

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

California Independent System Operator Corporation)	Docket Nos. ER01-313-000
)	ER01-313-001
)	
Pacific Gas and Electric Company)	ER01-424-000
)	ER01-424-001
)	

MOTION OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR TO COMPEL THE COGENERATION ASSOCIATION OF CALIFORNIA AND ENERGY PRODUCERS AND USERS COALITION TO RESPOND TO DISCOVERY REQUESTS

Pursuant to Rules 212 and 410 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.212 and § 385.410, the California Independent System Operator Corporation (“ISO”) hereby moves to compel the Cogeneration of California and Energy Producers and Users Coalition (“CAC/EPUC”) to answer certain discovery requests to which CAC/EPUC has objected to and / or been non-responsive.

I. Factual Background

This proceeding involves the unbundling of the ISO’s Grid Management Charge (“GMC”) filed on November 1, 2000. The GMC proceeding was consolidated with the Pacific Gas and Electric’s Pass Through Charge proceeding by Order of the Commission on December 29, 2001.

On April 4, 2001, CAC/EPUC submitted the Prepared Direct Testimony of James A. Ross. In that testimony, Mr. Ross argued that rejection of the unbundled GMC would be appropriate because “QF’s have been assessed and have paid an appropriate portion of the GMC in a non-discriminatory manner since the inception of the charge through their retail standby service.” Exh. No. CAC-2 at 12. In addition, Mr. Ross argued that the ISO’s unbundled GMC would have a detrimental economic impact on QFs, stating that the GMC “unreasonably eliminates the ability of

a consumer installing Self-generation to capture the financial benefits associated with industrial site sufficiency and thus may totally eliminate Distributed Generation as a viable customer option. Indeed, the CAISO's discriminatory policies on self-generation, if implemented, may reduce benefit [*sic*] that can be recaptured by the customer to such a level that customers are forced to purchase power off the grid from large, more remotely located generation." Exh. No. CAC-2 at 23-24. Mr. Ross stated that the ISO's unbundled GMC proposal "represents bad public policy as it discourages the development of Distributed Generation and QFs used in providing Self-generation and may exacerbate the existing energy crisis in the State of California." Exh. No. CAC-2 at 25. Again arguing that the ISO's proposed unbundled GMC would cause economic harm to behind-the-meter generation, Mr. Ross testified in his Prepared Cross-Answering Testimony filed in the above captioned docket on August 17, 2001, that "End-use customers will have a great economic incentive not to employ grid-connected self-generation. End-use customers may be forced to isolate, where possible, the self-generation from the interconnected system (*i.e.*, "island" from the ISO controlled grid) in order avoid excess charges resulting from Mr. Gross [*sic*] proposal." Exh. No. CAC-4 at 24-25. To support his conclusions regarding the economic impact of the unbundled GMC on QFs, Mr. Ross provided an example of a hypothetical QF, which assumed a certain number of megawatts of energy generated, on-site load requirements, standby service purchased, and availability. Exh. No. CAC-4 at 23-24.

On September 7, 2001, the ISO served CAC/EPUC via email with its first set of data requests in accordance with the electronic discovery procedures established in the prehearing conference. The questions sought certain data in the possession of CAC\EPUC. Under the definitions provided with the data requests, "CAC\EPUC" included consultants of the

organization, such as its witness Mr. Ross. On September 14, 2001, served the ISO via e-mail with a letter (Attached as Exhibit A) which objected to following four ISO requests:

ISO-CAC/EPUC-1: For each individual member of CAC and EPUC that serves behind-the-meter Load, please list the entity that provided stand-by service for the years 1998, 1999, and 2000.

ISO-CAC/EPUC-2: For each individual member of CAC and EPUC that serves behind-the-meter Load, please provide the following, in MW, by generating facility for the years 1998, 1999, and 2000.

- (a) The name plate rating of the on-site Generating Unit(s);
- (b) The actual generation by month;
- (c) The month peak demand of the behind-the-meter Load;
- (d) The monthly energy usage of the behind the meter Load
- (e) The amount of energy consumed by the behind-the-meter Load by month under standby tariffs.

ISO-CAC/EPUC-3: For each individual member of CAC and EPUC that serves behind-the-meter Load, in MWh and listed separately for each year, for 1998, 1999, and 2000, please provide the number of hours each on-site generator was off-line by month, including identifying whether the outage was planned or forced.

ISO-CAC/EPUC-13: Please state (i) the megawatt hours of energy sold to the California PX or to a Utility Distribution Company by each individual member of CAC or EPUC during each month of the calendar years 1999 and 2000; (ii) the variable cost of producing such energy; and (iii) the revenue received by the member of CAC or EPCU [*sic*] for such energy.

CAC/EPUC's objections were that the above requests sought information 1) outside the scope of the proceeding, 2) is not relevant to the subject matter of the proceeding, 3) was not likely to lead to the discovery of admissible evidence. In addition, for ISO-CAC/EPUC-2, 3 and 13, CAC/EPUC stated that the information sought is "commercially sensitive, requires an unduly burdensome compilation, and appears to be propounded for the sole purpose of harassment. Finally, CAC/EPUC stated that they are trade organizations and do not have data pertaining to individual members."

In response to these objections, the ISO served a second set of discovery requests via email on CAC/EPUC on September 24, 2001 (Attached as Exhibit B). CAC/EPUC served their

responses to the ISO's second set of discovery requests on the ISO via email on October 11, 2001 (Attached as Exhibit C). Among the requests and responses were the following:

ISO-CAC/EPUC-14: In her objections to ISO-CAC/EPUC-1, ISO-CAC/EPUC-3 [should read "2"], ISO-CAC/EPUC-3, and ISO-CAC/EPUC-13, counsel for CAC/EPUC stated that CAC/EPUC has no data pertaining to individual members.

- (b) Please admit or deny that Mr. James A. Ross has no data regarding individual members of CAC/EPUC that is responsive to ISO-CAC/EPUC-1, ISO-CAC/EPUC-3 [should read "2"], ISO-CAC/EPUC-3, or ISO-CAC/EPUC-13.

Response: *Mr. Ross' testimony does not rely upon any individual data.*

The ISO contacted counsel for CAC/EPUC via telephone to discuss the response given to ISO-CAC/EPUC-14(b) believing it to be non-responsive to the specific question posed to CAC/EPUC. That telephone call was followed by a voice-mail and email indicating that the ISO was requesting a responsive answer to 14(b). Counsel for CAC responded via a letter emailed on October 11, 2001 (Attached as Exhibit D) that "Mr. Ross did not rely on or review any individual data in the course of his employment as an expert witness in the GMC proceeding. Moreover, no individual data was ever provided to him by this law firm, CAC/EPUC, or any individual member of CAC/EPUC as part of his employment as an expert witness in the GMC proceeding." CAC further stated that if Mr. Ross had in his possession data related to any individual members of CAC/EPUC, *i.e.*, that "the individual data sought by the ISO is outside the scope of the proceeding, and is not likely to lead to the discovery of admissible evidence," and that the "information sought is commercially sensitive, requires an unduly burdensome compilation, and appears to be propounded for the sole purpose of harassment." Counsel for the ISO confirmed by a telephone call to CAC/EPUC counsel following receipt of the letter that CAC/EPUC would not be providing an answer to ISO-CAC/EPUC-14(b).

II. Discussion

A. CAC/EPUC's Objections are Without Merit

CAC's initial objections to ISO-CAC/EPUC-1, ISO-CAC/EPUC-2, ISO-CAC/EPUC-3, and ISO-CAC/EPUC-13 were threefold: (1) that CAC/EPUC did not have the requested data regarding individual members of CAC/EPUC; (2) that the requested data was irrelevant;¹ and (3) that the requested data was confidential.

1. Possession of the Information

Because responding to CAC/EPUC's other objections would be futile if CAC/EPUC lack the data, the ISO in ISO-CAC/EPUC CAC-14 sought confirmation that CAC/EPUC, and Mr. Ross in particular, in fact lacked the data. CAC's response that Mr. Ross did not rely upon the data, and its further elaboration that he did not come into possession of such data by virtue of his work for CAC/EPUC is patently non-responsive.

CAC/EPUC appears to believe that Mr. Ross's failure to rely on the information makes it immune to discovery. Rule 402(c) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.402(c), however, makes discoverable "any facts know or opinions held" by an expert. The rule, of course, makes perfect sense. Parties should be entitled to learn if an expert witness is in possession of information that undermines his testimony and opinions. That a witness has such information and chose not to rely upon it would certainly be a critical factor in evaluating his or her testimony.

If Mr. Ross indeed lacks the requested information, CAC/EPUC can simply confirm that he does not, and this discovery dispute would be ended. If Mr. Ross is in possession of responsive

¹ CAC/EPUC also stated that it would be burdensome for Mr. Ross to search his files for such data. The claim of burden, however, was predicated on an assertion of irrelevance.

data, however, nothing in the Rules or Commission precedent permits him to avoid disclosure simply because he did not rely upon it.

2. Relevance

As discussed above, in his Direct Testimony, Mr. Ross argued that QF's would suffer severe economic hardship under the ISO's proposals. The validity of his arguments depends upon the economic impact of the proposal on individual *real* QFs. Mr. Ross offers a hypothetical QF as an example. The value of a hypothetical, however, is determined by the degree to which its assumptions match reality. There is simply no other way for the Presiding Judge or the Commission to evaluate Mr. Ross's claims in the absence of real world information.

The information requested in ISO-CAC/EPUC-1, ISO-CAC/EPUC-2, ISO-CAC/EPUC-3, and ISO-CAC/EPUC-13 is precisely the type of information that is relevant to a real world inquiry. For example, QFs are not likely to "island" themselves if, despite the GMC, the QF is still making more money connected to the ISO Controlled Grid than it would if it disconnected. A QF may have millions of dollars of off-site sales and low variable costs. The on-site load of such a QF may be very small compared to its generation capacity. Under such circumstance, the QF would not appear likely to "island" because of the GMC, and such a determination would be relevant to evaluating Mr. Ross's testimony. The ISO's requests regarding the capacity of specific QF generators, the size of the on-site load, the revenues from off-site sales, and the variable costs of generation in ISO-CAC/EPUC-2 and ISO-CAC/EPUC-13 are thus highly relevant.

Mr. Ross also asserts that QFs are highly reliable. This is a strictly factual statement the validity of which depends on individual QF outage rates. The ISO's requests regarding hours that a QF generator is off-line in ISO-CAC/EPUC-3 are thus directly relevant.

Finally, Mr. Ross asserts that QFs pay an appropriate share of the GMC through standby charges. The validity of this information depends upon the the standby charges that the QFs pay. The ISO's requests regarding the identity of the entity providing standby service in ISO-CAC/EPUC-1 are thus also relevant.

Exh. No. CAC-2 at 12. In addition, Mr. Ross argued that the ISO's unbundled GMC would have a detrimental economic impact on QFs, stating that the GMC "unreasonably eliminates the ability of a consumer installing Self-generation to capture the financial benefits associated with industrial site sufficiency and thus may totally eliminate Distributed Generation as a viable customer option. Indeed, the CAISO's discriminatory policies on self-generation, if implemented, may reduce benefit [*sic*] that can be recaptured by the customer to such a level that customers are forced to purchase power off the grid from large, more remotely located generation." Exh. No. CAC-2 at 23-24. Mr. Ross stated that the ISO's unbundled GMC proposal "represents bad public policy as it discourages the development of Distributed Generation and QFs used in providing Self-generation and may exacerbate the existing energy crisis in the State of California." Exh. No. CAC-2 at 25. Again arguing that the ISO's proposed unbundled GMC would cause economic harm to behind-the-meter generation, Mr. Ross testified in his Prepared Cross-Answering Testimony filed in the above captioned docket on August 17, 2001, that "End-use customers will have a great economic incentive not to employ grid-connected self-generation. End-use customers may be forced to isolate, where possible, the self-generation from the interconnected system (*i.e.*, "island" from the ISO controlled grid) in order avoid excess charges resulting from Mr. Gross [*sic*] proposal." Exh. No. CAC-4 at 24-25. Mr. Ross further testified that "The Trial Staff now proposes to eliminate most, if not all, of those electric rate cost savings under the ridiculous notion that the transmission system exists for the benefit of these customers regardless of whether those

customers impose any load on the utility's electric system," Exh. No. CAC-4 at 19. To support his conclusions regarding the economic impact of the unbundled GMC on QFs, Mr. Ross provided an example of a hypothetical QF, which assumed a certain number of megawatts of energy generated, on-site load requirements, standby service purchased, and availability. Exh. No. CAC-4 at 23-24.

Although counsel for CAC/EPUC has stated Mr. Ross is testifying regarding QFs in general, not specific QF's, both Mr. Ross's Direct and Indirect testimony state that he is providing testimony on behalf of CAC/EPUC which represent enumerated and specific Companies and their qualifying facilities. (Exh. No. CAC-2 at 1-2; CAC-4 at 1-2). Through Mr. Ross's testimony, CAC/EPUC has plainly put at issue matters related to whether QFs pay their portion of the proposed unbundled GMC through standby service and the costs of the proposed unbundled GMC and the effect of those costs on the members of CAC/EPUC. The reasonableness of Mr. Ross's assertions regarding the impact of the ISO's policies on QFs is thus central to the issues in this proceeding, and it is appropriate for the ISO to test the validity of Mr. Ross's assertions in his testimony with actual data he may have regarding the QFs on whose behalf he is making those assertions.

3. Commercial Sensitivity

CAC/EPUC's objections regarding the commercial sensitivity of the information requested in ISO-CAC/EPUC-1, 2, 3, 13 and 14(b) are also without merit. If CAC/EPUC can demonstrate that the information is commercially sensitive, then at best it is entitled to a protective order under Rule 410(c) of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.410(c).

The Commission has held that "once the party [seeking discovery] has demonstrated relevance, the objecting party has the burden of demonstrating that the request should be denied or limited under Rule 410(c)." See *All American Pipeline Company*, 70 FERC ¶ 61,210 (1995) at

61,658. In the same decision, the Commission noted that in the case of competitively sensitive materials, “the competitive harm of releasing the materials must be weighed against the need for the information in preparing the opponent’s case, and the ALJ should consider whether protective measures are available to alleviate the harm that could result from disclosure.” *Id.*

Because the information sought by the ISO is relevant to the issues in this proceeding, in order to prevent its disclosure, CAC/EPUC must meet its burden by establishing that this information is, in fact, of a such a commercially sensitive nature that CAC/EPUC’s interests cannot be adequately safeguarded by a protective order. The requested information is of the type routinely produced under a protective order. CAC/EPUC’s demonstration will be particularly difficult because the ISO is a not-for-profit entity, and, thus, exposure to commercially sensitive information would not provide it with any competitive benefit. At best, therefore, CAC/EPUC should receive the protection provided by a protective order.

B. The Motion to Compel Is Timely

ISO’s second set of discovery requests were needed to confirm whether or not CAC/EPUC or the witness providing testimony on behalf of CAC/EPUC Mr. Ross had any information within their possession responsive to the ISO-CAC/EPUC-1, 2, 3 and 13. If both lack the information, a motion to compel would have been futile. This motion to compel is brought within 10 days after the objection of CAC/EPUC to provide a response to that clarifying inquiry and therefore is consistent with the Office of Administrative Law Judge’s Time Standards for Discovery.

III. Efforts Undertaken to Resolve this Dispute

The efforts undertaken by the ISO to resolve this dispute are described in the Background section of this filing above. The ISO notes that it tried to obtain similar information in Docket No.

ER98-997, and CAC refused to provide the information, even pursuant to a protective order. As a result, CAC agreed to withdraw certain testimony and the ISO withdrew corresponding rebuttal. In light of this history, the ISO believes that further efforts to resolve this dispute would be futile.

IV. Conclusion

In light of the foregoing, the ISO respectfully requests that the Presiding Judge direct CAC/EPUC to respond to data requests ISO-CAC/EPUC-1, ISO-CAC/EPUC-2, ISO-CAC/EPUC-3, ISO-CAC/EPUC-13 to the extent that Mr. Ross possesses information responsive to those requests, and ISO-CAC/EPUC-14(b).

Respectfully Submitted,

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