

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

City of Vernon, California)
) **Docket Nos. EL00-105-___**
) **ER00-2019-___**
) **(on Remand)**
)

**ANSWER OF
THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR
TO THE CITY OF VERNON’S
MOTION TO STRIKE**

Pursuant to Rule 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R §§ 385.212, 213, the California Independent System Operator Corporation (“CAISO”) hereby provides its Answer to Vernon’s Motion to Strike (“Vernon Motion”).

The background in this proceeding prior to the Vernon Motion is fully described in the CAISO’s Motion for Order On Remand Authorizing Adjustment of Rates and Refunds and Confirming Authority to Recover Amounts Refunded and the CAISO’s Answer to Vernon’s Answer. After the CAISO’s Answer to Vernon’s Answer, on January 28, 2007, Vernon filed a Motion to Strike or in the Alternative, Motion to Reply to the Joint Answer of Southern California Edison Company and Pacific Gas and Electric Company, and the Answer of CAISO.

The CAISO does not seek to respond to Vernon’s “Reply,” but only to the Motion to Strike. The Reply comprises only misstatements of fact and law to

which the CAISO has already responded¹ or new legal interpretations that are patently incorrect.² In neither case would a further response from the CAISO provide any additional assistance to the Commission. The Commission has all the information it needs decide such matters as whose interpretation of *ChevronTexaco*³ is supported by the facts and reasoning in that decision.

Vernon's Motion to Strike is gratuitous. It seems to be simply a cover for the relief that Vernon truly seeks, which is to file a second answer of its own. There is no reason to move to strike a permissive pleading, because the question of whether the pleading should be allowed is already before the Commission. If the Commission does not conclude the pleading will be of assistance, it will reject it, as it frequently does. In that case, a Motion to Strike is unnecessary. If the

¹ See, e.g., Vernon Motion at 2-3, 6 (Vernon's continued contention that the CAISO asks the Commission to order or "cause" the CAISO to collect the refunds from Vernon.)

² For example, Vernon asserts that the phrase "the annual authorized revenue requirement . . . associated with the transmission facilities and Entitlements turned over to the Operational Control of the ISO by a Participating TO approved by FERC" in Section 26.1 of the CAISO was "only intended to contemplate FERC's approval of Vernon as a PTO (*i.e.*, 'a participating TO approved by FERC')." Vernon Motion at 12. This suggestion will seem remarkable to the Commission, which is fully aware that it lacks jurisdiction over the transfer of operational control under Section 203 of the Federal Power Act ("FPA"), but rather regulates the rates and terms associated with such transfer (such as the Access Charge) under Section 205 of the FPA. See *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 11-12 (D.C. Cir. 2002).

In another example, Vernon states that *Alliant Energy v. Nebraska Public Power District*, 347 F.3d 1046 (8th Cir. 2003), stands for the proposition that "Parties to a contract may be bound modifications made by 'any regulatory authority . . . *having jurisdiction*,' not by a regulatory authority from whose jurisdiction they are expressly excluded," contending that the jurisdiction in question must extend to the entity in addition to the contract. This would come as a surprise to the Eighth Circuit, which was enforcing a contractual modification made by the Commission to a *non-jurisdictional* party.

³ *ChevronTexaco Exploration & Production Co. v. FERC*, 387 F.3d 892 (D.C. Cir. 2004),

Commission decides the pleading will be helpful, it will accept the pleading and, consequently, would deny any Motion to Strike that seeks rejection.

Nonetheless, because Vernon has filed the Motion to Strike, the CAISO believes it must respond to Vernon's assertions. Vernon asserts that the CAISO has not shown any benefit to the Commission in accepting the CAISO's Answer.⁴ In actuality, the CAISO set forth two. First, it noted that Vernon had made a number of arguments that could not have been anticipated when the CAISO filed the Motion and that the Answer would assist the Commission in evaluating those arguments. Second, the CAISO noted that it would advantage the Commission to be presented with as many of the arguments that might be made as is practical before it rules on the CAISO's motion, in order to minimize the possibility that the Commission will have to revise its decision at a later point or have to consider repeated rehearing requests

Vernon contends that it "strains credulity" that there are any arguments that the CAISO did not anticipate.⁵ To the contrary, many of Vernon's arguments were new and not anticipatable. For example, the Commission has yet to consider the legal effect of *Transmission Agency of Northern California v. FERC*, 495 F.3d 663 (D.C. Cir. 2007) ("*TANC*") and Vernon had not previously argued its interpretation of the decision, so the CAISO had no reason to anticipate Vernon's repeated misstatements of the holding of *TANC*. Despite Vernon's contention that

⁴ Vernon Motion at 8.

⁵ *Id.*

an inability to anticipate such arguments is irrelevant, that inability prevented the CAISO from earlier providing the Commission with the benefit of the CAISO's identification and rebuttal of those misstatements. Indeed, the CAISO's Answer included three pages detailing misstatements in Vernon's Answer. The CAISO cannot be expected to anticipate misstatements, and the Commission should not be denied the benefit of a response to them. The CAISO can also not be expected to anticipate that Vernon, in discussing whether the transmission Access Charge has previously been found just and reasonable, would confuse the distinction between the formula and the inputs to (and hence the output of) that formula. Arguments directing the Commission to the relevant principles and supporting caselaw regarding that distinction facilitate the Commission's deliberations.

In a related vein, Vernon contends that "any 'new' arguments [the CAISO and other parties] raise could and should have been asserted long ago."⁶ Vernon does not state when, or how, the CAISO should have made these arguments. By definition, the CAISO could not have responded to unanticipated arguments previously. More broadly, the CAISO had no avenue in which to present its argument for the relief sought in the Motion. Prior to *TANC*, the CAISO had a favorable decision from the Commission ordering Vernon to provide refunds. Under Section 313 of the FPA, only an aggrieved party can seek rehearing. Section 313 precluded the CAISO from asking the Commission to address the CAISO's authority itself to collect the owed amounts pursuant to its tariff.

⁶ *Id.* at 9.

Vernon's other argument is that the CAISO has conceded that its requested relief is irrelevant.⁷ Although the CAISO has taken the position that its authority to collect the amounts owed from Vernon arises from the CAISO Tariff and the Transmission Control Agreement, and that as a result the Commission does not need to order the CAISO to collect those amounts, the proceeding is currently before the Commission on remand. The Commission must decide what action it will take on remand. One such action – which the CAISO has requested – is for the Commission to confirm the amounts due and the CAISO's authority to proceed. The CAISO's Motion can thus resolve the issues on remand. It is incumbent on the CAISO, as a party to the proceeding and a jurisdictional entity, to bring this potential resolution to the Commission's attention, recognizing that the Commission, and not the CAISO, is the ultimate interpreter of the CAISO Tariff and the Transmission Control Agreement.

V. CONCLUSION

For the reasons stated above and in the Motion, the CAISO requests that Vernon's Motion to Strike be denied.

⁷ *Id.*

Respectfully submitted,

/s/ Michael E. Ward

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January 14, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists for the captioned proceedings, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010). Dated this 14th day of January, 2008, at Washington, D.C.

/s/ Michael E. Ward

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