 14, inclusive of footnotes;
4. On page 30, the words "According to the ISO," and all that follows through footnote 68 on page 31, inclusive of footnotes;

5. On page 31, the words “For instance, it appears” and all that follows through the end of the paragraph, inclusive of footnotes;
6. On page 32, the words “For instance, with respect to voltage support,” and all that follows through footnote 72, inclusive of footnotes;
7. On page 40, the words “Although SWP was led to believe” and all that follow through “See Ex. J-3, at 382” on page 48, inclusive of footnotes; and
8. On page 49, the words ““Moreover, given the ISO’s description” and all that follows through the end of the paragraph, inclusive of footnotes.

## **ARGUMENT**

From October 21 to November 14, 2003, Judge Bobbie McCartney considered the ISO’s proposed transmission Access Charge at hearing. This hearing was the culmination of years of stakeholder meetings, post-filing formal discussion, settlement negotiations, and other exchanges of information among the parties. The Judge carefully evaluated, identified for the record and duly logged a significant number of exhibits relating to all aspects of this proceeding. *On November 26, 2003, the Presiding Judge closed the record of the hearing.* On March 10, 2004, the Presiding Judge certified the record to the Commission; on March 11<sup>th</sup> the Presiding Judge issued her Initial Decision; and on April 9<sup>th</sup> a number of parties, including SWP, filed with the Commission briefs on exception.

As described below, each of the passages that the ISO moves to strike in SWP’s Brief on Exceptions refers to and relies upon material that is not part of the hearing record. Commission policy is unambiguous. Under Commission regulations and due process, in ruling on a proceeding that has undergone a

hearing before an Administrative Law Judge, the Commission does not, indeed cannot, consider evidence that was not part of the record before the Administrative Law Judge without reopening the record or otherwise providing a full opportunity for rebuttal. See *Office of Consumers' Counsel, State Of Ohio v. FERC*, 783 F.2d 206, 232-33 (D.C. Cir. 1986); 18 C.F.R. § 510(c). The Commission has repeatedly recognized this principle and has granted motions to strike arguments based on extra-record evidence.<sup>1</sup> The prohibition of the consideration of extra-record evidence is based in sound public policy. In this instance, SWP has used extra-record evidence not only to challenge the Initial Decision, but also to attack the ISO's good-faith and its commitment to reliability. The ISO has had no opportunity for cross-examination regarding these matters or to rebut the extra-record evidence relied on by DWR in an adversarial setting. Further, the ISO was not provided with notice of the circumstance under which the evidence was to be used.

Items 3, 7, and 8 above rely upon a Deposition of Chris Mensah-Bonsu, an exhibit that SWP filed on April 7, 2004 in another proceeding (Docket No. EL03-15). The deposition was taken March 24, 2004. SWP draws selectively from the deposition, accusing the ISO of discrimination and inconsistency. SWP's actions underscore the basis for the prohibition against extra-record evidence. Among other matters, SWP asserts that it was misled by ISO

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<sup>1</sup> See, e.g., *Northwest Pipeline Corp.*, 92 FERC ¶ 61,287 at 62,014-15 (2000); *Great Lakes Gas Transmission Limited Partnership*, 62 FERC ¶ 61,102 at 61,744 (1993); *United Gas Pipeline Co.*, 55 FERC ¶ 61,456, at 62,468 n.9; (1991). See also *Enbridge Properties*, 102 FERC ¶ 61,310 at PP 88 & 104 (2003); *Tennessee Gas Pipeline Co.*, 80 FERC ¶ 61,070 at 61,222 (1997); *Kentucky West Va. Gas Co.*, 43 FERC ¶ 61,496 at 62,224 (1988).

statements that there was no documentation regarding the standards and processes the ISO used in determining FTRs and capacity allocation for acceptance of the Southern Cities' capacity into the ISO. SWP Br. at 40. The discovery cited by SWP refers entirely to discussions *prior to Southern Cities execution of the Transmission Control Agreement*, which, as indicated in SWP's citations, was filed with the Commission on November 25, 2002. The documentation that SWP asserts contradicts these statements, on its face, involved discussions *after that date*.

SWP's reliance on this extra-record evidence provides no forum for the ISO to provide full evidentiary support for its disagreement with this assertion of inconsistency or SWP's assertions of discrimination. Moreover, counsel defending the deposition was not put on notice that SWP would be selectively using excerpts from the deposition for purposes of advancing SWP's positions in a proceeding other than the proceeding in which the deposition was taken. As such, counsel defending the deposition was not in any position to address SWP's allegations in this proceeding. Although the ISO has filed testimony in Docket No. EL03-15 on this same subject matter, as has Commission staff--both of which are at odds with SWP's conclusions--that testimony is not properly part of this proceeding. Although SWP suggests that this deposition is an appropriate matter for official notice, citing the Commission's notice of a deposition in Docket No. EL00-889,<sup>2</sup> SWP misses the point. In that instance, the Commission was taking official notice of an ISO admission in an open record and in a case that did

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<sup>2</sup> SWP Br. at 41 n.87, citing the rehearing order in *California Indep. Sys. Oper. Corp.*, 98 FERC ¶61,335 at 62,430 (2002).

not involve an evidentiary hearing. The record in this proceeding is closed under Rule 712 of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.712. SWP's use of this deposition constitutes a grievous violation of the ISO's right to due process and a gross manipulation of the Commission's fact-finding procedures that should be soundly rejected.<sup>3</sup>

Item 5 concerns unsupported assertions (citing SWP's own comments filed on March 29, 2004) about the ISO's consultations regarding the definition of PTO Service Area filed in Docket No. ER04-632. The need for an opportunity for the ISO to respond to such assertions is apparent given the implications that an lack of agreement with SWP is equivalent to a lack of effort on the part of the ISO to achieve consensus, and that a failure to reach agreement in this instance means that the ISO cannot or will not negotiate with New Participating TOs. Of course, such a view ignores the fact that six new Participating TOs have been added since 2000.

Items 1, 4, and 6 discuss statements and events concerning reliability that have occurred since the close of the record (Letter of ISO Vice President Randall Abernathy dated March 23, 2004; ISO Press Releases dated March 15, 2004, and March 29, 2004). The ISO seeks to strike this extra-record material because SWP uses it in an effort to twist a simple issue—whether the Commission should

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<sup>3</sup> As the Administrative Law Judge explained in *Texas Eastern Transmission Corp.*, 39 FERC ¶ 63, 036 at 65,204 (1987):

[The] submission after the close of the record, without a reopening under Rule 716, violates the prohibition in Rule 510(c). And, that latter rule aside, parties must not be permitted to add to a record periodically at any stage of a proceeding without limit, regardless of the merits of their reasons. To hold otherwise would deny their opponents a chance to attempt to refute the late evidence and make proceedings too elastic to be conclusive or manageable. It is trite but true that all litigation must have an end.

order the ISO in this proceeding to develop mechanisms to compensate SWP, on a non-competitive and nonjudgmental basis, for service it provides—into a referendum on the ISO's commitment to reliability. That is not an issue in this proceeding.

Item 2 concerns SWP's statement of its legal position in a filing on January 20, 2004. The statement neither is factual testimony nor was it before the Presiding Judge. Accordingly, it should not be considered by the Commission.

### **CONCLUSION**

Accordingly, the ISO respectfully requests that the Commission strike the indicated portions of the Brief on Exceptions of the California Department of Water Resources—State Water Project.

Respectfully submitted,

/s/ Michael E. Ward

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Dated: April 22, 2004

## CERTIFICATE OF SERVICE

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

Dated at Folsom, California this 22<sup>nd</sup> day of April, 2004

/s/ Anthony Ivancovich  
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