

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

City of Vernon, California

)

Docket No. EL01-14-000

**MOTION TO TREAT AS MOOT AND MOTION TO STRIKE
MOTION FOR LEAVE TO ANSWER AND ANSWER
OF CITY OF VERNON, CALIFORNIA**

Pursuant to Rule 212 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2000), the California Independent System Operator Corporation ("ISO")¹ submits its Motion to Treat as Moot and Motion to Strike the Motion for Leave to Answer and Answer of the City of Vernon, California ("Vernon") submitted in the above-captioned proceeding on December 7, 2000 ("Vernon Answer").

I. BACKGROUND

On November 9, 2000 as amended on November 17, 2000, Vernon filed a complaint requesting that the Commission require the ISO to: (1) approve Vernon's application to become a Participating Transmission Owner ("Participating TO"); (2) accept Vernon's proposed "clarifications" to the Transmission Control Agreement ("TCA");² (3) determine that Vernon's Scheduling Coordinator status is sufficient for Vernon to become a Participating TO; (4) find that Vernon has met the requirements of Section 3.1 of the ISO Tariff to become a Participating TO; (5) instruct the ISO to seek a waiver of the timing requirements of Section 3.1.1 of the ISO Tariff; and (6) take whatever other

¹ Capitalized terms not otherwise defined herein are used in the sense given in the Master Definitions Supplement, Appendix A to the ISO Tariff.

² The TCA is presently an agreement solely among the ISO and Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company, which are the Original Participating TOs.

actions are necessary for Vernon to become a Participating TO by January 1, 2001.³ On November 29, 2000 as supplemented on December 1, 2000, the ISO filed an answer to Vernon's complaint ("ISO Answer").

At its meeting on November 30, 2000, the ISO Governing Board unanimously approved Vernon's application, as modified by the ISO, to join the ISO, and authorized ISO management to file the necessary amendments to the TCA. These amendments included revisions to Sections 4.1.5, 6.2.2, 9.4, and 10.1.1 of the TCA to clarify the TCA in response to the concerns raised by Vernon, and appendices to identify the transmission interests that Vernon would be turning over to the ISO's Operational Control.

The Governing Board also authorized the ISO to file TCA amendments: (1) to update ISO Maintenance Standards in Appendix C to the TCA (changes that were previously authorized by the Governing Board at its meeting on September 7, 2000); (2) to include a new Appendix F identifying the persons to contact for notice purposes; and (3) to add a commitment to Section 16 of the TCA requiring any Participating TO, including Participating TOs that are not subject to the Commission's jurisdiction under Sections 205 and 206 of the Federal Power Act ("FPA"), to make any necessary refunds and adjustments to their Transmission Revenue Requirements ("TRRs") or balancing accounts and to undertake any other actions necessary to implement relevant Commission orders and the ISO Tariff.

Following the Governing Board meeting, the ISO forwarded a copy of the TCA, revised to reflect the changes approved by the ISO Governing Board, to Vernon for execution. As noted in the ISO's December 1, 2000 supplemental

³ Complaint at 1.

filing in this docket, the ISO anticipated that the Original Participating TOs and Vernon would execute the TCA as approved by the Governing Board.

On December 5, 2000, Vernon sent a letter to the ISO indicating that Vernon would only execute the TCA with several conditions: first, that the issue of whether or not Vernon was to be bound by the Alternative Dispute Resolution (“ADR”) provision of the TCA would be decided in this docket; second, that issues associated with the revisions to Section 16 of the TCA concerning refund obligations be “reserved”; and third, that a question concerning the definition of “Entitlement” be addressed in a subsequent Vernon motion in this docket.

The ISO responded to Vernon that same day. The ISO stated that it was willing to treat as effective Vernon’s execution of the TCA “subject to the Commission’s determination in Docket No. EL01-14-000 as to whether or not Vernon should adhere to the existing ADR provisions.” The ISO stated it could not agree to Vernon’s second condition concerning refunds. The ISO did, however, state that it was willing to consider alternative language from Vernon that addresses this concept. The ISO also noted that there was no substantive disagreement between any current party to the TCA and Vernon over what interests Vernon was proposing to turn over to the ISO’s Operational Control and that this issue should be resolved in a mutually agreeable manner.

On December 6, 2000, Vernon phoned the ISO and stated that the Vernon City Council had approved the TCA. However, when the ISO received from Vernon a copy of a resolution of the Vernon City Council authorizing execution of the TCA and a signature page that same day, the resolution stated that the TCA was being accepted as a “partial settlement offered by the ISO subject to the issues reserved for FERC approval in the letter dated December 5, 2000 from Bruce Malkenhorst to the ISO.” In a letter to Vernon later that day, the ISO sought clarification of the nature of Vernon’s authorization to execute the TCA

pursuant to this resolution. Vernon responded on December 7, 2000, stating that it would be filing an additional pleading in Docket No. EL01-14-000 that would: (1) indicate that the ADR issue should be decided in that proceeding, (2) contend that the revision to Section 16 of the TCA was inappropriate, and (3) “say something” about the issue of whether Vernon’s transmission rights should be deemed Entitlements. Vernon thus indicated that it was not executing the TCA as proffered by the ISO and approved by its Governing Board; instead, it was accepting only terms of the TCA, with its own modifications, as a “partial settlement.”

On December 7, 2000, Vernon filed a motion for leave to file an answer, along with the Vernon Answer. These filings were made allegedly to respond to the ISO Answer.⁴ Vernon requested “that the Commission find that the attached TCA as approved by the ISO Board and executed by Vernon is ripe for acceptance, and order that it be implemented” with certain modifications.⁵ Vernon asked that the TCA be modified to provide that: (1) issues raised by Vernon with respect to the binding arbitration provisions of the TCA are resolved by the Commission in the above-referenced docket; and (2) Section 16.2 of the TCA, as proffered by the ISO, is stricken and set for further Commission review and resolution, or otherwise set for further review subject to refund. Vernon also requested that the Commission deem Vernon’s transmission rights to be “Entitlements” for purposes of the TCA.⁶

The ISO will describe below more fully its reasons for proposing the change to Section 16 and why each Participating TO that receives transmission revenues from the ISO must make necessary refunds or adjustments to its TRR

⁴ Motion for Leave to File Vernon Answer at 1.

⁵ Vernon Answer at 11.

⁶ *Id.*

and its Transmission Revenue Balancing Account or an applicable balancing mechanism for the High Voltage Transmission Revenue Requirement (collectively referred to herein as a “Balancing Account”). As a threshold matter, simply stated, the ISO understood Vernon’s action not as execution of the TCA proffered by the ISO but as a contractual counteroffer to the TCA proffered by the ISO on December 1, 2000.⁷ Acceptance of Vernon’s execution of the TCA by the ISO (and Original Participating TOs) under these circumstances could have left Vernon free to contend later that it is not bound by the refund provision.⁸ At best, Vernon’s commitment to assume the obligations of the TCA was highly ambiguous.

On December 21, 2000, consistent with the decision of the ISO Governing Board and the TCA proffered to Vernon for execution, the ISO filed an amendment to the TCA: (1) to clarify responsibilities in Appendix C of the TCA concerning the ISO Maintenance Standards and to include a new Appendix F identifying the persons to contact at each party for notice purposes; (2) to address the Commission’s statement in *Mid-Continent Area Power Pool*, 92 FERC ¶ 61,229 (2000), that contractual arrangements involving regional transmission service should be crafted to ensure that responsibilities of all parties with respect to issues such as refunds are delineated in advance by ensuring that all Participating TOs, including those that are not subject to the Commission’s jurisdiction under Sections 205 and 206 of the FPA, contractually

⁷ The Original Participating TOs agreed to sign the amended TCA presented to Vernon for its signature, and their signatures and Certificates of Concurrence indicating unconditional agreement to the enclosed TCA amendments are included in the present filing.

⁸ The ISO recognizes that nothing in the TCA disables the Commission from examining the justness and reasonableness of any provision of the TCA, and the ISO would, of course, be bound by any Commission determination.

obligate themselves to make refunds or adjustments to their Balancing Accounts in accordance with Commission orders and the ISO Tariff; (3) to clarify four provisions of the current TCA in response to issues raised by Vernon; and (4) to identify the transmission interests that Vernon would be turning over to the ISO's Operational Control if Vernon executes the amended TCA unconditionally.

Because Vernon had not yet expressed its willingness to assume all obligations associated with being a Participating TO, including those affirmed by Section 16 of the TCA, the December 21 filing includes Appendix A and Appendix B for Vernon effective on a conditional basis. The effectiveness of these appendices, and of Vernon's membership as a Participating TO, was conditioned upon Vernon's executing the TCA without condition.⁹

As the ISO was producing the TCA amendment for filing, the ISO received additional correspondence from Vernon clarifying its prior execution of the TCA. Vernon states that execution of the TCA "fully binds Vernon to the TCA as it is or as it may be changed by the Commission."¹⁰ Based upon this further assurance, the ISO anticipates that it will file Vernon's executed signature page concerning the TCA early next week and will request that it be made effective as of January 1, 2001.

II. ANSWER

The ISO believes that Vernon's pleading is contrary to the Commission's rules preventing answers to answers. Rather than demonstrating good cause for its pleading, Vernon's December 7 Answer simply presents a moving target. More significantly, the issues raised in the Vernon Answer are mooted by the

⁹ In addition, in order for Vernon to join the ISO, the Commission will have to approve the FPA Section 203 application pending in Docket No. EC01-14-000 and determine the appropriate terms in Vernon's TO Tariff in Docket No. EL00-105-001.

¹⁰ A copy of the letter is provided as an attachment to this pleading.

amendment to the TCA proffered by the ISO and the Original Participating TOs on December 21, 2000. Finally, it is reasonable for the ISO to insist that, in order to become a Participating TO, Vernon make a binding contractual commitment to assume the obligations of the TCA, including the obligation to make the necessary adjustments to its TRR and Balancing Account.

A. The Vernon Answer Has Been Mooted By the ISO's Filing of the TCA

The concerns raised by Vernon in its answer have been rendered moot by the filing of the TCA amendments. The TCA amendment filing proposes changes concerning Section 16.2 of the TCA¹¹ and treatment of Vernon's transmission rights as "Entitlements" for purposes of the TCA.¹² In its December 7 Answer, Vernon states that the issues raised in Section 16.2 should be addressed as a "generic proposal . . . for review by all interested parties."¹³ The ISO believes that including this provision in the TCA amendment filing made on December 21, 2000 provides the appropriate forum for the Commission's review of a provision intended to apply to all Participating TOs. Likewise, the TCA amendment filing addresses the treatment of each Participating TO's transmission rights.

Accordingly, the ISO believes that the December 21, 2000 filing moots all issues pending with respect to Vernon's complaint in Docket No. EL01-14-000 except for the question of whether or not Vernon should be bound by the ADR

¹¹ See transmittal letter for December 21, 2000 TCA amendment filing at 8-

10.

¹² See *id.* at 10-11.

¹³ Vernon Answer at 7.

provisions previously approved by the Commission.¹⁴ However, as described below, Vernon merely refers to its prior pleading on this issue.

B. Vernon Has Failed To Demonstrate Good Cause For Waiving the Commission's Rules Generally Prohibiting An Answer to An Answer

Under the Commission's Rules of Practice and Procedure, an answer to an answer is prohibited unless the Commission orders otherwise.¹⁵ The Commission will accept an answer to an answer only if good cause exists for doing so.¹⁶

In the present case, however, Vernon has failed to demonstrate that the Commission should accept the portion of the Vernon Answer that has not been mooted by the TCA amendment filing, i.e., the portion concerning the binding arbitration provisions of the TCA. Vernon presents no arguments in its answer to support its position on the arbitration issue. Instead, Vernon simply refers the reader back to the November 17, 2000 amendment to its complaint.¹⁷ Therefore, Vernon has failed to meet its burden of demonstrating that an exception to the Commission's rules should be made to accept the Vernon Answer.

¹⁴ In its October 30, 1997 Order, the Commission found the ISO's proposed ADR procedure to be reasonable and in compliance with ISO Principle No. 11. *Pacific Gas and Electric Company, et al.*, 81 FERC ¶ 61,122, at 61,462 (1997).

¹⁵ Motion for Leave to File Vernon Answer at 1; 18 C.F.R. § 385.213(a)(2).

¹⁶ See, e.g., *Entergy Services, Inc.*, 91 FERC ¶ 61,155, at 61,590-91 (2000); *Wisconsin Power & Light Company*, 87 FERC ¶ 61,279, at 62,129 n.3 (1999). At one point, Vernon also appears to say that its answer may be characterized as an answer to its complaint. See Motion for Leave to File Vernon Answer at 1. However, it is difficult to see how a party could provide an answer to its own complaint.

The ISO recognizes that the present filing itself might be deemed an answer to the Vernon Answer. However, the ISO submits that it is justified in making this filing to respond to the statements made in the Vernon Answer.

¹⁷ See Vernon Answer at 5.

C. It is Reasonable for the ISO To Require Participating TOs To Make Necessary Refunds and Adjustments to Transmission Revenue Requirements and Balancing Accounts

1. Vernon Has Failed To Enter Into a Contractual Commitment To Abide By the Commission's Orders

As explained above, the ISO understood Vernon's actions not as execution of the TCA proffered by the ISO to evidence its acceptance of that contract, but as an indication that Vernon would accept only *some* of the terms of the TCA, i.e., as a contractual counteroffer to the ISO's TCA. The ISO was not authorized by the ISO Governing Board to accept Vernon's counteroffer and the ISO does not believe that the amended TCA, as approved by the Governing Board, should be revised further.

In particular, the revised refund provision is appropriately included in the TCA. Under Amendment No. 27 to the ISO Tariff, the ISO will transition from a transmission Access Charge methodology based on utility-specific rates to a methodology that blends all the High Voltage Transmission Revenue Requirements into a single ISO Grid-wide charge. Accordingly, the ISO believes that it is imperative for all Participating TOs, including those that are not subject to the Commission's jurisdiction pursuant to Section 205 and 206 of the Federal Power Act, to commit to make any necessary adjustments to their respective TRRs and Balancing Accounts to comply with Commission orders and the requirements of the ISO Tariff. Vernon, like the other Participating TOs, should be contractually committed to make these necessary adjustments prior to reaping the substantial financial benefits it will realize from becoming a Participating TO. The Access Charge methodology proposed in Amendment No. 27 would result in two-thirds of Vernon's TRR being paid by customers of the Original Participating TOs. It is eminently fair for Vernon, in exchange for those substantial benefits, to

commit to make any necessary adjustments to comply with Commission orders, as Section 16.2 of the TCA requires.

2. The Commission Has Recognized that Such Contractual Commitments are Vital to Regional Transmission Tariffs

On April 15, 1999, the Commission issued an order that addressed the joint pool-wide open access transmission tariff and Restated Agreement of the Mid-Continent Area Power Pool (“MAPP”).¹⁸ In that order, the Commission concluded that MAPP had improperly charged customers two different system rates for moving power into or out of the MAPP region. The Commission rejected the relevant section of MAPP’s tariff and directed MAPP to make refunds to customers billed under the improper rate provision.

The Nebraska Power District (“Nebraska”), a member of MAPP, filed a request for rehearing of the April 1999 Order. Nebraska noted it was owned and operated by the State of Nebraska and asked the Commission to clarify that the MAPP refund order applied only to jurisdictional entities. The Commission did so, agreeing that the refund determination in the April 1999 Order did not apply to nonpublic utility members of a power pool.¹⁹

On December 16, 1999, MAPP filed a refund report in compliance with the April 1999 Order. In that report, MAPP stated that although it had completed the ordered refunds, Nebraska had refused to pay, and for this reason MAPP had excluded from the refund obligations the amounts owed by Nebraska. Initially, the Commission rejected MAPP’s refund report.²⁰ In an order dated June 30, 2000, however, the Commission clarified that “the wholesale refund requirement imposed on the public utility pool members does not include Nebraska District’s

¹⁸ *Mid-Continent Area Power Pool*, 87 FERC ¶ 61,075 (1999) (“April 1999 Order”).

¹⁹ *Mid-Continent Area Power Pool*, 89 FERC ¶ 61,135, at 61,387 (1999).

²⁰ *Mid-Continent Area Power Pool*, 90 FERC ¶ 61,280 (2000).

share of any refunds.”²¹ The Commission explained that this determination was based on “the fact that all of the transmission customers owed refunds in the transactions at issue here are themselves MAPP members, that the MAPP members are governed by the contractual provisions of the Restated Agreement, and that members may seek recourse under their contractual provisions for Nebraska District’s refusal to pay a share of the refunds.”²² The Commission also stated that its decision would not affect the MAPP members’ rights to “*propose amendments to the Restated Agreement that would contain explicit contract provisions to ensure that all pool members – non-public utility as well as public utility members – assume obligations as well as benefits of pool membership.*”²³

In an order dated September 18, 2000, the Commission denied Enron’s request for rehearing of its June 2000 Order.²⁴ The Commission again emphasized that “[c]ontractual agreements involving regional transmission services can and should be crafted to ensure that the duties and responsibilities of all parties, particularly in circumstances like these [i.e. responsibility for refunds], are clearly delineated in advance.”²⁵

As explained above, under Amendment No. 27 to the ISO Tariff, the ISO will transition from a transmission Access Charge methodology based on utility-specific rates to a methodology that blends all the High Voltage Transmission Revenue Requirements (those related to facilities at 200 kV and above) into a

²¹ *Mid-Continent Area Power Pool*, 91 FERC ¶ 61,353, at 62,182 (2000) (“June 2000 Order”).

²² *Id.* at 62,182-83.

²³ *Id.* at 62,183 (emphasis added).

²⁴ *Mid-Continent Area Power Pool*, 92 FERC ¶ 61,229.

²⁵ *Id.* at 61,756 n.11.

single ISO Grid-wide charge.²⁶ All Participating TOs, including those that are not subject to the Commission's jurisdiction pursuant to Section 205 and 206 of the Federal Power Act, must make any necessary adjustments to their respective TRRs and Balancing Accounts. For example, if the Commission accepts a filing by an Original Participating TO to increase its TRR subject to refund and subsequently determines that the as-filed rates were overstated, all the Participating TOs (not just that Original Participating TO) will be required, in accordance with the ISO Tariff, to make prospective adjustments to their Balancing Accounts. This is because the Access Charge blends the transmission rates of all Participating TOs and it is conceivable that a new Participating TO such as Vernon will receive more revenue than its TRR, and, thus its Balancing Account will need to be adjusted.

This TCA amendment is necessary because the TCA in its present form does not of itself bind a Participating TO to the terms of the ISO Tariff.²⁷ Without Section 16.2, a non-jurisdictional Participating TO will not be obligated to adjust rates or make refunds in accordance with the ISO Tariff. Without this change, the consequence would be that a Participating TO not subject to FPA Section 205 jurisdiction would not be required to refund, either directly or through rate adjustments resulting from changes in its Balancing Account, revenues received in excess of those to which it is entitled under the ISO Tariff.

The ISO believes that all Participating TOs must "assume obligations as well as benefits of [ISO] membership."²⁸ The ISO agrees with the Commission

²⁶ Transmission Access Charges for the remaining Low Voltage facilities will continue to be collected on a utility-specific basis.

²⁷ Vernon has misunderstood the ISO's pleadings to imply the contrary. See Vernon Answer at 6.

²⁸ *Mid-Continent Area Power Pool*, 91 FERC at 62,183.

that refund obligations such as the requirements to adjust TRRs and Balancing Accounts be “clearly delineated in advance.”²⁹

III. CONCLUSION

Wherefore, as described herein, the ISO respectfully requests that the Commission reject Vernon’s December 7, 2000 Motion for Leave to Answer and Answer.

Respectfully submitted,

Charles F. Robinson
General Counsel
Roger E. Smith
Senior Regulatory Counsel
The California Independent
System Operator Corporation

Kenneth G. Jaffe
David B. Rubin
Bradley R. Miliauskas
Swidler Berlin Shereff Friedman, LLP

Counsel for the California Independent
System Operator Corporation

Date: December 22, 2000

²⁹ *Mid-Continent Area Power Pool*, 92 FERC at 61,756 n.11.