UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corp.	))	Docket No. ER00-2019-006 ER01-819-002

ANSWER OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION TO THE MOTION OF THE CITY OF VERNON, CALIFORNIA FOR LEAVE TO FILE INTERLOCUTORY APPEAL TO THE COMMISSION

To: The Honorable Bobbie J. McCartney

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, the California Independent System Operator Corporation ("ISO") respectfully submits this Answer to the Motion for Leave to File Interlocutory Appeal to the Commission ("Motion") filed on January 2, 2003, by the City of Vernon, California ("Vernon").[1] The Motion concerns the Presiding Judge's Order of December 17, 2002, adopting a procedural schedule for the above-identified matter, in which the ISO was authorized to file supplemental direct testimony for its case-in-chief (identified as Updated ISO Testimony). The ISO submits that the procedural schedule, which was supported by Staff and all intervenors except Vernon, both is consistent with the Federal Power Act ("FPA") and Commission regulations and will effect a more efficient and equitable proceeding. Accordingly, the Motion should be denied.

[1] The ISO recognizes that, under section 715 of the Commission's Rules of Practice and Procedure, the Presiding Judge is not required to consider an answer to a motion for leave to file an interlocutory appeal. Neither, however, is the Presiding Judge prohibited from considering such an answer. The ISO submits that its Answer will assist the Presiding Judge in her deliberations.

I. The ISO's Supplemental Testimony Is Consistent with the Commission's Order in This Proceeding

Despite Vernon's assertion that the ISO's case-in-chief must be limited to its March 31, 2000, filing, the Commission has explicitly directed a broader record. As Vernon notes, the Commission provided considerable guidance in its order accepting the ISO's filing and setting it for hearing. Compliance with that filing*requires* supplemental direct testimony. For example, the Commission stated:

- Generally, the use of transition periods are to mitigate large cost shifts and rate effects. Therefore, we believe the record should include, on a broader level, information on the overall impact of changes in transmission costs on the overall cost of electricity.

- We also agree with Intervenors that more information is needed regarding various aspects of the ISO proposed treatment of FTRs.

- With respect to exceptions for existing QF and cogeneration facilities, we generally agree with the ISO's criteria used to support its proposal. However, the record should be further developed to demonstrate that the criteria are applied in a non-discriminatory manner in order to avoid possible future claims of discrimination.

California Indep. Sys. Oper. Corp., 91 FERC ¶ 61,205 (2000). Fulfillment of this Commission guidance necessitates supplemental testimony.

II. The ISO's Supplemental Testimony Will Advance an Efficient and Equitable Proceeding.

Vernon has laid out the history of this proceeding, which the ISO will not repeat. As Vernon notes, it has been almost three years since the ISO filed Amendment No. 27, which modified the ISO's Transmission Access Charge and is the subject of this proceeding. During that period, Amendment No. 27 was the subject of intense settlement negotiations under the guidance of the Chief Administrative Law Judge. During those proceedings, the parties set forth the case for their positions, often

forcefully. The ISO believes that some parties made persuasive cases, and is carefully considering, and may adopt, some of the positions advanced. In addition, the ISO believes it can have access to additional updated data that will enable the Presiding Judge to better evaluate the just and reasonable nature of Amendment No. 27.

The ISO could, of course, make any concessions to others' positions and, at least to some degree, present additional supporting data as part of its rebuttal testimony. Vernon can cite no regulation or precedent to the contrary. To preclude concessions would be counter-productive; to forbid additional data would deprive the ISO of the opportunity to rebut answering testimony. In a similar vein, the Commission has in other proceedings accepted the ISO's answers to protests in which it has agreed to respond to those protests and has relied upon such concessions in its decisions. *See, e.g., San Diego Gas & Elec. v. Sellers of Energy Services, etc.*, 99 FERC ¶ 61,158 at 61,631–32, 61,634, 61,635–36 (2002); *California Indep. Sys. Oper. Corp. v. Williams Energy Svcs. Corp., et al.*, 98 FERC ¶ 61,327 at 62,377 (2002); *California Indep. Sys. Oper. Corp*., 89 FERC ¶ 61,229 at 61,687 (1999); *see also PJM Interconnection, L.L.C.*, 101 FERC ¶ 61,192 at P 6 (2002).

Deferring the ISO's concessions and data until rebuttal, however, would necessitate the parties' preparation and presentation of unnecessary testimony contesting a position that the ISO no longer holds. Moreover, it would preclude parties from filing answering testimony, and would severely limit the opportunity for discovery, regarding any modifications of the ISO's positions and updated and additional data. Presentation of any modified positions and any additional data in supplemental direct testimony will thus serve both equity and efficiency.

III. The ISO's Supplemental Testimony Is Consistent With the Federal Power Act.

To advance its case that the procedural schedule is in violation of the FPA, Vernon attempts to characterize the ISO's supplemental testimony as an amendment to the Amendment No. 27 rate filing, which should require initial review by the Commission under section 205 of the FPA.[2] Vernon's characterization is inapt. When a utility makes a filing under section 205, it is requesting that the rate go into effect in 60 days. The Commission decides whether and when the rate is to go into effect. Even if the Commission sets the matter for hearing, it may not delay the effective date of the rate for more than six months. An amendment to a filing is no different, which is why the Commission restarts the sixty-day clock when a filing is amended. *See*, *e.g.*, *South Miss. Elec. Power Assoc. v. Entergy Svcs., Inc.*, 85 FERC ¶ 61,413 (1998); *Duke Power Co.*, 57 FERC ¶ 61,215 at 61,713 (1991); *Yankee Atomic Electric Co.*, 60 FERC ¶ 61,316 at 62,096 (1992).

Amendment No. 27 is in effect. 91 FERC ¶ 61,205 at 61,730. The ISO's filing of its testimony will not change the effective rate in sixty days or at any time thereafter. Absent a section 205 filing, only the Commission, after review of the initial decision by the Presiding Judge, may change the effective ISO Transmission Access Charge. There is thus simply no basis for comparing the ISO's supplemental testimony with a filing under section 205.

[2] Vernon's assertion that counsel for the ISO suggested that the ISO "might make changes that would be in the nature of an FPA Section 205 filing" is misleading. It is devoid of support in the record and contrary to any logical reading of counsel's remarks. The only statement by counsel regarding a section 205 filing, which is quoted by Vernon, is a hypothetical postulating the adoption of Vernon's position. *See* Tr. at 20, ll. 20 to 24.

IV. The ISO's Supplemental Testimony Is Consistent with Commission Regulations and Policy

Despite Vernon's implications to the contrary, the Commission has not hesitated to allow supplemental testimony when circumstances may have changed, or even when a filing did not fully support a rate. For example, in its suspension order in *Northern Border Pipeline*, 87 FERC ¶ 61,380 (1999) (subsequent history omitted), the Commission stated that "the pipeline should consider filing supplemental direct testimony" to support an unchanged rate component on which the pipeline had not believed it had the burden of proof. In *Kansas City Pipeline Co*, 88 FERC ¶ 61,313, *reh'g denied*, 88 FERC ¶ 61,201 (1999), the Commission invited supplemental testimony on an issue that had not been addressed in the initial filing, and in *American Electric Power Corp.*, 67 FERC ¶ 61,168 (1994), the Commission directed the submittal of testimony on a new issue.

The Commission's order in *K N Interstate Gas Transmission Co.*, 86 FERC ¶ 61,229 (1999), further illustrates the propriety of the procedural schedule established by the Presiding Judge. In that proceeding, the pipeline had filed its initial direct case in reliance upon a previous Commission ruling that it was entitled to a presumption of rolled-in rate treatment for its facilities. The Commission, however, in setting the matter for hearing, had ruled that the presumption did not apply. During the proceeding, the Administrative Law Judge had granted summary judgment against the pipeline on the issue of rolled-in costs, finding the pipeline had not met its burden. Noting that the Commission's rules for summary judgment require that the proponent have the opportunity to present evidence on the issue, the Presiding Judge had stated that the pipeline could have sought to introduce evidence by supplemental testimony, but failed

to do so. *K N Interstate Gas Transmission Co.* , 85 FERC ¶ 63,004 at 65,089–92. In approving the Partial Initial Decision, the Commission affirmed the Administrative Law Judge's refusal to consider supplemental testimony submitted in response to the summary judgment motion. 86 FERC at 61,827. The Commission noted:

> [The pipeline] might have filed supplemental testimony to address the changes made by the suspension order. An examination of the record, however, shows that [the pipeline] did not seek to file such testimony. . . . [A]t the prehearing conference . . . [the pipeline] did not bring up the subject of supplementing its direct testimony . . . . Instead, it agreed to a procedural schedule that provided for discovery followed by the filing of answering testimony.

86 FERC at 61,826. The Commission explained:

> [O]rdinarily, only the pipeline's direct testimony would be considered in a motion for summary disposition. In this case, supplemental testimony might have been considered as well due to the change in the conditions of litigation, but none was filed within the period of time that [the pipeline's] case-in-chief was under examination by intervenors through discovery and within which it would have been reasonable for [the pipeline] to address additional issues.

86 FERC at 61,827. Thus, under Commission rules, it is proper, under appropriate circumstances, for a utility to supplement its case-in-chief if other parties have the opportunity to propound discovery on that testimony prior to their answering testimony.

V. Vernon Is Not Prejudiced by the Procedural Schedule.

The procedural schedule does not interfere with Vernon's preparation of its case. There is no reason to believe that the ISO's supplemental testimony will involve more than a few issues. Because Vernon already has the ISO's initial filing and has participated in the settlement negotiations, Vernon is aware of the vast majority, and more likely virtually all, of the ISO's case. Vernon has sixteen and one half weeks from

the establishment of the procedural schedule to propound profitable discovery and prepare testimony on the issues. During the last eight weeks of that period, Vernon will have access to, and be able to address, whatever few modifications the ISO has made. In contrast, the ISO has accommodated the other parties' need for time by agreeing to submit its rebuttal testimony five weeks after Commission Staff files its testimony.

As the Presiding Judge properly noted, the proper time to challenge the content of the ISO's supplemental testimony is after it has been filed. Vernon cannot know at this time if the supplemental testimony will improperly expand the scope of the proceeding. If, upon review of the testimony, Vernon believes that the ISO has impermissibly modified its filing or has introduced new issues such that Vernon is prejudiced in its preparation of the case, Vernon can move to strike all or portions of the testimony. In the interim, there is no reason to believe that the ISO will act improperly. Further, if, after the filing of the ISO's supplemental testimony, Vernon believes it has been blind-sided, Vernon can ask for an extension of the procedural schedule. Although the Chief Administrative Law Judge is understandably reluctant to depart from the established deadlines, they are not sacrosanct and the Chief Administrative Law Judge has recognized the need to modify them when circumstances require.

VI. The ISO's Governance Is Irrelevant to the Procedural Schedule.

Vernon also asserts that the Commission's position that the ISO's Board of Governors lacks independence is a bar to the ISO's supplemental testimony. The Commission, in contrast, has never asserted that its governance dispute with the ISO invalidates ISO actions. Indeed, the Commission has stated that to the contrary that the

governance dispute does not *per se* void ISO actions. *Mirant Delta, LLC, et al.*, 100 FERC ¶ 61,059 at P 72 (2002)("July 17 Order").

The Commission has chosen to resolve the governance dispute through an enforcement action in the United States District Court. *See FERC v. ISO*, Case No. 1: 02V-1625 (D.C. Dist. Ct.)**.** The ISO has challenged the Commission's orders regarding governance in the United States Court of Appeals. *See ISO v. FERC*, Case Nos. 02-1287, 02-1318 and 02-1350, et al. (D.C. Cir.). The courts will resolve the issue.

In the interim, as reflected by the Commission's statements in its July 17 Order, the Commission has recognized that the only course of action is to proceed with business as usual. Since the December 19, 2001, order cited by Vernon, the Commission has acted on six amendments filed by the ISO to its tariff. In most cases, including the ISO's Market Design 2002, the Commission has approved the amendment in whole or in part. Never has the Commission concluded that the ISO's actions were barred by the governance orders.

Indeed, such a policy would be counterproductive. The Commission cannot move forward with its Standard Market Design and Regional Transmission Organization initiatives in the absence of an organization charged with operating the ISO Controlled Grid. Vernon's position would paralyze all movement toward the Commission's objectives in California. Indeed, under Vernon's position, the ISO could not even prosecute the instant case. It is inconceivable that the Commission would adopt such a policy.

VII. Conclusion

For the foregoing reasons, Vernon's Motion for Leave to File Interlocutory Appeal should be denied.

Respectfully submitted,

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Dated: January 8, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C.
this 8th day of January, 2003

/s/ Michael E. Ward

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