UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company,	)	
	)	
Complainant,	)	
	)	
v.	)	**Docket No. EL00-95-087**
	)	
Sellers of Energy and Ancillary Service Into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange,	)	
	)	
Respondents.	)	
	)	
	)	
Investigation of Practices of the California Independent System Operator and the California Power Exchange	)	**Docket No. EL00-98-074**

BRIEF OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION AS TO GRANT COUNTY TRANSACTIONS

Pursuant to the Commission's May 12 Order on Requests for Rehearing and Clarification in this proceeding, 107 FERC ¶ 61,165 (2004) ("May 12 Order"), the California Independent System Operator Corporation ("California ISO" or "ISO")[1] submits this brief on whether transactions between the ISO and the Public Utility District No. 2 of Grant County, Washington ("Grant County") made during the period October 2, 2000 through June 20, 2001 (the "Refund Period") are properly treated as "Out of Market" ("OOM") transactions for purposes of price mitigation, and which parties are liable for payment of such transactions.

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

I. BACKGROUND

During the hearing process established by the Commission in this proceeding, several governmental entities, including Grant County, argued that certain spot transactions entered into between them and the ISO during the Refund Period should not be subject to mitigation by the Commission because they were not "OOM transactions," but rather "bilateral" transactions.[2] The Presiding Judge agreed with the ISO and California Parties that the Commission's orders made no exemption for these transactions, and therefore struck the testimony and exhibits relating to this issue from the record.

On Rehearing of the Commission's March 26 order in this proceeding, Grant County re-raised this issue, maintaining that its transactions with the ISO were not OOM sales. Grant County also argued that its sales should not be subject to mitigation because the "narrow theory upon which the Commission based its authority to compel refunds" from governmental entities did not fit the factual circumstances of Grant County's transactions with the ISO.[3] In its October 16, 2003 Order on Rehearing, 105 FERC ¶ 61,066 (2003) ("October 16 Order"), the Commission granted Grant County's request for rehearing, finding that the circumstances of Grant County's transactions with the ISO provided it with neither personal jurisdiction over Grant County nor subject matter jurisdiction over its ISO transactions. *Id*. at P 177.

Subsequent to the issuance of the October 16 Order, the California Power Exchange ("PX") advised the ISO of its intention to object to Grant County's claim in the PX

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[2] One of these parties was the Turlock Irrigation District, which filed a motion on November 25, 2003, to be dismissed with prejudice from all refund liability in these proceedings. Answers to this motion were filed by the California Parties and Automated Power Exchange. In the May 12 Order, the Commission directed that these parties file briefs within 10 days of that order addressing this issue. May 12 Order at P 86.

[3] Request for Rehearing of Public Utility District No. 2 of Grant County, Washington, Docket No. EL00-05-081, et al. (April 24, 2003) ("Grant County Rehearing").

bankruptcy[4] on the ground that Grant County's recourse is against the ISO and not the PX, in light of the reasoning stated in the Commission's October 16 Order with respect to Grant County. The ISO, on March 12, filed a motion for clarification of the October 16 Order,[5] asking that the Commission make clear that the Commission, in its discussion of Grant County in the October 16 Order, was referring only to its lack of jurisdiction to *mitigate the prices* Grant County received for these transactions, and did not intend to undermine the fundamental principle that the obligation of payment for the sales by Grant County rests where the obligation of payment for all energy contracted for by the ISO rests, *i.e*., with the Scheduling Coordinators on whose behalf the ISO made the purchases. Several entities filed answers to the March 12 Motion, and on April 12, 2004, the ISO filed a motion for leave to reply and reply to these answers.

In the May 12 Order, however, the Commission concluded that its analysis in the October 16 Order relating to Grant County's transactions with the ISO "was based on an incomplete understanding of the transactions in question and their role in the CAISO market." May 12 Order at P 81. The Commission noted that Grant County had not challenged the Commission's finding that it had jurisdiction over sales made by governmental entities into markets operated by the ISO and PX. Instead, Grant County cited its own "unique circumstances" as meriting a finding that the Commission lacked jurisdiction over its transactions with the ISO. *Id*. at P 83. The Commission concluded,

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[4] As the Commission is aware, not all Scheduling Coordinators have paid all invoices from the ISO covering the Refund Period, including specifically the period in which Grant County made its sales. The PX, which is one of those Scheduling Coordinators, is in bankruptcy. Because it (along with other sellers during these periods) has not been paid in full, Grant County is pursuing a claim in the PX bankruptcy proceeding. Grant County has also filed a claim in the PG&E bankruptcy proceeding. Part of the amount that the PX owes the ISO is attributable to amounts that PG&E, in turn, owes to the PX. Also, as is discussed below, Grant County has filed suit against the ISO seeking recovery of the full, unmitigated, price of the power that it supplied to the ISO during the Refund Period. *Public Utility District No. 2 of Grant County, Washington v. California Independent System Operator Corp*., No. CV-04-129-JLQ (E.D. Wash. filed April 22, 2004).

[5] Motion of the California Independent System Operator Corporation for Clarification of the Commission's Order on Rehearing Dated October 16, 2003, Docket Nos. EL00-95-081, et al. (March 12, 2004) ("March 12 Motion").

however, that while those circumstances might be "indicia of whether particular sales by governmental entities fall under FERC jurisdiction, they are not . . . determinative of the question." Instead, the Commission concluded that the "key issue is whether particular sales could only be made pursuant to the CAISO Tariff." *Id*.

The Commission explained that although its earlier orders in this proceeding had focused on transactions made in the organized ISO and PX markets, the ISO also entered into OOM transactions, "short-term energy purchases necessary to maintain the reliability of the CAISO-controlled grid." *Id*. at P 84. Because OOM transactions were authorized by the Commission and operated according to Commission rules, the Commission found that "such transactions, involving governmental entities, like spot market transactions involving governmental entities, fall under the Commission's jurisdiction." *Id*. The Commission stated that, on rehearing, it now recognized that the "unique circumstances" cited by Grant County do not, in themselves, control the jurisdictional question. Instead, even if those factors were present, the Commission would have jurisdiction over any OOM transactions entered into by Grant County (or other governmental entities), "because those entities knew or should have known that such transactions were governed by the FERC-approved CAISO Tariff." *Id*. at P 85.

The Commission noted that the July 25 and December 19 orders in this proceeding determined that short-term bilateral transactions, other than OOM transactions, are not subject to mitigation. Because Grant County stated that it submitted testimony that its transactions "do not meet the Commission's definition of OOM transactions," but that testimony was stricken, the Commission concluded that it would reopen the record to "evaluate whether the stricken evidence supports Grant County's assertion that its transactions with the CAISO were not OOM transactions." *Id*. at P 86. The Commission directed the parties to submit briefs, not to exceed 20 pages, addressing this issue within 10

days of the issuance of the May 12 Order. The Commission also stated that it did not need to presently address the concerns expressed by the ISO in the March 12 Motion, as well as the answers thereto, but instead, these concerns may be renewed in the brief addressing the question of whether Grant County's transactions with the ISO were OOM transactions.

II. ARGUMENT

A. Grant County's Transactions with the ISO During the Refund Period Were OOM Transactions, as That Term is Defined by the Commission's Orders in this Proceeding

In its orders in this proceeding, the Commission has separated the universe of spot transactions[6] made outside the ISO and PX formal markets into "short term bilateral" transactions which are not subject to refund, and "OOM" transactions, which are subject to mitigation.[7] The crux of Grant County's argument is that the transactions that it entered into with the ISO during the Refund Period are not "OOM" transactions, but rather, fall within the category of "short-term bilateral" transactions and are therefore exempt from mitigation. Grant County maintains that the Commission's orders, in this and other proceedings, as well as an ISO operating procedure, supports this interpretation. As demonstrated below, however, Grant County's position is based on a misunderstanding of the difference between OOM transactions and other short-term bilateral transactions that the Commission enunciated in the May 12 Order, that is, whether the transactions at issue were made pursuant to the ISO Tariff, as well as a misreading of the Commission's previous orders in this proceeding.

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[6] The Commission has defined "spot" transactions for the purpose of this proceeding as transactions that are 24 hours or less in duration and were entered into the day of or day prior to delivery.

[7] The Commission also exempted from mitigation spot transactions that were entered into pursuant to the orders issued by the Secretary of Energy during the Refund Period invoking Section 202(c) of the Federal Power Act ("DOE Transactions"). However, these transactions are not relevant to this brief.

Some background with respect to the framework under which the ISO transacted during the Refund Period is helpful in placing this issue in the proper context. During the Refund Period, the ISO entered into several types of transactions with various suppliers, all of which were made pursuant to its Tariff. The most prevalent, as the Commission noted in the May 12 Order, were transactions made through the ISO's formal markets for Ancillary Services and Supplemental Energy. Suppliers submitted bids into these markets, and, if selected, were paid based on a single-price auction mechanism. There are numerous ISO Tariff provisions that govern these transactions.[8] These formal markets, however, were not sufficiently robust during much of the Refund Period to enable the ISO to procure adequate energy through bids submitted into these markets to ensure the reliability of the ISO Controlled Grid. Therefore, in many instances during the Refund Period, the ISO was forced to go outside of its formal markets for Ancillary Services and Supplemental Energy in order to obtain the additional amounts of energy necessary to reliably operate the grid.

One manner in which the ISO could, and did, procure energy outside of its formal markets is pursuant to Section 5.6.2 of the ISO Tariff, which gives the ISO the authority to dispatch a Participating Generator if "reasonably necessary to prevent an imminent or threatened System Emergency or to retain Operational Control over the ISO Controlled Grid during an actual System Emergency."[9] Generators who are dispatched pursuant to this authority are paid either the market clearing price or a cost-based rate, as set forth in Section 11.2.4.2 of the ISO Tariff. In addition to this mechanism, the ISO Tariff, Section 2.3.5.1.5, also permits the ISO to procure energy through negotiated contracts with non-PGA suppliers. Specifically, Section 2.3.5.1.5 provides that "if the ISO concludes that it may be unable to comply with the Applicable Reliability Criteria, the ISO shall, acting in

[8] Most of the provisions governing the operation of the ISO's formal markets are found in Section 2 of the ISO Tariff.

[9] The ISO's *pro forma* Participating Generator Agreement reinforces the obligation of Participating Generators to comply with this section of the ISO Tariff.

accordance with Good Utility Practice, take such steps as it considers to be necessary to ensure compliance, *including the negotiation of contracts through processes other than competitive solicitations*." (emphasis added).

It is this third type of transaction, a contract negotiated pursuant to ISO Tariff Section 2.3.5.1.5, that the ISO entered into with Grant County, as well as with numerous other non-PGA suppliers, during the Refund Period.[10] As noted by Mr. Spence Gerber in his rebuttal testimony submitted in this proceeding on behalf of the ISO, both the second and third type of transactions are generally referred to as Out of Market, or OOM, transactions, both by the ISO was well as suppliers, because they are made outside of the formal markets operated by the ISO. Exh. ISO-37 at 90-91.

Grant County's argument is that only the second type of transaction referred to above, that is, the dispatch of Participating Generators pursuant to Section 5.6.2 of the ISO Tariff, are OOM transactions, and therefore subject to mitigation. Transactions made under the ISO's general contracting authority, as set forth in Section 2.3.5.1.5 of the ISO Tariff, Grant County maintains, are not technically OOM transactions. Instead, Grant County argues that these transactions fall under the category of short-term bilateral transactions, and therefore are not subject to mitigation.

One of the facts relied on by Grant County to support its argument is that during the Refund Period, the ISO's Operating Procedure S-318 defined "Out of Market" as energy obtained from a Scheduling Coordinator, and "Non Scheduling Coordinator" as energy obtained through sources other than Scheduling Coordinators. Grant County Rehearing at 17. This distinction, which was specific to Operating Procedure S-318,[11] does not, however, support Grant's argument, because the issue is not one of mere phraseology, as Grant

[10] See Exh. ISO-37 at 90:1-14. Most of these transactions (all, in the case of Grant County) were for delivery less than 24 hours after arrangement was made. Thus, they fit the definition of "spot" transactions under the Commission's orders in this proceeding.

[11] *See* Exh. ISO-37 at 91:1-5.

would have the Commission believe. The term "OOM" is not, in and of itself, significant; that is, it has no independent legal force outside of the context of the Commission's use of the term to describe a particular set of transactions. Indeed, the terms "Out of Market" or "OOM" do not appear in the ISO Tariff. What matters is how the Commission has defined those transactions made outside of the ISO's formal markets that are subject to mitigation (referred to as OOM transactions) and those that are not (referred to as short-term bilateral transactions), and whether Grant County's transactions fall into the former or the latter category.[12] Stated another way, what did the Commission mean when it referred to OOM transactions *in this proceeding*, and do Grant County's transactions meet this definition? Whether Grant County's transactions would have been called "OOM" or "Non Scheduling Coordinator" transactions under an ISO protocol, moreover one that the Commission has never referenced in its discussion of this issue in this proceeding, has no bearing on this determination.

The Commission has, in fact, developed in its orders in this proceeding a set of criteria to determine whether transactions are OOM transactions subject to mitigation. In its order of July 25, 2001, initiating the refund proceeding, the Commission granted clarification that the ISO's OOM purchases would be subject to refund, under the rationale that OOM purchases are no different than purchases made through the ISO's formal markets, that is, they are purchases made by the ISO in order to procure the resources necessary to reliably operate the grid. 96 FERC ¶ 61,120 at 61,515 (2001) ("July 25 Order"). Additionally, in the May 12 Order, the Commission explained that the key issue in determining whether particular transactions made outside of the ISO's formal markets are subject to mitigation is

[12] In its Request for Rehearing, Grant County also argued that previous Commission orders have defined OOM as limited only to the dispatch of Participating Generators pursuant to Section 5.6.2. Grant County Rehearing at 16 (citing *California Independent System Operator Corp.*, 90 FERC ¶ 61,006 (2000); *El Segundo Power*, 95 FERC ¶ 61,159 (2001)). This argument is unconvincing, because in neither of these orders did the Commission limit the definition of OOM. Instead, the Commission merely described and dealt with one type of OOM.

whether those sales "could only be made pursuant to the CAISO Tariff." May 12 Order at P 83. Thus, based on the Commission's orders in this proceeding, the question of whether the Grant County transactions, and others like them, are "OOM" transactions subject to mitigation, can be determined by answering the following questions: (1) are the transactions at issue spot transactions; (2) were the transactions made outside of the ISO's formal markets; and (3) were the transactions entered into pursuant to the terms of the ISO Tariff in order to procure the resources necessary to reliably operate the grid.

All of the transactions at issue between Grant County and the ISO satisfy these conditions. No one disputes that the Grant County transactions were spot transactions, that is, of a duration of 24 hours or less and entered into the day of or day prior to delivery, or that the transactions were entered into outside of the ISO's formal markets. Moreover, as noted above, all of these transactions were made pursuant to the ISO's authority in ISO Tariff Section 2.3.5.1.5 to negotiate contracts through processes other than competitive solicitation, when necessary in order to ensure the reliability of the grid. This fact was recognized by Grant County in testimony submitted during the hearing phase of this proceeding. Its witness, Mr. Culbertson, specifically stated that the transactions between the ISO and Grant County were entered into pursuant to Section 2.3.5.1.5 of the ISO Tariff.[13] There is, in fact, no other manner in which the ISO could have obtained energy from entities such as Grant County, because, as is explained in greater detail in Section II.B. below, the CAISO *only* contracts for energy pursuant to the authority in and terms of its tariff.[14] The transactions entered into between Grant County and the ISO therefore satisfy the essential characteristics of OOM transactions as articulated in the Commission's orders in this proceeding. That is, they were spot market purchases, made exclusively pursuant to

[13] Exh. GC-1 at 5. Bonneville Power Administration, which made an argument similar to Grant County's concerning its spot transactions with the ISO during the hearing phase of this proceeding, also explicitly recognized that its transactions were entered into pursuant to Section 2.3.5.1.5 of the ISO Tariff. Exh. BPA-57 at 6:22-7:11.

the terms of the ISO Tariff, in order to procure energy necessary to ensure the reliable operation of the ISO Controlled Grid.

Indeed, the discussion of this issue in the Commission's previous orders in this proceeding strongly suggests that the Commission, when it has referred to "OOM transactions," meant not only the dispatch of PGA generators pursuant to Section 5.6.2 of the ISO Tariff, but also the type of transactions entered into between Grant County and the ISO pursuant to Section 2.3.5.1.5 of the ISO Tariff. For instance, in the July 25 Order, the Commission explained that the ability of suppliers to demand unjust and unreasonable rates is amplified with respect to OOM transactions because suppliers know that the ISO is in a must-buy situation. July 25 Order at 61,515. This statement suggests that the Commission viewed OOM purchases as including the type of transactions entered into between the ISO and Grant County. Under the ISO Tariff, when the ISO dispatches a Participating Generator pursuant to Section 5.6.2, the Generator is paid either the market clearing price or a cost-based rate. Thus, a Participating Generator that is dispatched by the ISO pursuant to this section of the ISO Tariff cannot demand a price above the market-clearing price for that interval. However, non-PGA suppliers such as Grant County were in a position where they could command higher prices by virtue of the shortage of bids into the ISO's formal markets, because the prices for their transactions with the ISO were not so constrained. Thus, the Commission's rationale for mitigating OOM transactions in the July 25 Order only makes sense if the Commission's reference to "OOM transactions" contemplated those transactions entered into between the ISO and non-PGA suppliers pursuant to Section 2.3.5.1.5 of the ISO Tariff.

In the December 19 Order, the Commission, in response to requests for rehearing filed by several parties, reiterated that OOM transactions would be subject to mitigation.

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[14] *See* discussion *infra* at p. 14.

December 19 Order at 62,196. Significantly, the parties requesting reconsideration on this issue were not in-state generators with PGAs, but rather out-of-state marketers and utilities that were not subject to ISO dispatch authority, and whose transactions made during the Refund Period resembled those made by Grant County, that is, sales outside the ISO's formal markets at negotiated prices, entered into pursuant to Section 2.3.5.1.5 of the ISO Tariff. For instance, Portland General, one of the entities requesting rehearing on this issue, argued that OOM transactions should not be subject to mitigation because they were freely negotiated outside of the ISO's formal markets, and thus, more akin to the transactions entered into by the California Department of Water Resources ("CDWR"), which the Commission found not to be subject to mitigation.[15] The Commission explicitly noted and rejected these arguments. December 19 Order at 62,196. This strongly suggests that the Commission did not intend for the universe of OOM transactions to be limited to transactions made pursuant to the ISO's dispatch authority over Participating Generators. If the Commission had intended this limited interpretation, there would have been no reason for the Commission to consider the rehearing requests of the marketers and out-of-state utilities, or for those entities to have even sought rehearing, given that those entities had not entered into Participating Generator agreements with the ISO. Moreover, in discussing the issue of sales made pursuant to the Department of Energy orders, the Commission noted that the ISO *negotiated directly* with parties to obtain OOM energy. *Id*. at 62,196-97. The ISO's dispatch authority over Participating Generators does not involve negotiations. The terms and price for such dispatches are spelled out in the ISO Tariff, as noted above. The only OOM purchases that involve negotiations between the ISO and suppliers are those made pursuant to the ISO's contracting authority set forth in Section 2.3.5.1.5. Therefore, it stands to reason that the Commission, when it referred to OOM

[15] Request for Rehearing of Portland General Electric Company, Docket Nos. EL00-95-045, et al. (filed

transactions, meant to include transactions entered into with the ISO at negotiated prices by non-PGA suppliers, such as Grant County.

By contrast, the Commission, in its discussion of "short-term bilateral" transactions, which are not subject to mitigation, has identified only two types of transactions that fall into this category, neither of which is similar to the transactions entered into between the ISO and Grant County. The first consists of transactions entered into directly between CDWR and third-party suppliers. See July 25 Order at 61,514-15. The second consists of sales made directly between sellers and purchasers of energy.[16] See December 19 Order at 62,197-97. The common element between these two types of transactions is that the ISO was not involved in either, and therefore, neither was made pursuant to the terms of the ISO Tariff. Indeed, the lack of any mention by the Commission of bilaterals in connection with transactions made with the ISO is unsurprising, given the fact that no transactions with the ISO, even when entered into with entities that do not normally have a contractual relationship with the ISO, are truly "bilateral" in nature. The ISO does not purchase energy on its own behalf. The ISO has no load of its own to serve. Instead, the ISO procures energy on behalf of the Scheduling Coordinators in the ISO Market, in order to ensure the reliability of the ISO Controlled Grid. This principle is expressed in Section 2.2.1 of the ISO Tariff, which states: "In contracting for Ancillary Services and Imbalance Energy the ISO will not act a principal but as agent for and on behalf of the relevant Scheduling Coordinator."

August 24, 2001) at 8-9.

[16] Specifically, the Commission rejected the arguments of the City of San Francisco and the Port of Oakland that "short-term bilateral contracts" should be made subject to refund, noting that this proceeding only involves sales through the ISO and PX markets, not bilateral sales. December 19 Order at 62,196-97.

B. The Commission Should Confirm that the Obligation of Payment for Transactions Between Grant County and the ISO Rests with the Scheduling Coordinators, and Not Directly with the ISO Itself

Even if the Commission ultimately determines that it does not have jurisdiction to mitigate Grant County's transactions with the ISO during the Refund Period, the Commission should, at a minimum, confirm that its orders in this proceeding did not modify the fundamental principle that the *obligation of payment* for these transactions rests where the obligation of payment for all energy contracted for by the ISO rests, *i.e*., with the Scheduling Coordinators on whose behalf the ISO transacted. As explained in the ISO's March 12 Motion, the ISO originally sought this ruling because the PX had advised the ISO of its intention to object to Grant County's claim in the PX bankruptcy on the ground that Grant County's recourse was against the ISO and not the PX, in light of the reasoning stated in the Commission's October 16 Order with respect to Grant County. The need for such clarification has since become even more acute, as Grant County has sued the ISO in federal court seeking payment from the ISO directly.[17]

Given the Commission's finding in the May 12 Order that the "unique circumstances" of Grant County are not determinative of the Commission's jurisdiction over Grant County's sales, it is not entirely clear what argument parties might now make with respect to this issue. The ISO is concerned, however, that if the Commission determines that it does not have jurisdiction to mitigate Grant County's transactions with the ISO, certain parties, including the PX and Grant County, may use such a ruling as the basis to argue that Grant County's transactions with the ISO were somehow totally outside the framework of the ISO Tariff and therefore the ISO was purchasing on its own account and not on the behalf of the Scheduling Coordinators, including the PX, with the result that the ISO could be directly

[17] *Public Utility District No. 2 of Grant County, Washington v. California Independent System Operator Corp*., No. CV-04-129-JLQ (E.D. Wash. filed April 22, 2004).

responsible for payment to Grant County. Therefore, the ISO requests that the Commission confirm that Grant County's claim for redress based on its failure to receive full payment for its sales is solely against the Scheduling Coordinators who have failed to pay the amounts invoiced to them by the ISO for the months in which Grant County made those sales, in particular the PX.

The ISO can only act pursuant to its Tariff. This reality is a function not only of Commission regulation, but also the statute that created the ISO.[18] Briefly stated, the ISO's organic statute directed the ISO to seek authority from the Commission to enable it to perform its reliability function, and the ISO Tariff is the product of that direction. That tariff includes Section 2.2.1, which, as explained above, explicitly states that the ISO does not transact for energy on its own account, but for the account of the Scheduling Coordinators who represent the load that uses that energy. This section was specifically addressed by the Commission in one of the orders issued at start-up of the ISO. One of the intervenors in that proceeding contended that this section should be changed to require the ISO to procure on its own behalf rather than as agent for the Scheduling Coordinators. The Commission ruled as follows:

> We also reject EPUC/CAC's recommended change to Section 2.2.1 of the ISO Tariff. *The ISO should not be deemed to procure ancillary services on its own behalf since the ISO is not a participant in the market place*. The ISO is appropriately securing the necessary ancillary services on behalf of Scheduling Coordinators since it is the Scheduling Coordinators who will utilize these services.

81 FERC ¶ 61,122, at 61,496 (1997) (emphasis added).

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[18] The ISO is a non-profit public benefit corporation under California law, whose authority to transact for energy derives from California Assembly Bill 1890 ("AB 1890"). The ISO's Articles of Incorporation state that "the specific purpose of this corporation is to ensure efficient use and reliable operation of the electric transmission grid pursuant to the Statute."[18] In AB 1890, the California legislature stated that the ISO "shall ensure efficient use and reliable operation of the transmission grid consistent with achievement of [established] planning and operating reserve criteria," AB 1890, Article 3, Section 345, and that the ISO "shall ensure that additional filings at the Federal Energy Regulatory Commission . . . seek the authority needed to give [the ISO] the ability to secure generating . . . resources necessary to guarantee achievement of [established] planning and operating reserve criteria." *Id.*, Article 3, Section 346. The ISO complied with the statutory mandate to seek the necessary authority from the Commission when it

This tariff provision, as well as the Commission's explicit characterization of it and rejection of any change to it, demonstrate that when the ISO contracted with Grant County for energy – just as when it transacted with any other seller – it did so not on its own account but rather as agent for Scheduling Coordinators, including the PX. The obligation to pay Grant County, therefore, became the obligation *of the principals to the transaction*, *i.e., the Scheduling Coordinators*. This relationship among a seller, the ISO as agent, and the Scheduling Coordinators as buyer-principals, has been well understood by all who sell to the ISO and all who use the energy, since start-up. This relationship goes to the very heart of the ISO's business – the markets it operates, its billing and invoicing system, and its very ability to continue its operations, the benefits of which everyone, including both the PX and Grant County, has accepted. Indeed, all of the documents that make this relationship clear, from AB 1890 to the ISO's articles of incorporation to the ISO Tariff, are matters of public record, available to Grant County and any other seller of energy that deals with the ISO. Thus, Grant County was on notice that the ISO was acting as an agent for those entities serving load in its Control Area, and not as a principal, when it transacted with Grant County.[19] Moreover, the PX, as a Scheduling Coordinator, signed a Scheduling Coordinator Agreement in which it agreed to abide by the terms of the ISO Tariff,[20] which

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filed the ISO Tariff. In sum, the ISO is not a general purpose entity, but a special purpose corporation whose purpose, insofar as relevant here, is to "ensure reliable operation" of the grid.

[19] The PX contends that Grant County should have no claim against it because the PX, too, is an agent for its participants. California Power Exchange's Answer to CAISO's March 12 Motion for Clarification, Docket Nos. EL00-95-081, *et al*. (filed March 29, 2004) ("PX Answer") at 6-7. The PX, however, is a Scheduling Coordinator with the ISO, and the ISO transacts for Imbalance Energy as agent on behalf of *its* Scheduling Coordinators, including the PX. The PX also says that the ISO, not the PX, had a "contractual relationship" with Grant County. *Id.*, at 7. In fact, as Section 2.2.1 of the ISO Tariff makes clear, the ISO *transacted* with Grant County only as agent on behalf of the PX, which means that the PX is the contractual principal vis-à-vis Grant County. In the PX's April 20, 2004 Motion for Leave to Reply and Brief Reply to Filings made by ISO and California Parties ("PX Reply"), the PX acknowledges that it is obligated to pay the ISO's invoices, pursuant to Section 2.2.1 of the ISO Tariff, and that it intends to pay those invoices in full. PX Reply at 1-2.

[20] Section 2.B of the ISO's Scheduling Coordinator Agreement provides that a Scheduling Coordinator will:

abide by, and will perform all of the obligations under the ISO Tariff placed on Scheduling Coordinators in respect of all matters set forth therein including, without limitation, all matters relating to

includes the provision that the ISO, when contracting for Imbalance Energy, is doing so not on its own account but for the benefit of Scheduling Coordinators.

If the Scheduling Coordinators are the principals on whose behalf the ISO contracts for energy, it follows that if one of those Scheduling Coordinators fails to pay its portion of the cost of the energy for which the ISO contracted, the recourse of the seller is against that Scheduling Coordinator and not the ISO. Moreover, nothing in the ISO Tariff suggests that the ISO, in acting as agent, is to be inserted between the seller and the defaulting Scheduling Coordinator: the right to payment is the seller's against the Scheduling Coordinator, and the obligation to pay is the Scheduling Coordinator's to the seller.

Both the Commission's orders and the ISO Tariff itself reinforce the point in the previous paragraph, which already is clear from the portion of Section 2.2.1 quoted above. In the same order in which it approved Section 2.2.1, the Commission rejected another proposed change to Section 2.2.1 that would have obligated the ISO to pursue defaulting Scheduling Coordinators on behalf of sellers. The Commission stated as follows:

> Southern Cities /Azusa and Banning contend that the ISO should be responsible for the collection of Scheduling Coordinator's debts and that this should be included as a general obligation on the ISO under ISO Tariff Section 2.2.1. . . .
> With regard to Southern Cities/Azusa and Banning's recommendation, we agree with the ISO that the ISO's duties should not be expanded to include the collection of bad debt of Scheduling Coordinators. The purpose of Scheduling Coordinators is to act as an intermediary between the ISO and customers and in this capacity it should be the responsibility of Scheduling Coordinators to recover amounts that they are owed.

81 FERC ¶ 61,122, at 61,506-09. Thus, at start-up, intervenors before the Commission tried to create an obligation on the part of the ISO to pursue Scheduling Coordinators who had not made their required payments to sellers, but the Commission rejected that proposal. There *is* a provision in the ISO Tariff that *authorizes* the ISO to pursue such actions if it chooses to do so under certain conditions, but that provision does not suggest

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the scheduling of Energy and Ancillary Services on the ISO Controlled Grid, ongoing obligations in respect of scheduling, Settlement, system security policy and procedures to be developed by the ISO

that in doing so the ISO would be changing the fundamental payment obligation of the defaulting Scheduling Coordinator to the seller; the provision states that the ISO would be pursuing "on behalf of" the seller the amounts "owed to it" by the defaulting Scheduling Coordinator. ISO Tariff § 11.20.1.

The ISO Tariff provisions and the Commission orders described above make clear, beyond the possibility of confusion, that the ISO only contracts for energy on behalf of Scheduling Coordinators, not for its own account, and that whenever a Scheduling Coordinator fails to pay its portion of the cost of energy transacted for by the ISO on its behalf, the seller seeking payment has a claim only against the Scheduling Coordinator and must pursue that Scheduling Coordinator, even in bankruptcy proceedings, unless the ISO agrees as an accommodation to do so, pursuant to Section 11.20.1. In the case of Grant County's claims against the PX, the ISO has not agreed to pursue them on behalf of Grant County, so therefore Grant County must pursue them, and it is doing so.

As noted above, the ISO does not yet know for sure what form parties' positions will take on this issue, given the Commission's statements in the May 12 Order. However, the answers to the ISO's March 12 Motion provided a glimpse into the arguments that parties will likely make in their briefs to the Commission on this issue. For instance, in its answer to the March 12 Motion, Grant County contended that because it did not make sales "under" or "pursuant to" the ISO Tariff, and did not sign a Participating Generator Agreement, it cannot be "bound by" the ISO Tariff.[21] The implication of Grant County's assertions appears to be that, although Scheduling Coordinators such as the PX are obligated as the contracting party under Section 2.2.1 of the ISO Tariff to pay Grant County for the energy it supplied, Grant County wishes to remain free to assert simultaneously the contrary position that the

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from time to time, billing and payments, confidentiality and dispute resolution.

[21] Answer of Public Utility District No. 2 of Grant County, Washington to California Independent System Operator Corporation's Motion for Clarification, Docket Nos. EL00-95-081, *et al*. (filed on March 29, 2004) ("Grant County Answer") at 3-4.

ISO was the contracting party and, on that basis, seek payment directly from the ISO. The PX likewise suggested that, since the Commission cannot "define Grant County's rights and obligations," Grant County could sue the ISO in court for payment. PX Answer at 6. Puget Sound Energy, Inc. went so far as to contend that the ISO was making the purchases from parties such as Grant County "outside" the ISO Tariff and pursuant to the Western Systems Power Pool ("WSPP") Agreement, and therefore the ISO is directly responsible for payment.[22]

The ISO submits that all of these arguments are red herrings. First, it must be noted that if the sales by Grant County and Puget were made pursuant to the WSPP Agreement (as they have asserted), the principal to the transactions could not possibly be the ISO under the very terms of the WSPP Agreement: the ISO is not a signatory to that agreement.[23] Moreover, it does not at bottom matter whether Grant County made sales "under" or "pursuant to" this or that tariff or whether the Commission can or cannot determine the reasonableness of the prices or other terms and conditions of those sales; what matters, for purpose of the clarification the ISO seeks, is *who was Grant County's counterparty*.[24] In other words, Grant County could have had a published tariff saying that its sales were made at $50/MWh, and under such-and-such other terms and conditions, but none of that would address the question raised by the ISO's March 12 Motion: – to whom was Grant County selling?

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[22] Answer of Puget Sound Energy, Inc. in Opposition to Motion of California Independent System Operator Corporation for Clarification of Order on Rehearing, Docket Nos. EL00-95-081, et al. (filed on March 29, 2004) ("Puget Sound Answer") at 1-3.

[23] The WSPP Agreement is found on the web at http://www.wspp.org/Web%20Pages/WSPP%20Current%20Documents.htm. It makes clear that the only transactions subject to its terms are those between entities that have become parties to that WSPP Agreement itself, by executing it. See, e.g., Section 1 (definition of Parties); Section 4.15 (definition of Purchaser); Section 4.17 (definition of Seller). The ISO is *not a party* to that Agreement, as shown by the list at Original Sheets 91-93. Therefore, the ISO cannot be the principal to any transaction made by Grant County or Puget under the WSPP; saying that a transaction is under the WSPP is thus perfectly consistent with the ISO's point that it acts not principal but as agent when it purchases Imbalance Energy.

The question of to whom Grant County was selling is answered by the ISO Tariff – a public document that clearly discloses and establishes the capacity in which the ISO transacts for Imbalance Energy from any seller. Indeed, the PX appears to have acknowledged that it is the ISO Tariff that controls in this situation. In its April 20, 2004 reply to the ISO and California Parties, the PX admitted that it is obligated to pay the invoices for Imbalance Energy issued to it by the ISO, pursuant to Section 2.2.1 of the ISO Tariff, including the Imbalance Energy obtained from Grant County. PX Reply at 2. The PX also states that it intends to pay those invoices in full. *Id*. at 1. The Commission has full authority (or "jurisdiction" as that term is used in the Commission's orders in this proceeding) over the ISO and over the ISO Tariff, and it is the principle of that ISO Tariff that the ISO asks the Commission to reaffirm.[25]

For these reasons, the ISO requests that the Commission state that nothing in any of its orders in this proceeding, including any finding that it does not have jurisdiction to mitigate Grant County's transactions, is intended to change the fundamental framework governing *all* procurement of energy by the ISO, which is as described above and grounded in Section 2.2.1 of the ISO Tariff and the Commission's relevant orders. The ISO *only* contracts for energy pursuant to the authority in and terms of its tariff. It matters not *from whom* the ISO obtains energy, *nor whether the seller happens to be a governmental entity whose rates the Commission cannot normally regulate*; regardless of the seller's identity, those contracts are entered on behalf of Scheduling Coordinators and not on the ISO's own

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[24] The ISO also notes that Grant County, in its testimony in this proceeding, adopted a contrary position, as noted above. Namely, that its sales to the ISO during the Refund Period *were* made pursuant to Section 2.3.5.1.5 of the ISO Tariff.

[25] Puget argues, strangely, that a seller should be held to know the ISO acts on behalf of Scheduling Coordinators only when the seller bids into the ISO's single-price auction markets. Puget Answer, at 4. There is no basis in the ISO Tariff to make the ISO's status as principal or agent depend on whether a seller is selling into the auction markets or outside those markets. Section 2.2.1 is clear that the ISO acts as agent when it purchases Imbalance Energy; it does not say the ISO acts as agent only when purchasing Imbalance Energy through the auction markets. If a seller is held to know the ISO acts as agent for purchases in the auction markets(and Puget Sound acknowledge that is, in fact, the case),

behalf. If a Scheduling Coordinator fails to pay, a seller's only claim is against that Scheduling Coordinator, not the ISO.

III. CONCLUSION

For the reasons stated above, the ISO requests that the Commission find that the transactions entered into by Grant County with the ISO during the Refund Period are properly to be mitigated as OOM transactions, and, regardless of the Commission's conclusion concerning its jurisdiction over Grant County's sales, clarify that its orders in this proceeding do not modify the fundamental principle that the *sole obligation of payment* for the sales by Grant County rests where the obligation of payment for all energy contracted for by the ISO rests, *i.e*., with the Scheduling Coordinators on whose behalf the ISO transacted.

Respectfully submitted,

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then the seller must be held to know the ISO acts as agent outside those markets, so long as it is transacting for Imbalance Energy.

CERTIFICATE OF SERVICE

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

Dated at Folsom, CA on this 24th day of May, 2004.

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Dan Shonkwiler