UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corporation	**)** **)** **)**	**Docket Nos. ER98-997-000** **ER98-1309-000**

BRIEF OPPOSING EXCEPTIONS OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION

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Pursuant to Rule 711 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.711, the California Independent System Operator Corporation ("ISO") submits its Brief Opposing Exceptions in this proceeding.

I. Summary

The Brief on Exceptions of the Cogeneration Association of California ("CAC") is largely devoted to arguing that the Commission should *not* review the Initial Decision's conclusions regarding the application to Qualifying Facilities [QFs] of ISO Tariff requirements for metering, telemetry and scheduling on a gross basis. The ISO has explained in its Brief on Exceptions, however, the Initial Decision's conclusions in this regard will have a significant impact of the ability of the ISO to comply with applicable reliability standards and to properly allocate the costs of that compliance. For these reasons, review of the Initial Decision is critically necessary.

CAC also argues that the Commission should reverse the Initial Decision's conclusions that the terms of the ISO Tariff should prevail over the terms of a QF

Participating Generator Agreement ("PGA") in the case of conflict. Otherwise, according to CAC, the Initial Decision's conclusions regarding exemptions from the ISO Tariff would be nullified. If the Commission reverses the Initial Decisions conclusions about the ISO Tariff requirements for metering, telemetry and scheduling on a gross basis, CAC's concerns will be moot. Even if the Commission were to affirm the Initial Decision in this regard – despite the evidence that is contrary to the Initial Decision's conclusions – CAC's concerns would still not justify a provision that the terms of a QF-PGA prevail over the ISO Tariff in the case of conflict. Such a provision would severely hamper the ability of the ISO to amend the ISO Tariff to address changing circumstances and of the Commission to require appropriate amendments. Recent events in California have demonstrated the necessity of maintaining such flexibility. Rather, CAC's concerns can be address a Commission order directing that any exemptions be incorporated in the ISO Tariff.

The Brief on Exceptions of Southern California Edison ("Edison") asks the Commission to reverse the Initial Decision's conclusion that the a QF-PGA need not include requirements that the ISO ensure that Utility Distribution Companies, such as Edison, receive notice of a QF's intention to execute a PGA and of changes to operating instructions under a QF-PGA and procedures for resolving conflicts between the QF-PGA and a power purchase agreement between the QF and the Utility Distribution Company. The lack of such requirements and procedures, however, do not render the ISO's *pro forma* PGA unjust and unreasonable as applied to QFs. There is no basis for requiring the ISO to

police a QF's compliance with its contracts with other entities. The ISO Tariff and Commission procedures provide the Utility Distribution Company with adequate notice.

II. Background

As discussed in the ISO's Brief Opposing Exceptions, the issue in this proceeding is whether Qualifying Facilities ("QFs") should be required to sign a Participating Generator Agreement ("PGA") [1]that obligates the QF to abide by the same ISO Tariff provisions that are applicable to other Participating Generators. The primary dispute involves compliance with the ISO Tariff's provisions requiring gross telemetry of QF Generation, and metering of QF Generation and Load on a gross basis. The need for these requirements derives from the ISO's obligation to maintain the reliability of the ISO Controlled Grid, taking into account the QF's behind-the-meter Load.

The Initial Decision concluded, despite overwhelming evidence to the contrary, that the ISO could fulfill its reliability obligations without taking behind-the-meter Load into account. *California Independent System Operator Corp.,* 96 FERC ¶ 63,015 (hereafter "I.D."). In its Brief on Exceptions, the ISO excepted to this finding of the Initial Decision, and the related findings and conclusions that the ISO's requirements for metering, telemetry and scheduling on a gross basis were unjust and unreasonable.[2] The ISO explained that these findings, if affirmed by the Commission, would seriously undermine the ISO's ability to

[1] Terms used herein with initial capitalization and not otherwise defined herein have the meanings set forth in the Master Definitions Supplement, ISO Tariff Appendix A.

comply with relevant reliability criteria and to ensure the reliability of the ISO Controlled Grid and the ISO Control Area.

Commission staff also filed a brief urging reversal of the Initial Decision on these issues. The Western Systems Coordinating Council, which is responsible for reliability criteria to which the ISO must conform, filed a motion to intervene out-of-time and a brief urging reversal of the Initial Decision's conclusion regarding the reliability criteria.

In addition, the Cogeneration Association of California ("CAC") and Southern California Edison ("Edison") each filed a brief on exceptions. Each spends a significant portion of its brief on exceptions urging affirmance of the Initial Decision. Each does, however, except to certain portions of the Initial Decision. These exceptions pertain to the Initial Decisions conclusions regarding the following two sets of issues:

> **Issue I.A: Is the *pro forma* Participating Generator Agreement (PGA) just and reasonable if applied to QFs?**
>
> **Issue I.B: If it is not just and reasonable, what changes to the existing terms and conditions of the *pro forma* PGA are required in order to create a just and reasonable QF PGA?**

The Initial Decision rejected Edison's request that the ISO be required to furnish advance notice to the relevant Utility Distribution Company ("UDC") of a QF's intention to enter into a PGA. The Initial Decision stated that Edison failed to demonstrate that this burden should be imposed on the ISO. I.D. at 65,134.

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[2] The ISO also excepted to certain other findings requiring revisions to the *pro forma* PGA.

Issue IV.B: Is the provision of the PGA that states that the ISO tariff will control in the case of conflict between the ISO tariff and the PGA just and reasonable as applied to QFs?

Issue IV.C: Is it just and reasonable for the ISO to have the unilateral ability to amend the ISO tariff requirements that are incorporated into the PGA by amending the ISO tariff pursuant to its Section 205 rights under the FPA?

The Initial Decision found that it is just and reasonable for the ISO to have the ability to amend the ISO Tariff requirements incorporated into the PGA for a QF by amending the ISO Tariff itself, pursuant to its rights under Section 205 of the FPA. The Initial Decision explained that the right of the ISO to amend its Tariff is subject to protest by interested parties and Commission review, and QFs thus have a remedy with respect to unjust or unreasonable amendments or changes to tariff provisions. The Initial Decision recognized that the ISO's ability unilaterally to amend its Tariff is necessary because of changing conditions in the electric market. *Id*. at 65,148.

III. Exceptions Opposed

The ISO opposes the following exceptions of CAC:

1. That the Initial Decision erred by failing to procedurally provide an effective remedy to implement the finding that the *pro forma* PGA is neither just nor reasonable as applied to Qualifying Facilities.

2. That the Initial Decision erred by permitting that the ISO Tariff will control in the case of conflict between the ISO Tariff and the PGA.

3. That the Initial Decision erred in allowing the ISO to have the unilateral ability to amend the ISO Tariff requirements that are incorporated into the PGA by amending the ISO Tariff pursuant to its Section 205 rights under the FPA.

The ISO also opposes the following exception of Southern California Edison Company ("Edison"):

> 1. That the Presiding Judge erred in finding that [Edison's] and CAC's proposals, which accounted for the contractual relationship, if any, between a QF and a UDC, were not shown to be just and reasonable. Specifically, the Presiding Judge's determination that it would appear more reasonable for such matters to be negotiated between SCE and its QFs is not well founded. *See* I.D. at 65,134.

IV. Rebuttal to Policy Considerations Warranting Commission Review

Although a Brief on Exceptions is not the appropriate vehicle for arguments opposing review, the majority of CAC's discussion of policy considerations warranting Commission review is devoted to arguing that the Commission should not review the Initial Decision's conclusions regarding the ISO Tariff's provisions requiring telemetry of QF Generation and metering of QF Generation and Load on a gross basis. The reasons that review of the Initial Decision regarding these issues is necessary are fully laid out in the Briefs on Exceptions of the ISO, Commission Staff, and the WSCC.[3]

CAC is indeed correct that the Initial Decision is the result of a long procedural process and an extensive record. This is not cause, however, for the Commission to avoid review of a seriously flawed Initial Decision. If left standing, the Initial Decision will broadly affect the ability of the ISO to meet applicable reliability criteria and to fairly allocate the costs of reliability. The extensive proceedings that led to the Initial Decision and the significance of its impact are

[3] Indeed, these issues are identified in the Considerations Warranting Commission Review in the Edison's Brief on Exceptions. Edison Brief on Exceptions at 4 (hereafter "Edison Brief").

simply more the reason for the Commission to review the Initial Decision. The ISO does believe that an expeditious decision by the Commission in this matter would be very helpful to afford affected parties certainty in an important area.

CAC also contends that the Commission should review what it terms the "procedural" aspects of the Initial Decision because the Initial Decision's conclusion that the terms of the ISO Tariff should prevail in the case of conflict with a QF-PGA would nullify the exemptions from the ISO Tariff that the Presiding Judge determined were appropriate. CAC goes on to argue that enforcement of these exemptions is necessary "to ensure that QFs are treated in a just and reasonable manner, and not subjected to unduly discriminatory practices." CAC Brief on Exceptions at 5 (hereinafter "CAC Brief").

The ISO has explained in its Brief on Exceptions that the exemptions that CAC seeks from ISO Tariff requirements for metering, telemetry, and scheduling on a gross basis are not appropriate, but rather are inimical to the ISO's ability to conform with applicable reliability criteria and will result in improper cost-shifting. If the Commission agrees with the ISO and reverses the Initial Decision in this regard, CAC's Considerations Warranting Review are moot.

If, however, the Commission agrees with the Initial Decision that QFs should be exempted from the ISO Tariff's provisions requiring gross telemetry of Generation, and metering of Generation and Load on a gross basis, there is still no basis for concluding that the provisions of a QF-PGA should prevail over the provisions of the ISO Tariff in the case of conflict. The considerations raised by CAC warrant review only of the conclusion of the Initial Decision that these

exemptions should be accomplished through the QF-PGA, rather than through amendment of the ISO Tariff. *Compare* I.D. at 65,148-49 *with* ISO Initial Brief at 44-46.

Edison's discussion of policy considerations warranting Commission review simply identifies the central policy issue in this proceeding: the application of the ISO Tariff requirements regarding gross metering and telemetry to QFs. Edison Brief at 4. The ISO has fully explained in its Brief on Exceptions why the Initial Decision's conclusions regarding this issue warrant Commission review.

V. Argument

A. The Initial Decision Properly Decided that the Terms of the ISO Tariff Should Prevail Over the Terms of a QF-PGA, and that the ISO Should Have the Authority to Unilaterally Amend the ISO Tariff as It Applies to QFs Through the QF-PGA.

CAC notes that the ISO Tariff currently requires the QFs be metered, telemetered, scheduled, and allocated transmission costs on a gross load basis. CAC Brief at 11. CAC is generally correct.[4] CAC notes that if the terms of the ISO Tariff control over the terms of a QF-PGA in the case of conflict, then any exemption from the Tariff requirements that appear in the QF-PGA would be nullified. *Id.*

[4] With certain exceptions, the ISO Tariff requires that QF Generating Units be telemetered on a gross basis. ISO Tariff §§ 5.1.3, 5.1.4. It requires that QF Generating Units and the Loads served by QF Generating Units be scheduled (ISO Tariff § 2.2.7.2) and metered on a gross basis. ISO Metered Entities ISO Tariff § 10.2.1, MP 2.2.4.3, ISO Tariff SC § 10.6.6.1, MP 2.3.5. It allocates various transmission costs, including Ancillary Services, on the basis of gross metered Load. *See, e.g.*, ISO Tariff § 2.5.20.1

It is true that if the provisions of the ISO Tariff control in the case of conflict between the PGA and the ISO Tariff, then the ISO will be able to modify the terms and conditions that are applicable to QFs participating in the ISO's markets by exercising its right to file amendments to the ISO Tariff under Section 205 of the FPA. Ex. CAC-1 (Ross) at 11:18-12:2. CAC's concerns do not, however, justify a contrary result. CAC has made no showing that such a circumstance is unjust or unreasonable. Significantly, no other party shared CAC's position in the proceeding below. *See* Ex. ISO-5 (Dozier) at 11:20-12:32; ISO-6 (Dozier) at 13:7-14:11; Ex. SCE-1 (Shockey) at 19:6-9. This may be because a contractual requirement that the PGA – to the extent it includes provisions other than requiring compliance with the ISO Tariff – prevails over the ISO Tariff would significantly interfere with the ability of the ISO, California, and the Commission to address changing circumstances in the California electricity markets. Ex. ISO-5 (Dozier) at 12:12-32.

The Commission has described in recent decisions the many changes that the California electricity markets have undergone since restructuring, and the crisis that arose in those markets. *See, e.g., San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, et al., 93 FERC ¶ 61,121 (2000); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, et al., 93 FERC ¶ 61,294 (2000). The Commission has made significant changes to the ISO markets to address the crisis conditions. *See, e.g., id.; San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, et al., 95 FERC ¶ 61,115 (2001); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary*

Services, et al., 95 FERC ¶ 61,391 (2001). The current circumstances demand continued efforts to develop better mechanisms to ensure an adequate and reliable supply of reasonably priced Energy for Californians.

CAC's proposal would effectively tie the ISO's and Commissions' hands with regard to issues concerning an entire segment of the California markets. Further, the ability of the Commission to modify the PGAs as necessary to implement its plans would be severely limited. *See United Gas Pipeline Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332 (1956); *FPC v. Sierra-Pacific Power Co.*, 350 U.S. 348 (1956).

In the proceedings that led to the Initial Decision, CAC offered no valid justification for excusing QFs from the obligations imposed upon other California Generators. It argued that cogenerators are not primarily in the business of selling power, but rather of serving their thermal host. Ex. CAC-1 (Ross) at 4:22-5:4; Ex. CAC-2 (Ross) at 4:21-5:1. Such an assertion strains credulity with a facility such as Midway Sunset, with 265 MW of capacity, only a small portion of which serves behind-the-meter Load. *See* ISO-Ex. 17 (Schedule 1). Even to the extent that the assertion is true, however, it does not explain why a QF that chooses to sell Energy for profit, and which already enjoys special privileges – such as a requirement that local utilities purchase the Energy – should not otherwise play by the rules.

To the extent that QFs believe that a proposed amendment to the ISO Tariff should not be applicable to QFs, they are free to protest the amendment. 16 U.S.C. § 824d(e). That way the Commission can determine whether the

arguments are valid. Instead, CAC would deny the Commission that opportunity – setting in stone the provisions applicable to QFs, regardless of changed circumstances.

CAC also argued below that QFs lack the resources to monitor amendments to the ISO Tariff. Tr. (Ross) at 523:15-21. The very existence of CAC and its participation in this proceeding, and numerous other proceedings before the Commission, belies this claim. CAC is an organization of QFs, at least some of whom are owned by parent corporations such as Texaco and ARCO. Ex. CAC-1 (Ross) at 1:20-27. The purpose of organizations such as CAC is so that entities can pool their resources in order to monitor regulatory developments and participate in litigation. The burden placed on QFs in this regard is no greater than that placed on other businesses of similar size, none of whom enjoy special exemptions from the cost responsibilities imposed by the ISO Tariff. There is no reason to treat QFs differently in this regard than other Market Participants.

In light of these considerations, if the Commission affirms the Initial Decision's conclusion that QFs should be exempted from the ISO Tariff requirements for metering, telemetry, and scheduling on a gross basis – despite the evidence to the contrary – then the Commission should address CAC's "procedural" concerns by a Commission Order directing the ISO to revise the Tariff to incorporate the exemption. This approach would afford CAC the central relief it seeks without unduly restricting the ability of the ISO and the Commission to make necessary changes to requirements applicable to QFs set forth in the

ISO Tariff, in response to changing market conditions. Indeed, this is CAC' s proposed alternative relief.[5]

B. The Initial Decision Properly Decided that a QF-PGA Would Be Just and Reasonable in the Absence of a Provision Requiring Notice to a UDC of Contractual Arrangements Between the ISO and a QF.

Edison contends that the Initial Decision erroneously failed to accept three provisions that Edison contended should be included in a QF-PGA: According to Edison, the provisions would 1) ensure that the QF informs the UDC, in a timely fashion, that it is entering into a PGA by requiring the QF to provide a copy of Schedule 1 and the operating instructions to the UDC and requiring the ISO to verify the QFs fulfillment of this responsibility; 2) ensure that the QF informs the UDC of any changes in technical information and that the ISO provides a copy of such changes to the UDC with which the QF has a PPA; and 3) provide the ISO guidance on the handling of operating instructions, should a dispute arise between a UDC and a QF over such instructions. Edison Brief at 5. Edison argues that it must have this information because many QFs are under contract to sell their power to a UDC. *Id.* The shortcoming of Edison's argument is that it fails to explain why provisions regarding such information should appear in a contract between the ISO and a QF.

Edison's position is that the Initial Decision incorrectly concluded (1) that requiring the ISO to ensure that the QF provides notice of its intent to enter a

[5] CAC also suggests that the Tariff also specify that the provisions from which QFs are exempted are unjust and unreasonable. CAC Brief at 8. Such language has no place in a tariff and serves no purpose. If the ISO ever wished to amend the ISO Tariff to remove the exemptions, it would have the same burden to prove that the amendment is just and reasonable regardless of whether such language appeared in the ISO Tariff.

PGA would be burdensome and (2) that Edison could negotiate a provision in its contracts with QFs requiring such notice. Yet Edison's assertions could be applied to all PGAs that the ISO enters into with Generators. Any Generator might be under contract to sell all of its power to another entity. Indeed, Edison's logic could apply to every type of contract into which the ISO enters. The resulting burden would be significant, particularly considering that the simple act of entering a PGA would not itself interfere with the fulfillment of those contracts or QF power purchase agreements.

It is true that the relationship between a QF and a UDC with which it has a power purchase agreement is different from the relationship created by other power contracts: the QF's power is included among the Generation identified in the UDC's PGA. This circumstance, however, argues against the need for any special provisions. QF power sale contracts with Edison are listed on Edison's PGA, Tr. (Shockey) at 472:17-473:11. Therefore, the ISO will need to confirm the QF's authority, under its power purchase agreement, to enter a PGA with Edison prior to execution of the PGA; and most likely the QF will need to revise its Scheduling Coordinator Agreement with Edison. *Id.* at 475:14-476:15.

Moreover, PGAs and revisions to the conditions listed in Schedule 1 must be filed with the Commission, which will notice the filing. *Id.* at 478:18-479:7. Thus, Edison will have all the notice it needs. Because a provision in a QF-PGA requiring notice to the UDC is therefore unnecessary, there is no basis for concluding that a QF-PGA would be unjust or unreasonable in the absence of such a provision.

Edison further excepts to the Initial Decision because it did not specifically discuss, and therefore provided no reasoned basis for, rejection of Edison's other recommendations identified above. Under the circumstances, however, the Commission should conclude that the Initial Decision implicitly rejected Edison's arguments and accepted the ISO's. Because it is the *pro forma* PGA, and specifically the PGAs that the ISO filed for two QFs – not Edison's recommendations – that are the subject of these dockets, a failure by the Initial Decision to adopt the recommendations of Edison constitutes an approval of the relevant provisions of the *pro forma* PGA. *Cf. Williston Basin Interstate Pipeline Co.*, 67 FERC ¶ 61,137 (1994) (Presiding Judge implicitly rejected pipeline company's DCF study when he accepted Staff's DCF analysis). The Initial Decision's reasoning in rejecting a requirement for notifying UDCs of a QF's PGA application is equally applicable to Edison's other proposed revisions. Each deals with disputes under the contract between the UDC and the QF. There is no valid reason for addressing such disputes in a QF-PGA.

Moreover, the failure of the Initial Decision specifically to discuss each of Edison's proposed changes to the *pro forma* PGA certainly does not provide a basis for reversing the Initial Decision's rejection of those proposals. Even an appellate court does not require an agency to meticulously explain its rejection of each and every argument; it suffices if the Court can perceive the agency's reasoning. *See Duke Power Co. v. FERC,* 864 F.2d 823, 826 (D.C. Cir. 1989). The Commission does not, however, review the Initial Decision as an appellate body. Rather, the Commission has all the powers it would have had making the

initial decision. 5 U.S.C. § 557(b). In particular, the Commission performs a *de novo* review of legal conclusions. *See Columbia Gas Transmission Corp.*, 26 FERC ¶ 61,334 (1984). The burden is on Edison to show not just that its proposed revisions would be helpful or convenient to it, but that the *pro forma* PGA is unjust and unreasonable in the absence of those proposals. *See, e.g., OXY USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995) ("[T]he Commission may approve the methodology proposed in the settlement agreement if it is 'just and reasonable'; it need not be the only reasonable methodology, or even the most accurate."); *New England Power Co.*, 52 FERC ¶ 61,090 at 61,336 (1990) (concluding that a rate design was "just and reasonable" despite the fact that the design was not perfect, and that more desirable alternatives may have existed). Edison has not met that burden.

VI. Conclusion

For the reasons described above, the Commission should reject the exceptions of CAC and Edison.

Respectfully submitted,

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