

**BEFORE THE  
PUBLIC UTILITIES COMMISSION  
OF THE  
STATE OF CALIFORNIA**

Order Instituting Rulemaking on Policies and  
Practices for the Commission's Transmission  
Assessment Process

R.04-01-026

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**REPLY COMMENTS OF THE  
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION  
IN RESPONSE TO ORDER INSTITUTING RULEMAKING**

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Pursuant to the Order Instituting Rulemaking ("OIR"), filed January 22, 2004, and the Administrative Law Judge's Ruling Revising Schedule for Comments, dated April 23, 2004, the California Independent System Operator Corporation ("CAISO") respectfully submits its reply comments in the above-referenced proceeding.

**I. Introduction**

At their core, the comments of each intervenor recognize that the implementation of Assembly Bill 57 ("AB 57") presents a valuable opportunity. The requirement imposed on investor owned utilities ("IOUs") to develop, and obtain Commission approval of, long-term procurement plans provides a mechanism to reinvigorate the efficiency and coordination of the transmission planning and siting process within overall IOU resource procurement. Underlying this acknowledgement is agreement that the status quo is suboptimal.

The OIR represents a small step, in a larger effort, to improve the current transmission planning process. It does so by acknowledging the reality that the CAISO has been assigned the responsibility for ensuring the reliable and efficient operation of the bulk electricity grid,

compelling participating transmission owners (“PTOs”) to construct “needed” projects, and determining whether economic or reliability grounds exist for federal rate recovery. The OIR recognizes that the Commission and the CAISO share responsibility for creating an efficient, well-functioning electric transmission delivery system in California. That goal can best be achieved by leveraging each entity’s expertise to the benefit of all Californians by clearly assigning planning responsibilities and working towards a seamless transmission planning through siting process.

The three IOUs and a generation developer group<sup>1</sup> support the OIR. The Office of Ratepayer Advocates (“ORA”), the Utility Reform Network (“TURN”), and a consortium of municipalities and a citizens group<sup>2</sup> oppose the OIR. The opposition raises both legal and policy concerns to adoption of a rule deferring need determinations to the CAISO. As discussed below, the CAISO believes these concerns are without merit. In fact, when the purported legal barriers to the OIR are hurdled, the alleged policy concerns are more a matter of perception than reality. Contrary to intervenor representations, the CAISO agrees that rules should not be established that create an undue bias in favor of transmission in determining the optimal resource mix the IOUs should pursue to fulfill their obligation to serve their customers. Establishing and overseeing the procurement activities of the IOUs is and should be the domain of the Commission. The OIR does not unduly restrict the flexibility rightfully afforded the Commission in performing this role. The ultimate goal of this OIR -- and that pursued by the CAISO in this proceeding -- is that if a reliability or economic need is identified, California’s

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<sup>1</sup> The members of the Border Generation Group are Coral Power, L.L.C, InterGen, and Sempra Energy Resources (collectively “Border Group”).

<sup>2</sup> Comments were jointly submitted by the City of Temecula, City of Hemet, City of Murrieta, and Save Southwest Riverside County (collectively “Riverside Parties”).

evolving planning through siting process will expeditiously identify a resource to fulfill that need and ultimately permit the timely construction of the resource.

The intervenors also raise questions concerning the practicality of the Commission's ability to confirm whether the adopted methodologies were applied by the CAISO. The CAISO posits that the fundamental elements of the CAISO's reliability methodology may be adopted in this proceeding and are readily subject to confirmation by the Commission. The CAISO further believes that issues concerning the methodology and assumptions and inputs to the methodology with respect to the economic methodology are best addressed following the Commission's review in Phase V of I.00-11-001. Nevertheless, with regard to the reliability methodology, the CAISO recognizes that there may be transitional issues until the long-term procurement proceeding develops approved plans whose results can be used as input assumptions. To the extent the Commission believes such transitional issues need to be resolved, the CAISO is amenable to scheduling a Commission-sponsored technical workshop to address interim input assumptions to facilitate application and confirmation of the CAISO's reliability methodology.

## **II. The Current System Need Not Be Broken To Warrant Improvement**

ORA attacks the fundamental justification for the OIR by contending that the current process for approving transmission lines is working well and that major changes to the process are unnecessary. ORA's argument, however, ignores the direct statutory duplication between the respective transmission need assessments conducted by the CAISO and Commission, as well as the inherent inefficiency, threat of inconsistent outcomes, and forum shopping created by the redundant processes. Once recognized, the strength ORA derives from its dependence on hindsight<sup>3</sup> and the outcome of a limited number of past proceedings wanes because of the

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<sup>3</sup> Much of the ORA's brief depends on using an inaccurate view of the past to illustrate deficiencies in the OIR. For example, ORA claims that the purported delegation to the CAISO would be bad public policy because "in the past, CAISO approval of a project has only happened well after the CPUC began its review, or occurred so early it was out-of-date at the time of the CPC&N proceeding." (ORA at 35-38.) The CAISO strongly disagrees with



realization that ORA is responding to the wrong question. The question is not whether the current system is “broken,” but whether it can be improved to better achieve the stated goal of the Energy Action Plan to expand transmission infrastructure by “reduc[ing] the time before needed facilities are brought online.” Indeed, TURN concurs that “[s]trengthening and improved coordination of the transmission planning process are clearly needed, to eliminate duplication and expedite permitting.” (TURN at 2.)

As recognized by the Commission Staff Report, the IOUs, and TURN, among others, the Commission’s application of Public Utilities Code § 1001 and the CAISO’s responsibilities under its FERC approved Tariff lead to overlapping determinations. Public Utilities Code § 345 states that “[t]he Independent System Operator shall ensure efficient use and reliable operation of the transmission grid consistent with achievement of planning and operating reserve criteria no less stringent than those established by the Western Systems Coordinating Council and the North American Electric Reliability Council.” Further, Public Utilities Code § 334 provides explicitly that “[t]he proposed restructuring of the electric industry would transfer responsibility for ensuring short- and long- term reliability away from electric utilities and regulatory bodies to the Independent System Operator . . . .” Consistent with these statutory instructions, the CAISO Tariff explicitly commands the CAISO to “determine that a transmission addition or upgrade is needed where it will promote economic efficiency or maintain system reliability.” (CAISO Tariff § 3.2.1.) Similarly, the Commission’s practice under Public Utilities Code § 1001 is to again assess whether a project “is needed on the basis of either reliability or economics.”<sup>4</sup> In

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ORA’s characterization of the quality and timing of the CAISO’s past project reviews. But more importantly, ORA’s tactic does not address the merits of the OIR. The OIR is precisely intended to establish a coordinated process that removes the likelihood of regulatory discord by establishing a sequence of CAISO and Commission review. The CAISO understands ORA’s historic role in transmission siting proceedings and the potential for the OIR to modify this role. However, even after the OIR, the ORA will continue to have a critical role in protecting ratepayer interest by evaluating the relative economics of competing routing alternatives.

<sup>4</sup> D.02-12-066 at mimeo 7.

short, while the overall review conducted by the Commission in accordance with CEQA and Public Utilities Code § 1002 is broader than that engaged in by the CAISO, the substantive determinations made by the CAISO and Commission are coextensive with respect to evaluating the need for a project on reliability and economics grounds.

Indeed, the California Energy Commission (“CEC”) independently concluded that California suffers from jurisdictional responsibilities that are “overlapping.” The CEC stated,

In the CPCN process, the CPUC often re-examines planning issues, refusing to accept the CA ISO’s determinations in the planning process. As a result, projects with regional or statewide benefits that could help the state mitigate market power, stabilize electricity prices, and improve the reliability and environmental performance of the electricity system have been denied permits by the CPUC or suffered long delays in the process because of an inadequate assessment of these benefits.<sup>5</sup>

The CEC references Valley-Rainbow as an example of the inefficiencies created by duplicative need assessments. The CAISO agrees with TURN that the critical lesson learned from Valley-Rainbow is not that the process is too slow, but rather that action must be taken in a timely manner to address a need identified in the planning process before resource options are lost. (TURN at 9-10.) The CAISO further agrees that the primary solution to this painful lesson starts with the enhanced resource coordination and planning offered by the collaborative implementation of the OIR with AB 57 through the IOUs’ long-term resource plans, including front-end incorporation of the CEC Integrated Energy Policy Report. However, the CAISO disagrees with ORA that Valley-Rainbow does not corroborate the conclusion reported by the CEC that overlap and inefficiencies exist.

ORA implies that the CAISO’s “unrealistic assumptions about the feasibility of the route,” “an unwillingness to examine in depth alternatives,” and “the isolation of the CAISO staff from the political and land-use impacts along the route” doomed the project. (ORA at 16-

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<sup>5</sup> 2003 Integrated Energy Policy Report (Nov. 12, 2003) at p. 19.

17.) None of these issues were either explicit or implicit justifications for rejection of the project. Instead, Valley-Rainbow was rejected because the Commission found “SDG&E will be able to meet the N-1/G-1 reliability criteria through 2008 or 2009,” which was outside the Commission’s adopted five-year planning horizon.<sup>6</sup> Notwithstanding this finding, the Commission is currently considering an order to approve new resource contracts for SDG&E to “address its anticipated grid reliability shortfall beginning in 2005.”<sup>7</sup> The point here is not who was right, but rather that the inconsistent reliability findings led to an inefficient use of resources and delayed and confused resource procurement, which has caused “suboptimal results for SDG&E’s ratepayers.” (TURN at 9.) Accordingly, the Valley-Rainbow project demonstrates that value exists in streamlining the transmission planning through siting process by eliminating redundancy between the CAISO and Commission.

### **III. The OIR Is Part Of A Bigger Picture Which Most Parties See Similarly**

Much of the opposition to the OIR appears to arise from fear that deferring to the CAISO’s need determinations will slant the Commission’s reinvigorated long-term planning process under AB 57 from one that selects among various resource types to one that is “transmission-centric.” ORA, for instance, states a concern that the OIR would give “preferential treatment for transmission projects compared to generation or energy efficiency projects.” (ORA at 46.) A corollary to this concern, expressed by TURN, is that consumers could be saddled with substantial fixed costs for transmission assets overbuilt on a cost recovery basis. (TURN at 7.) This should not be the outcome of the OIR and it is not the CAISO’s intent in supporting the OIR to create such a regime.

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<sup>6</sup> D.02-12-066, mimeo at 57.

<sup>7</sup> See, Proposed Decision of ALJ Brown, “Opinion Approving Motion of San Diego Gas & Electric Company (U 902 E) for Approval to Enter into New Electric Resource Contracts Resulting From SDG&E’s Grid Reliability Request for Proposal,” R.01-10-024, mimeo at 69 [Fact #1].

The CAISO agrees with intervenors that for virtually any identified need for a new asset, whether reliability-based or economic-based, there will be multiple resource alternatives available to resolve that need. As noted above, the CAISO has authority to operate the grid in an efficient and reliable manner and, to achieve that goal, can compel participating transmission owners (“PTOs”) to construct transmission projects. In contrast, the CAISO cannot compel the construction of new generation or the implementation of demand-side management programs. With respect to the IOUs, the Commission possesses the jurisdiction in some capacity to analyze all three overall resource classifications. The OIR should not be read as altering this reality, but rightfully seeking to leverage the CAISO’s expertise in grid reliability, transmission planning, and if approved, its familiarity with the Commission-approved economic methodology. Thus, the fundamental question is how the CAISO’s transmission determinations can be used to fulfill the goal of an overall coordinated resource planning process. The OIR, therefore, should not be viewed as determining who will make the resource decision, but more how that decision will be reached. In other words, the contemplated OIR process is perfectly complementary to the more broadly focused procurement process overseen by the Commission.

The OIR envisions an “upfront” determination on transmission need in the procurement process that follows from an analysis of available alternatives and is consistent with an IOU’s comprehensive infrastructure plan. (OIR at 7.) The OIR further contemplates that the CAISO’s planning process would transform the guidance provided by the Commission’s procurement proceeding into a specific electrical project, but not specific project route. All intervenors support a simultaneous optimization of resources at the Commission during the procurement process. However, ORA notes the level of detail encompassed by the upfront determination remains unclear. What appears more apparent following publication of the “Joint Opening

Statement of CPUC President Michael Peevey and CEC Commissioner John Geesman”<sup>8</sup> is that the procurement proceeding will incorporate the outcome of the CEC’s Integrated Energy Policy Report (“IEPR”). In the 2004 update to the IEPR, the CEC intends to identify opportunities for transmission expansion by evaluating not only reliability and economic need in collaboration with the CAISO, but also identifying viable transmission corridors based on rights-of-way and environmental conditions.

ORA believes it is overly ambitious to assume the Commission will be able to carefully and comprehensively review the information necessary to identify projects in sufficient detail to provide the “upfront determination.” (ORA at 43.) To overcome this anticipated deficiency, ORA recommends that the specific outcomes of the CAISO’s annual grid planning process be funneled into the procurement proceeding so that specific transmission projects can be measured side-by-side with other resources. (ORA at 44.) Similarly, TURN concludes that alternatives for meeting an identified grid reliability or economic need should be analyzed and the trade-offs assessed in the Commission’s long-term resource planning process. In TURN’s view, the CAISO would provide input on both reliability requirements and economic factors to facilitate determination of need in the context of the IOUs’ long-term plans. (TURN at 5.)

Therefore, all intervenors envision that the Commission, rather than the CAISO, would be the ultimate decision-maker on resource selection issues. The distinctions are ORA and TURN foresee CAISO input in support of a detailed determination in the long-term procurement proceeding, while the OIR dictates more general guidance directing subsequent CAISO analyses. In the latter case, deference to the CAISO would be based on consistency with the long-term plan and methodologies adopted by the Commission. Only the Commission, however, can determine which overall structure best corresponds to its vision of its integrated planning

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<sup>8</sup> Filed in R.04-04-003, April 30, 2004.

process. From a sequencing standpoint, the CAISO believes both models can improve the efficiency of the transmission planning process and eliminate redundant need determinations. Regardless of approach, the CAISO advocates that the CAISO's proposed economic transmission methodology is a reasonable means to evaluate trade-offs between alternative resources and, once approved as a generally accepted methodology, should be applied in any forum. Stated differently, regardless of whether the initial transmission planning assessment is performed as part of the CAISO's grid planning process or as part of the procurement process, the IOUs should apply a generally-accepted and standardized methodology, e.g., the CAISO's proposed economic methodology, to access the optimal mix of resources that satisfy the need requirements.

The CAISO further believes that either model can support the CAISO's statutory responsibilities of ensuring the efficient and reliable operation of the grid. In this regard, the CAISO notes that deference to the CAISO in the context of evaluating the annual grid planning studies in the procurement process can take the form of setting a threshold measure against which other resource choices may be compared. In other words, where the CAISO offers a transmission project to address a particular reliability or economic need, the Commission would recognize such reliability or economic need and ensure, in the context of the long-term procurement proceeding, that a resource was identified to address that need by either accepting the transmission project (based on the characteristics of the need, project specifications, etc) or selecting a resource (following a Commission proposed RFP process) that is superior to the transmission project. By suggesting this modification to the OIR, the CAISO is not suggesting it is preferable to the OIR, but rather is merely attempting to assist the Commission in assessing the comments of intervenors.

The ORA raises a related concern regarding the OIR's proposed adoption of the CAISO's 10-year planning horizon. Specifically, ORA objects to the adoption of the planning horizon to the extent it implies "that any project the CAISO identified as being 'needed' within 10 years must be given a CPC&N." (ORA at 44.) Again, the CAISO agrees with ORA's fundamental concern. There may be large transmission projects that require immediate commencement of engineering, procurement of rights of way, and environmental review to ensure their availability to meet the then-identified need. Other projects may not need such long lead times. In such circumstances, there may need to be some degree of iteration in the context of the long-term procurement process. However, even with respect to projects that do not need long lead-times, commencing certain preliminary steps, such as acquiring rights of way, will preserve the transmission option by preventing the situation that was encountered in Valley-Rainbow, where development encroached on the corridor between the time the project was identified by planners and the CPCN proceeding. In addition, using the CAISO's need determinations to initiate action to preserve the corridor will enhance overall planning efficiency by signaling to generation developers the location of long-term transmission infrastructure upgrades.<sup>9</sup> This will promote reversal of the pernicious circumstance where transmission chases generation.<sup>10</sup>

Accordingly, the intervenors concur as to many of the essential elements of prudent resource planning and nothing in the OIR necessarily conflicts with these elements. In the end,

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<sup>9</sup> Public Utilities Code § 454.1(a) provides: "Reasonable expenditures by transmission owners that are electrical corporations to plan, design, and engineer reconfiguration, replacement, or expansion of transmission facilities are in the public interest and are deemed prudent if made for the purpose of facilitating competition in electric generation markets, ensuring open access and comparable service, or maintaining or enhancing reliability, whether or not these expenditures are for transmission facilities that become operational." Accordingly, the Commission should confirm that any expenses incurred by the IOUs with respect to projects found needed by the CAISO, regardless of whether it is ultimately granted a CPCN, is eligible for cost recovery.

<sup>10</sup> The CAISO's newly established Large Generator Interconnection Procedures (developed in accordance with FERC Order No. 2003), as well as its well-articulated position in the Commission procurement proceeding that all resources procured by the IOUs need to be "deliverable" to load, if adopted, should also substantially address this issue.

the ultimate objective of the reformation of California’s planning process should not be lost – commitments must be made to ensure the construction of resources identified in the planning process to meet an identified need in a timely manner. The CAISO believes deferring to the CAISO’s need determination either in the long-term planning process itself or as a product of the long-term procurement process will serve that objective.

#### **IV. The OIR Will Not Result In Unlawful Deference To The CAISO**

Several intervenors assert that the OIR’s contemplated deference to the CAISO on issues of “need” constitutes an unlawful delegation of the Commission’s responsibilities under Public Utilities Code § 1001. However, the OIR does not contravene the law and is consistent with the Commission’s statutory obligations.

The CAISO is well aware of numerous past Commission decisions rejecting the argument that AB 1890 truncated the Commission’s traditional obligation pursuant to Public Utilities Code § 1001 to independently assess reliability or economic need for proposed IOU transmission projects.<sup>11</sup> The CAISO further understands that the OIR does not reflect a departure from this past precedent. Rather, “[t]he Commission believes that by adopting an economic [and reliability] methodology that the CAISO and IOUs will apply to transmission projects, the Commission would be fulfilling its statutory mandate under Section 1001, which places on the Commission the responsibility to determine that a utility project is needed.” (OIR at p. 9.) The CAISO agrees with the Commission that adopting analytical parameters by rulemaking and subsequently testing application of those parameters in an evidentiary hearing does not constitute an unlawful delegation. However, prior to addressing this issue and in the interest of a full and

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<sup>11</sup> E.g., D.01-10-029 (Tri-Valley Decision); D.02-12-066 (Valley-Rainbow Decision); D.03-05-038 (Valley-Rainbow Rehearing Decision).



complete record, the CAISO details its claim that the locus of authority to determine need on both an economic and reliability basis has in fact shifted to the CAISO.

**A. The CAISO Has Been Granted Statutory Authority To Determine Need For Transmission Projects**

The CAISO has responsibility for transmission planning under both California and federal law. Under California law, the Commission retains responsibility for siting. California rules of statutory interpretation provide that specific statutory provisions must be read in the context of the full statutory framework, in a manner that is workable and reasonable, and that avoids absurd results. If the rules of statutory construction are applied to the relevant statutory provisions, the only fair conclusion to be drawn is that the determination of whether a transmission facility is needed for reliability or economic reasons has been carved from the Commission's responsibilities under Public Utilities Code § 1001 and reassigned to the CAISO.

AB 1890 transferred responsibility for ensuring grid reliability from the State's investor owned utilities and the Commission to the CAISO. Public Utilities Code § 345 states that "[t]he Independent System Operator shall ensure efficient use and reliable operation of the transmission grid consistent with achievement of planning and operating reserve criteria no less stringent than those established by the Western Systems Coordinating Council and the North American Electric Reliability Council." Further, Public Utilities Code § 334 provides explicitly that "[t]he proposed restructuring of the electric industry would *transfer* responsibility for ensuring short- and *long-term reliability away* from electric utilities and regulatory bodies to the Independent System Operator . . ." (emphasis added) and creates the Electricity Oversight Board to ensure that state interests are protected notwithstanding the transfer.

Transmission planning is an integral part of assuring transmission grid reliability. Without adequate transmission facilities it is not possible to "ensure efficient use and reliable

operation of the transmission grid." Moreover, Public Utilities Code § 345 explicitly notes that the ISO must ensure compliance with planning criteria as well as operating reserve criteria, making it clear that the ISO has responsibility to provide for transmission planning. Thus, it would not be possible for the CAISO to ensure compliance with planning criteria and long-term reliability if it did not have a meaningful role in identifying the facilities that must be built to meet the established standards, and if its determinations of need could be disregarded in the siting process.

In addition, AB 1890 required the CAISO to make appropriate filings with the Federal Energy Regulatory Commission ("FERC") to "request confirmation of the relevant provisions of this chapter and seek the authority needed to give the Independent System Operator the ability to secure generating and transmission resources necessary to guarantee achievement of planning and operating reserve criteria no less stringent than those established by the Western Systems Coordinating Council and the North American Electric Reliability Council." (Public Utilities Code § 346.) Consistent with this directive, the CAISO filed a comprehensive tariff at FERC that provided for the creation of a coordinated transmission planning function led and coordinated by the CAISO. This section is necessary to give the CAISO the ability to secure "the transmission resources necessary to guarantee achievement of planning ... criteria," in accordance with Public Utilities Code § 346.

Further, it was a clear objective of the California legislature in passing AB 1890 that the CAISO be accepted as an "Independent System Operator" by the FERC. Consistent with FERC nomenclature, AB 1890 named the institution created to operate the transmission system Independent System Operator, see e.g. Public Utilities Code § 345; the legislation endorsed the characteristics of Independent System Operators that had been articulated by FERC, see e.g. Public Utilities Code § 330(k); and the legislation required the ISO to obtain appropriate

authorization to provide for a competitive electricity market from FERC, see e.g., Public Utilities Code § 346. CAISO coordination of transmission planning was a prerequisite of FERC's recognition of the CAISO as an Independent System Operator, see 77 FERC 61,204, pp 61,834-36 (November 26, 1996); 80 FERC ¶ 61,128, pp 61,416-35 (July 30, 1997). These factors are further evidence of the clear intent on the part of the California legislature to transfer responsibility for transmission planning to the CAISO.

The CAISO recognizes, however, that AB 1890 did not revise state law as to transmission facility siting as set forth in Public Utilities Code section 1001, et seq. Public Utilities Code section 1001 provides that no electrical corporation shall begin construction of a line "without having first obtained from the [California Public Utilities Commission] a certificate that the present or future public convenience and necessity require or will require such construction". Thus, in Commission CPCN proceedings, utilities must still show that the project is required by the "public convenience and necessity," as well as address other factors that must be considered by the CPUC under CEQA and Public Utilities Code § 1002 – all of which deal with routing, not planning. However, with respect to the determination of need based on reliability and economics, the Commission must concede jurisdiction. "It is settled that a later statute may supersede, modify, or so affect the operation of an earlier law as to repeal the conflicting earlier law by implication." (*Orange County Air Pollution Control Dist. v. Public Utilities Commission* (1971) 4 Cal.3d 945, 954, fn. 8, citing *Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805.)

The CAISO's responsibilities in the wake of AB 1890 and the Commission's continued responsibilities in the context of transmission siting under Public Utilities Code section 1001, et seq, are easily harmonized as required under California rules of statutory construction. (See *Maricela C. v. Superior Court* (1998) 66 Cal.App.4<sup>th</sup> 1138; 1143-4 ["The parts of a statute must

be harmonized by considering the particular clause or section in the context of the statutory framework as a whole."]; *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* (1968) 263 Cal.App.2d 41, 54 ["The courts assume that in enacting a statute the Legislature was aware of existing, related laws and intended to maintain a consistent body of statutes."].) To give effect to the CAISO's transmission planning responsibilities, the method by which utilities demonstrate need in the context of CPCN proceedings should, consistent with the OIR, be to demonstrate that the CAISO has found a grid reliability need or economic efficiency opportunity in its coordinated planning process. Extracting those facts from the Commission's historical role under Public Utilities § 1001, the Commission remains responsible for determining public convenience and necessity based on its environmental review, impacts on utility capital structure and costs and ratepayers impacts. Any other interpretation renders the transmission planning work undertaken by the CAISO in accordance with its responsibilities under AB 1890 and federal law superfluous and ineffective, contrary to California rules of statutory interpretation.

Finally, given the FERC directives mentioned above, that the CAISO must coordinate transmission planning, and subsequent FERC determinations approving the transmission planning section of the CAISO's tariff, see e.g. 81 FERC ¶ 61,122, pp 61,459 (October 30, 1997); 80 FERC ¶ 61,128, pp 61,430-35 (July 30, 1997), the CA ISO has planning responsibilities under federal as well as state law. Section 3.2.1 of the CAISO tariff expressly commands that the "ISO will determine that a transmission addition or upgrade is needed where it will promote economic efficiency or maintain system reliability." Federally approved tariffs have the force and effect of federal law. (*Continental Forge v. S. Cal. Gas Co.* (D.C. Nev. 2001) 170 F.Supp.2d 1052, 1060, fn. 11; *Marcus v. AT&T Corp.* (2<sup>nd</sup> Cir. 1998) 138 F.3d 46.) Accordingly, to the extent the Commission interprets the scope of its need determination in a

CPCN proceeding to be coextensive or overlapping with need defined under the CAISO tariff, i.e., to promote economic efficiency or maintain reliability, the CAISO's federally approved tariff would preempt Public Utilities Code § 1001. This shift in jurisdiction follows from the changed regulatory environment in the restructured market place. Prior to AB 1890, the Commission existed as the primary overseer of the IOUs' planning function and its effect on rates through construction of physical assets. Need had to be determined in that forum or else it would not be determined anywhere. Planning has now shifted to the CAISO. In this role, the CAISO independently evaluates reliability and economics of projects for purposes of determining need and, once need is established, for supporting PTO cost recovery before FERC.

**B. The Commission Is Not Unlawfully Delegating Decision-Making Authority To The CAISO**

Although the CAISO believes the foregoing arguments immunize the OIR from legal attack, whether the Commission can delegate its need determination does not appear central to the Commissioners' consideration of the OIR's viability. The OIR clearly states that the Commission does not intend to avoid or transfer its statutory responsibility under Public Utilities Code § 1001 to the CAISO. Rather, the Commission believes that by adopting economic and reliability criteria and validating the CAISO's application of those criteria that the Commission will satisfy its independent statutory obligation to ascertain a reliability or economic need for a particular IOU project. (OIR at 5 and 9.) The CAISO agrees. Regardless of whether the CAISO performs discretionary tasks in its need determination, the Commission's validation of the CAISO's application of the approved standards renders the OIR lawful.

Several parties cite *Cal. Sch. Employee's Ass'n v. Pers. Comm'n of the Pajaro Valley Unified School Dist.* (1970) 3 Cal.3d 139, 144, for the proposition that powers conferred upon public agencies that involve the exercise of judgment or discretion cannot be surrendered or

delegated to subordinates.<sup>12</sup> However, that case also acknowledges “an agency’s subsequent approval or ratification of an act delegated to a subordinate validates the act, which becomes the act of the agency itself.” (*Id.*) The doctrine of ratification is subject to two limitations: (1) the governmental body can only ratify that which it could have lawfully authorized directly and (2) the subsequent ratification must be made with the same formalities required for the original exercise of the power. (*Mott v. Horstmann* (1950) 36 Cal.2d 388, 391.) The OIR clearly satisfies these conditions. The fundamental premise of the opposition to the OIR rests on the Commission’s authority pursuant to Public Utilities § 1001 to perform need assessments. Further, the same formalities employed by the Commission for finding need pre- and post- OIR will be identical - the proposed validation process will be conducted through the formal CPCN proceeding, including an evidentiary hearing and formal Commission order. Thus, there is no unlawful delegation.

Nevertheless, the Riverside Parties assert that the OIR would violate the Legislature’s express mandates regarding delegation of fact-finding and adjudicatory functions by the Commission. In particular, the Riverside Parties cite Public Utilities Code §§ 310 and 311 as prohibiting the Commission’s authority to delegate adjudicatory and fact-finding functions to entities other than the ALJs or Commissioners. Public Utilities Code § 310 provides:

No vacancy in the commission impairs the right of the remaining commissioners to exercise all the powers of the commission. A majority of the commissioners constitutes a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power of the commission. *Any investigation, inquiry, or hearing which the commission may undertake or hold may be undertaken or held by or before any commissioner or commissioners designated for the purpose by the commission. The evidence in any investigation, inquiry, or*

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<sup>12</sup> Until the economic methodology is fully evaluated in I.00-11-001 and the Commission rules on the CAISO’s proposed reliability criteria, the question regarding how prescriptive the adopted standards will be remains uncertain. If the Commission can adopt highly prescriptive procedures for applying the economic and reliability standards, the prohibition against delegation will not be implicated. However, for purposes of these reply comments the CAISO assumes some discretion in application will exist.

*hearing may be taken by the commissioner or commissioners to whom the investigation, inquiry, or hearing has been assigned or, in his, her, or their behalf, by an administrative law judge designated for that purpose. Every finding, opinion, and order made by the commissioner or commissioners so designated, pursuant to the investigation, inquiry, or hearing, when approved or confirmed by the commission and ordered filed in its office, is the finding, opinion, and order of the commission. (Emphasis added.)*

Similarly, § 311 states merely that “[t]he evidence in any hearing shall be taken by the commissioner or the administrative law judge designated for that purpose.” (Emphasis added.)

Again, the Riverside Parties’ argument is unsupportable. Neither § 310 nor § 311 prescribe the scope of any investigation, inquiry, or hearing, but merely dictate by whom the evidence will be taken in those proceedings. They are procedural statutes, not substantive statutes. The OIR, in contrast, proposes what amounts to substantive rules of evidence relating to CPCN proceedings. The OIR proposes to adopt methodologies, criteria, or standards that must be followed by the CAISO to warrant deference and it then proposes to limit the scope of the subsequent adjudicatory process to determining whether or not those methodologies, criteria or standards were followed – the validation process. No intervenor questions the Commission’s authority to exercise its legislative capacity by refining the showing for or the elements that constitute “need” under Public Utilities Code § 1001 to the extent consistent with other statutory requirements, such as those imposed by Public Utilities Code § 1002. Thus, there is nothing inconsistent between the OIR and Public Utilities Code §§ 310 and 311 and the Riverside Parties simply confuse what salient facts must be tested in an adjudicatory process and how an adjudicatory process must be conducted.

#### **V. The OIR Will Not Result In A Violation of Due Process**

The Riverside Parties protest the OIR on the ground that the CAISO’s Grid Planning Process fails to “provide the procedural due process protections required in CPUC proceedings.” (See, e.g., Riverside Parties at 11.) They focus on the relative informality of the CAISO grid

planning process and the purported absence of “trial-like” hearings, impartial hearing officer, public notice, or official records to conclude that the OIR is unlawful. (*Id.*) The purported due process challenge to the OIR is wrong both legally and factually.

**A. Procedural and Substantive Due Process Requirements Are Satisfied**

The due process clauses of the federal and state constitutions generally “[place] procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of ‘property’ within the meaning of the Due Process Clause.” (*Memphis Light, Gas & Water Div. V. Craft* (1978) 436 U.S. 1, 9.) To prove a procedural due process violation, a party must show that (1) it has a property interest, (2) it was deprived of that interest by state action, and (3) the deprivation was without due process of law. (*Brewster v. Bd. of Ed. Of Lynwood Sch. Dist.* (9<sup>th</sup> Cir. 1998) 14 F.3d 971, 982.) The argument that the OIR violates due process incorrectly assumes, without analysis, that citizens of the state, or their representatives, possess a property interest in the determination in a CPCN proceeding that a project is needed for reliability or economic purposes. It is well settled that a public utility customer has a cognizable property interest in continued service and that some form of due process must be provided prior to terminating service. (*Id.*) However, while an individual may have a particularized property right in utility service, the only potential interest implicated here is a generalized right that the state only authorize construction of projects needed for reliability or economic reasons. It should be emphasized that the CAISO’s finding of need is not tied to a specific route and, therefore, does not impact any identifiable individuals’ real property or health and safety interest. The CAISO has not found any authority suggesting that the boundary of constitutionally protected property rights can expand. Indeed, the California Constitution grants the Commission plenary power to fix rates. (Cal. Const., Art. XII, sec. 6.) In contrast, it has been held in similar circumstances that an individual does not have a constitutionally cognizable property interest in a



particular rate merely because the government has taken action that affects the charged rate. (*Dinwiddie Construction Company v. Dept. of Insurance* (N.D. Cal. 1990) 745 F.Supp. 589. 595.) Accordingly, a ratepayer does not have a right to a hearing merely because action is taken declaring a general reliability or economic need for project that may in the future affect the rate paid.

To the extent Riverside Parties and others contend that individuals have a constitutionally protected interest affected by the need determination because of a purported impact of such need determination on their health and safety or physical property rights resulting from the location of the project, the claim equally fails. Issues relating to health and safety, routing, and the project's effect on community, historical and aesthetic values remain subject to the full panoply of procedural safeguards currently afforded in CPCN proceedings. It is not necessary to allow parties concerned about such issues to again challenge need for the transmission planning solution in order to protect such routing related issues. As such, the OIR does not alter the procedural due process afforded by the Commission with respect to these interests. Most importantly, the CPCN process, both as it exists today and under the OIR, continues to exhibit the same notice, hearing, evidentiary, and appeal procedures that currently exist.<sup>13</sup> Moreover, it is similarly true that the Commission, as the governmental agency taking action, does not determine need under the OIR until after a full notice and evidentiary hearing to confirm the CAISO's application of the adopted methodologies. Thus, all the process constitutionally due individuals potentially affected by the CPCN application has been, or will be, satisfied.<sup>14</sup>

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<sup>13</sup> In addition, it should be noted that all interested parties will be provided a full opportunity to challenge, augment, or refine the economic methodology through the evidentiary hearing scheduled in proceeding I.00-11-001.

<sup>14</sup> “[Due] process is flexible and calls for such procedural protections as the particular situation demands.” (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481.) Since the types of property protected the due process clause vary widely, what may be required by that clause in dealing with one set of interests may not be required in dealing with another set of interests. (*Arnett v. Kennedy* (1974) 416 U.S. 134.) The deprivation of liberty interests or those benefits constituting “means for daily subsistence” are accorded greater procedural protection than mere economic

The only possible change, as noted above, is that the scope of issues to be adjudicated may presumably be narrowed by the fact that the need determination entails validation only. In essence, this changes the substantive showing that is necessary to meet the Commission's definition of need. Rather than review need *de novo*, the Commission will not revisit the need determination if certain foundational facts relating to validation are found to exist, thereby creating what may be construed an evidentiary presumption. Evidentiary presumptions implicate substantive, not procedural, due process and, again, all protections guaranteed by the constitutional are met in this instance. (See, e.g., *Michael H. v. Gerald D.* (1989) 491 U.S. 110, 1009; *Weinberger v. Salfi* (1975) 422 U.S. 749, 772.) Evidentiary presumptions that affect economic activity or interests, such as those relating to the Commission's need determination, are subject to review under a rationality standard. This means that they must be upheld if they bear a rationale relationship to a legitimate state interest. (*Dinwiddie Construction Co., supra*, 745 F.Supp. at 592-593.) The close nexus between the OIR's modifications and the Commission's goal to streamline and eliminate redundancy in the transmission planning and siting process clearly meets this test.

**B. Opponents Of The OIR Misunderstand The Process Provided By The CAISO**

The Riverside Parties claim that “[b]ecause the ISO is not a governmental entity, it is not subject to a variety of laws guaranteeing fair and open decision-making (which are applicable to the CPUC)[footnote omitted] including open meeting laws, public records and freedom of information laws, laws regulating ex-parte communications, and due process requirements.” (Riverside Parties at 10.)<sup>15</sup> As noted above, the due process concerns raised by intervenors are

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interests. Even assuming that a property interest existed in a determination of economic or reliability need, that interest would be tangential, at best, and largely affecting an economic interest. Consequently, the process contemplated by the OIR satisfies the flexible requirements of due process.

<sup>15</sup> The two statutes explicitly cited by the Riverside Parties as guaranteeing fair and open decision-making at the Commission are Public Utilities §§ 306 (open meetings) and 311.5 (public notice of agendas).

not well founded. Nor is examination of the CAISO's grid planning process, in contrast to the Commission's revised CPCN proceedings, the appropriate target for examination for due process scrutiny. Nevertheless, the Riverside Parties' claim is incorrect as a factual matter. Public Utilities Code § 345.5(c)(3) explicitly provides that the CAISO shall "[m]aintain open meeting standards and meeting notice requirements consistent with the general policies of the Bagley-Keene Open Meetings Act." Similarly, subsection (c)(4) of that § 345.5 requires the CAISO to "[p]rovide public access to corporate records consistent with the general policies of the California Public Record Act ... and affording the public the greatest possible access, consistent with other duties of the corporation." Thus, the attempt to portray the CAISO process as cloaked in secrecy fails and should be ignored by the Commission in evaluating the OIR.

Also ignored in the unfounded criticism of the CAISO's procedural safeguards associated with the CAISO's Grid Planning Process is the presence of alternative dispute resolution ("ADR") procedures pursuant to the CAISO Tariff. Section 3.2.1.1.1 provides that "[i]f the Participating TO or *any other party* questions the need for the project (except where the Project Sponsor commits to pay the full cost of construction) the proposal will be submitted to the ISO ADR Procedures for resolution." (Emphasis added.) The term "party" is undefined in the Tariff, but clearly differs from Market Participant, which is limited to entities, including Scheduling Coordinators, who participate in the energy marketplace through the buying, selling, transmission, or distribution of Energy or Ancillary Services. (CAISO Tariff, Appendix A.) Accordingly, the CAISO Tariff accommodates broad public participation in the Grid Planning Process and its procedural protections, i.e, the ADR process. Moreover, given that the ADR procedures are part of the tariff, they are not "voluntary" as claimed by the Riverside Parties, but rather are imposed on the CAISO as a matter of federal law.

For disputes over \$1 million, the CAISO's ADR procedures allow for selection of a neutral arbitrator (§ 13.3.1.2), application of uniform procedures (§ 13.3.3), discovery procedures (§ 13.3.7), an evidentiary hearing with provision for the cross-examination of witnesses (§ 13.3.8), and opportunity for appeal to FERC (§ 13.4.1).<sup>16</sup> In short, the CAISO's tariff, with respect to the Grid Planning Process, does offer the procedural protections consistent with due process and intervenors are simply wrong to contend otherwise.<sup>17</sup>

## **VI. The CAISO Recognizes The Value Of Public Participation In Its Grid Planning Process**

ORA, perhaps recognizing that the OIR does not violate legal due process requirements, contends instead that the OIR is "poor public policy because of the lack of procedural safeguards at the CAISO." (ORA at 29.) Again, the CAISO disagrees. Nevertheless, the CAISO appreciates the concerns raised by ORA, the Riverside Parties, and TURN with regard to facilitating meaningful public participation and ensuring transparent decision-making. While the CAISO's Grid Planning Process has long been lauded by its participants as transparent and effective, the CAISO remains open to suggestions on how to improve the process. In the end,

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<sup>16</sup> A party to an arbitration may appeal to FERC "only upon the grounds that the award is contrary to or beyond the scope of the relevant ISO Documents, United States federal law, including, without limitation, the FPA, and any FERC regulations and decisions, or state law." (CAISO Tariff § 13.4.1.) The interplay between CAISO Tariff § 13.4.1 and the OIR may result in unintended consequences that warrant further evaluation and remediation. To the extent the adoption of CAISO methodologies by the Commission rises to the level of a state law, the language of the Tariff could be construed to permit an appeal to FERC on the basis that the CAISO did not follow the methodologies. This would be duplicative of the validation process before the Commission and create an improper incentive for forum shopping.

<sup>17</sup> The Riverside Parties criticize the accuracy of the CAISO's description of the Grid Coordinated Planning Process as set forth in its opening filing. For example, the Riverside Parties claim with respect to the development of the IOUs' annual transmission expansion plans that the CAISO simply "sends a staff person to participate in that process, but nothing more." This is incorrect. The CAISO chooses to allow the PTOs to preside over the stakeholder meetings because the PTOs are the primary drafters of the planning studies and prepare the information in the first instance. The CAISO simply chooses to follow a collaborative, not adversarial process with the planning process. However, that does not mean the CAISO is detached from the process or that stakeholders are prevented from participating. The CAISO directs the scope of IOU studies, monitors their progress, and independently reviews and confirms all results and data from those studies. In doing so, the CAISO fully considers input from all interested stakeholders.

the CAISO commits to working with interested parties and the Commission to ensure the Commission has confidence that the methodologies adopted and its validation procedures protect the public and will lead to an analytically sound outcome. Thus, as the CAISO responds to specific issues raised by various intervenors, it also proposes potential modifications with respect to certain of its internal procedures.

**A. Lack of Authority to Award Intervenor Compensation**

The CAISO acknowledges that no mechanism currently exists to financially support public participation in its processes. However, the absence of a funding mechanism has not impeded effective public participation in the CAISO ongoing stakeholder regarding Hunter’s Point Generating Station outreach program in San Francisco or in the development process for the Jefferson-Martin 230 kV line. A copy of the list of entities participating in the CAISO San Francisco Long-Term Study that identified the Jefferson-Martin project as the preferred transmission option to meet San Francisco’s reliability needs is attached hereto. Moreover, the ADR procedures mitigate the potential financial hardship borne by consumer entities intervening in the process. Section 13.3.14 of the Tariff provides that at the discretion of the arbitrator, any party may recover its costs and attorney’s fees to the extent that the party confers a benefit to the general public and the necessity and financial burden of private enforcement make the award appropriate.

Finally, the CAISO is amenable to entertaining suggestions on who to make its existing process more accessible. For example, the CAISO recognizes the financial constraints that many public interest organizations labor and is open to holding meetings in more convenient locations.

**B. Record for CAISO Board Consideration**

ORA complains that the CAISO process does not result in a record being presented to the Board for consideration. (ORA at 35.) ORA is correct that a formal record is not presented to

the Board, but instead management provides a comprehensive report setting forth the results of the grid planning process and a summary of opposing viewpoints. In addition, all interested parties have an opportunity to make public comment (both in writing as well as verbally) before the CAISO Board. The CAISO's practice is to solicit input from stakeholders throughout the grid planning process. Nevertheless, to ensure that active stakeholders have their position accurately characterized for the Board, the CAISO is willing to consider proposals for enhancing the existing means to provide public comment in the CAISO's Grid Planning Process.

**C. The CAISO Can Expand Its Notice Procedures**

The Commission acknowledges that the approach to transmission planning set forth in the OIR "is an improvement over historic processes and practices for several key reasons [including that] the ISO planning process allows for public participation and discussion of alternatives before the IOU has selected a project and submitted it to the CPUC for approval."<sup>18</sup> As noted in its opening comments, the CAISO stakeholder process relies on public self-awareness and communication by and among stakeholders included on the CAISO's Market Participant e-mail list. During the grid planning process it is unknown what the outcome will be and what, if any, specific transmission project will be selected for Commission review. Accordingly, the CAISO cannot replicate the specificity of the Commission's notice requirements. Nor should it, since the CAISO approves electrical planning solutions to the transmission grid each of which can be constructed along any number of different routes as identified by the Commission. Therefore, it is for the Commission to identify, and provide notice to, the specific individuals potentially affected by the Commission's alternative routes.

The CAISO proposes to modify its notice procedures by ensuring that it provides notice of its grid planning process to all public entities, i.e., cities and counties, that may be affected by

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<sup>18</sup> OIR at p. 8-9 [emphasis in original].

the preliminary projects identified in the IOUs' annual reports. In this way, representatives of any individuals and entities potentially impacted by the grid planning process will have received notification. This modification substantially improves on existing practice and reflects the CAISO's commitment to facilitating public participation in its processes.

## **VII. The Process Proposed in the OIR Does Not Contravene CEQA**

The OIR explicitly confirms that the Commission "is not proposing any changes to the CEQA process" and that the Commission will remain "responsible" for CEQA review. (OIR at 8.) The Riverside Parties and ORA reject the Commission's assurances in this regard. CEQA constitutes a procedural statute that requires governmental agencies to consider and disclose the potential environmental effects of their discretionary permit decisions. Nevertheless, the Riverside Parties and ORA wrongly claim that CEQA controls the particular issues on which the Commission must render a discretionary permit decision in the first place. The ORA suggests that the Commission cannot meet its duties under CEQA with respect to CPCN applications for CAISO-approved transmission projects unless it is free to consider whether that project is needed. CEQA provides no support for this argument, which rests on a misreading of what constitutes a valid "alternative" under CEQA. Nor is CEQA's requirement that a lead agency analyze the *environmental impacts* of the "no project" alternative somehow tantamount to a requirement under CEQA that the Commission must determine project need. Rather, CEQA requires the Commission to consider the environmental effects of the project as proposed by the applicant, and to develop and consider alternatives -- each of which must meet the applicant's basic project objectives -- where the proposed project would have significant environmental effects. The process envisioned under the OIR is perfectly consistent with these requirements.

The OIR contemplates a rational, two-step approach that closely mirrors the way any project requiring discretionary government approvals is initially planned and designed by the

developer, including defining project objectives, and *then* analyzed by the lead agency under CEQA. First, consistent with its obligations under the Federal Power Act and AB 1890, the CAISO would determine the basic configuration of the needed transmission upgrades – and, thus, the CPCN applicant’s basic project objectives under CEQA. It should be emphasized that this determination is made based on, and only after, the Commission has optimized the resource mix through the IOUs’ procurement plans. Next, the IOU would propose for the Commission’s consideration in a CPCN proceeding a specific routing for the CAISO-approved project. Where necessary under CEQA, the Commission would also develop and consider routing alternatives in order to address potential environmental impacts of the proposed route as well as local community values and other considerations mentioned in Public Utilities Code § 1002 and by local intervenors in CPCN cases like the Riverside Parties. Contrary to the ORA’s assertions, however, it is not necessary for the CPUC to second-guess the CAISO’s determination that the transmission upgrade is needed in order to address all local land use, environmental, and community concerns. Those issues are addressed by the Commission, both under Section 1002 and CEQA, and the OIR reaffirms the Commission’s intent to continue to comply with those authorities in its consideration of future CPCN applications.

At the same time, it is important to remember that, where CEQA requires consideration of alternatives, it also makes clear that those alternatives must be feasible, capable of reducing significant environmental impacts of the proposed project, and result in implementation of most of the project applicant’s basic project objectives. (14 Cal. Code Regs. § 15126.6(a), (c).) The Commission has recognized in past CPCN cases these fundamental principles, and tailored its alternatives analysis accordingly.

Moreover, where alternatives analysis is required, CEQA requires only that a “range of reasonable alternatives” be considered. (14 Cal. Code Regs. § 15126.6(a).) ORA’s assertion



that the Commission must revisit the full range of *planning options* (and, presumably, a full slate of routing alternatives for each of them) as part of its environmental review under CEQA of the potential environmental effects of the applicant’s proposal is inconsistent with these authorities as well as the purpose of the long-term procurement process.<sup>19</sup>

The ORA is correct that, where an EIR and alternatives analysis is required under CEQA, the Commission must also evaluate the “no project” alternative, along with its impact. (14 Cal. Code Regs. § 15126.6(e).) However, this is not the same thing as determining whether the project is needed. Rather, “[t]he purpose of describing and analyzing a no project alternative is to allow decision makers to compare the *impacts* of approving the proposed project with the *impacts* of not approving the proposed project.” (*Id.* at §15126.6(e)(1).) Since consideration of the environmental effects of the “no project” scenario requires a lead agency to make some assumptions about what would happen if the proposed project is not built – e.g., new generation would have to be permitted quickly to take the place of the rejected transmission line, with attendant air quality impacts, or load shedding would have to occur, with attendant public services and socioeconomic impacts – it is true that the Commission’s environmental review will “project[] what would reasonably be expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services.” (*Id.* at § 15126.6(e)(3)(C).) There is a big difference, however, between a *de novo* review of project need, with full consideration of all the various electrical alternatives, and a limited review under CEQA of the environmental impacts of what might happen if the ISO-approved project is not built. In this regard, CEQA does not require approval of the “no

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<sup>19</sup> Intervenors’ contentions are akin to arguing that a local government considering whether to grant a conditional use permit to a real estate developer for a shopping mall somehow violates CEQA unless its EIR considers not merely alternative setbacks, designs, or locations for the shopping mall, but also “alternatives” such as building residential subdivisions or converting the land to agriculture.

project” alternative even where it is found to be “environmentally superior.” (Cal. Pub. Res. Code § 15093.)

### **VIII. Intervenors’ Shotgun Approach To Sink The OIR Misses Its Mark**

Intervenors raise several ancillary challenges to the OIR’s proposed deference to the CAISO. The Riverside Parties and ORA dispute the CAISO’s objectivity. Those parties allege that as the operator of the grid, the CAISO has an institutional bias favoring the addition of new transmission facilities. (ORA at 30.) This accusation can be refuted or rendered moot on several grounds. First and most importantly, under the structure contemplated by the OIR, the CAISO’s transmission planning process would reflect “the Commission’s transmission determination made as part of its review of the IOUs long-term procurement plans.” (OIR at 6.) The CAISO’s process follows, and builds off of, the Commission’s prior determination that “transmission is needed after balancing competing options such as generation and demand side alternatives.” (*Id.*) Thus, under the contemplated process, a resource filtering process has already occurred that endorsed a transmission solution and the CAISO’s identification of a solution would be consistent with this directive.

Second, the implicit claim that the CAISO has never met a transmission project it did not like is patently false. The parties impugning the CAISO’s neutrality fail to offer any compelling examples of bias.<sup>20</sup> Had the Riverside Parties and ORA examined the CAISO’s actual record with respect to assessing transmission projects they would have discovered that the CAISO denied approval of 12 projects proposed in the IOUs 2003 expansion plans.

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<sup>20</sup> Riverside Parties cite to the CAISO’s advocacy of the Valley-Rainbow project purportedly “long after it became apparent that the record before the CPUC did to support a finding of reliability or economic need.” (Riverside Parties at 12.) With all due respect to the Commission’s Valley-Rainbow decision, the Commission’s current consideration of SDG&E’s grid reliability request for proposals in R.01-10-024 corroborates that the CAISO’s support of the Valley-Rainbow project was reasonable. Moreover, the CAISO’s future advocacy role would be in validating application of Commission approved standards.

Third, any bias the CAISO could have would be blunted by the fact that the CAISO would be applying Commission-adopted standards that are subsequently confirmed by the Commission. Again, it must be presumed that if the Commission adopts standards and implements a validating process, then the Commission has confidence that the outcomes will reflect impartial and well-reasoned decision-making. In this regard, the OIR clearly avoids the concerns identified by the Commission articulated in *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.* (1953) 40 Cal.2d 436. The Commission interpreted the regulatory scheme in *Dry Cleaners* as impermissible because there was no “guide for the exercise of the delegated authority.”<sup>21</sup> That concern does not exist here.

ORA also contests the CAISO’s economic evaluation of transmission projects on grounds including (1) the evaluation of project economics is a core competency of the Commission, not the CAISO; (2) the CAISO’s past record regarding economic review suggests deference will lead to unsatisfactory results; and (3) it is “highly unlikely” a consensus on an economic methodology can be achieved. (ORA at 38-42 [Sec. VII.A, B, and C].) ORA’s assertions evaporate in light of Phase 5 of I.00-11-001.

With respect to the first point, the fact that the Commission is reviewing, evaluating, and potentially adopting, with or without modifications, the CAISO’s proposed economic methodology in I.00-11-001 acknowledges and respects the Commission’s competence in economic analysis. ORA makes the unfounded assumption that the Commission’s competence must be exercised on an *ad hoc* case-by-case basis rather than by establishing rules of general applicability which are then monitored for compliance. Moreover, the CAISO is the entity that developed the economic methodology and therefore can reasonably be considered in the best

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<sup>21</sup> D.02-06-028 (2002).

position to apply the methodology to particular project proposals. Thus, nothing in the OIR contradicts recognition of the Commission’s competence in economic analysis.

On the second point, the CAISO’s past record is irrelevant. The Commission in I.00-11-001 either will adopt the economic methodology or it won’t. If it does adopt the methodology, then the economic methodology should lead to satisfactory results. If the methodology is not adopted, no deference will be accorded to the CAISO and ORA’s point is moot.

Finally, the last point mistakenly elevates “consensus” as a minimum threshold requirement. Consensus is desirable, but Commission approval does not require stakeholder unanimity. Simply put, what is required is for the Commission to adopt the methodology. Whether the methodology receives consensus approval or the Commission settles for something less than consensus in adopting the methodology will have to await the outcome of I.00-11-001. In this regard, the CAISO does agree with the Riverside Parties, however, that it is appropriate to defer a final ruling on the economic aspect of the OIR until the economic methodology has been reviewed and adopted by the Commission. Otherwise, any ruling on the OIR may be premature.

**IX. Riverside Parties Incorrectly Assert That The Proposed Deference To The CAISO Could Result In Negative Unintended Consequences**

The Riverside Parties contend that the proposed modification to G.O. 131-D “could limit the Commission’s ability to, on its own initiative, require utilities to bring forward new transmission projects for evaluation” where the CAISO “declined to approve a given transmission project or specific alternative.” (Riverside Parties at 20-21.) As an initial matter, it should be noted that the scenario suggested by this concern, i.e., CAISO rejects a project favored by the Commission, contradicts Riverside Parties’ unfounded accusation that “the ISO has an inescapable institutional bias favoring the addition of new transmission facilities.” (Riverside Parties at 12.) More importantly, the likelihood of a conflict is minimized by the Commission’s adoption of the standards applied by the CAISO. The fundamental premise underlying the OIR

is that the Commission has confidence in the rules and methodology to be used by the CAISO to determine need. Equally significant, the Commission retains the right to compel the IOUs to procure other resources to secure grid reliability or to propose an alternative transmission project. Accordingly, the probability that this concern will manifest itself in a manner detrimental to California consumers is extremely remote at best.

The Riverside Parties also assert that the OIR could result in usurpation of authority by the CAISO unintended by the Commission because of the CAISO's request that G.O. 131-D accommodate the evolving nature of the Applicable Reliability Criteria and economic methodology. As noted in the CAISO's opening comments, the CAISO is compelled by both state and federal law to apply the NERC/WECC standards. These entities can and are continuously contemplating modification to their standards especially after the August 14, 2003 Northeast blackout. When promulgated, changes to the NERC/WECC standards are automatically incorporated into the Applicable Reliability Criteria. Similarly, Public Utilities Code section 345's mandate that the CAISO "ensure efficient use and reliable operation of the transmission grid" imposes on the CAISO an independent obligation to ensure a reliable and cost-effective transmission system. The CAISO, therefore, is obligated to amend its Grid Planning Standards and Grid Coordinated Planning Process from time to time to meet its statutory responsibilities. The CAISO simply believes that reopening OIR or amending G.O. 131-D upon every change in either the Applicable Reliability Criteria or Grid Coordinated Planning Process would defeat the regulatory efficiency envisioned by the OIR. The CAISO welcomes alternative proposals to accommodate the CAISO's dual concerns.

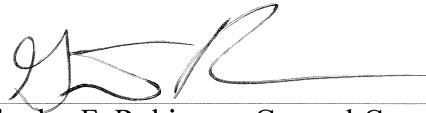
The CAISO does not believe, however, that the CAISO's proposal would create undue uncertainty and the opportunity for gamesmanship in interpreting the scope of the delegation. Changes to NERC/WECC criteria are published and well known. Similarly, changes in the

CAISO Grid Planning Standards or the economic methodology would have to be formally adopted by the CAISO and communicated to the Commission. The scope of the applicable standards would always remain transparent.

**X. Conclusion**

The CAISO believes that the Commission should adopt changes to G.O. 131-D consistent with the public interest and as outlined above. In addition, the CAISO respectfully requests that the Commission schedule a technical workshop to address details relating to the CAISO's proposed reliability methodology.

Respectfully submitted,



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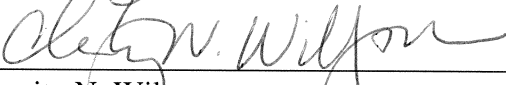
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Date: May 12, 2004

## CERTIFICATE OF SERVICE

I hereby certify that I have served, this day, a copy of the foregoing Reply Comments of The California Independent System Operator Corporation in Response to Order Instituting Rulemaking on the service list for **R.04-01-026** by electronic mail to each party.

Executed on May 12, 2004, at Folsom, California.

  
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