UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corporation	)))	Docket No.	ER00-2019-013 ER01-819-006 ER03-608-004

JOINT MOTION TO REJECT OFFER OF PROOF

Pursuant to Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 C.F.R. § 385.212 (2003), Southern California Edison Company (SCE), Pacific Gas and Electric Company (PG&E), the California Independent System Operator Corporation (ISO), and the Cities of Anaheim, Azusa, Banning, Colton and Riverside, California (collectively, Joint Movants) hereby file this Motion to Reject the Offer of Proof (Offer of Proof) submitted by the California Department of Water Resources State Water Project (SWP) on November 7, 2003 and respectfully request that the Commission urge the Presiding Judge not to permit SWP to submit an offer of proof that contains any material other than SWP's pre-filed testimony and exhibits regarding the issues addressed by the Offer of Proof, which in any case remain in the record of this proceeding.

I. BACKGROUND

Having already ruled summarily on two issues raised by SWP -- what facilities' costs are to be included in ISO Transmission Access Charge (TAC) rates and whether the ISO Tariff needs more specificity with respect to what facilities should be

turned over to ISO Operational Control -- the Presiding Judge indicated that she would permit SWP to submit an "offer of proof" regarding these two issues during the course of the ongoing hearing. The Joint Movants did not, and do not, object to the notion of permitting SWP to make an appropriate offer of proof on these two ssues, despite their removal from the case as a result of the Partial Initial Decision. The understanding was that such an offer, being appropriately limited in scope, would be countered by the Joint Movants' testimony and exhibits relating to these two issues, which would also remain in the record. Unfortunately, the Offer of Proof submitted by SWP **to the Commission**, rather than the Presiding Judge, on Friday, November 7, 2003, goes beyond any notion of what is appropriately included in such an offer.

As the Joint Movants understand it, the Presiding Judge indicated that she would allow an SWP offer of proof to include that portion of SWP's prefiled testimony and exhibits that had otherwise been rendered moot by her Partial Initial Decision. In off-the-record discussions with the Presiding Judge, Joint Movants understood that any attempt by SWP to include assertions as to what testimony (including exhibits) might have been elicited on cross-examination, were it permitted, would only be included **if** the parties could all agree on such matters. The Presiding Judge explained that if the Commission eventually reversed her Partial Initial Decision on the two issues, the Commission might have a sufficient record to rule on the issues without the need to remand the issues to the Presiding Judge to accept further evidence and cross examination on the issues.

The Joint Movants were not philosophically opposed to this approach, if it truly would have conserved resources **and** the parties could agree on what the record might have looked like had the issues remained before the Presiding Judge. SWP distributed a draft offer of proof ("Draft Offer of Proof"), very similar in form to that filed by SWP on November 7, 2003, in an effort to abide by the Presiding Judge's desire to develop an uncontested record, if possible.

After reviewing the Draft Offer of Proof, several of the Joint Movants told SWP that they certainly could not or would not agree to certain statements in the Draft Order of Proof. In fact, some of the statements in the Draft were simply untrue as a matter of fact, and it appeared to some Joint Movants that SWP had made absolutely no effort to discern the actual facts or positions of the parties. Rather, the Draft Offer of Proof consisted of statements taken wholly out of context and/or on SWP's position as to what it wanted another party to say or think. As a result, the Joint Movants informed the Presiding Judge that they would not agree to an offer of proof that presumed what they or their witnesses might have stated or agreed to had the relevant issues not been resolved summarily. The Presiding Judge, understanding that the relevant parties could not agree on what might be testified to on the witness stand, indicated that she would still permit an offer of proof to be offered by SWP. The Presiding Judge specifically indicated that such an offer of proof would be limited to prefiled testimony (including exhibits), materials of which she could take judicial notice, and, if the parties agreed, transcribed off-the-record cross-examination (through the vehicle of deposition by written interrogatory) and/or a stipulation as to what testimony would have been elicited in cross-examination. (In fact,

in the course of the case, an offer of proof made by another party to this proceeding, properly consisting only of stricken pre-filed testimony and exhibits, was accepted without objection. It is that course of action that is appropriate here as well.)

The Presiding Judge also made quite clear that, in the absence of such a stipulation or sworn testimony, any speculative description of what cross-examination might have elicited from a witness was essentially argument of counsel and was entitled to no evidentiary consideration. As such, it was not properly included in an offer of proof on these issues. Despite this seemingly clear direction from the Presiding Judge, what SWP filed with the Commission on November 7th contains significant amounts of wholly inappropriate material. It is perhaps not surprising, then, that SWP's Offer of Proof was not made on the record before the Presiding Judge. Moreover, the Joint Movants were not informed that an offer of proof would be **unilaterally filed** with the Commission by SWP, as opposed to being presented to the Presiding Judge.

The Joint Movants are not even sure that Commission procedures allow for an offer of proof following a Partial Initial Decision to be made directly to the Commission. Even if the Commission would contemplate such an offer under certain circumstances, the Joint Movants urge the Commission to reject SWP's filed Offer of Proof outright in this instance. Several Joint Movants have already had to waste litigation time and resources answering a rather frivolous Motion for Emergency Stay of the Partial Initial Decision. Now, rather than address this matter of the Offer of Proof before the Presiding Judge, as the Presiding Judge and the Joint Movants fully expected -- an approach which would have used very few resources -- the Joint Movants once again

have been required to expend their resources answering another frivolous filing with the Commission. Notably, SWP does not even indicate in the cover letter that the Offer of Proof is intended for the Presiding Judge and/or that she should rule upon it. As the Joint Movants cannot be sure whether the Commission will simply transmit the Offer of Proof to the Presiding Judge or address it at the Commission level, they feel compelled to answer it in writing.

II. THE "OFFER OF PROOF" IS BASELESS

Because the Presiding Judge indicated she would not entertain an offer of proof of the nature that has now been submitted by SWP, the Joint Movants expect that the Commission will defer to the Presiding Judge on what to enter into the record, if anything, as an offer of proof. The Joint Movants, however, wish to illustrate just how inappropriate what SWP has filed truly is. While the following are just a few examples of how several of the positions taken by SWP in this so-called Offer of Proof are utterly without support, the Offer of Proof as a whole should be rejected. The Commission should make clear in rejecting the Offer of Proof that only the now moot pre-filed materials that are already in the record of this proceeding are properly included in any subsequent offer of proof SWP might offer and that such offer should be made to the Presiding Judge, not the Commission. It is utterly improper for an offer of proof to consist of mere supposition that lacks meaningful support; and, the Offer of Proof submitted last Friday certainly lacks support in many instances.

For example, SWP tries, rather poorly, to place words in other parties' mouths. SWP claims that SCE would "agree that participant funding of transmission

may provide the pricing framework needed to overcome the reluctance of incumbent Transmission Owners . . . to build transmission, with the result that badly needed transmission infrastructure could be put in place quickly." Offer of Proof, E.5. While SCE agrees that SWP accurately quoted the Commission, it does not necessarily agree with the Commission's statement, and SWP cannot simply assume that SCE agrees with the quoted Commission statement without any basis whatsoever. In fact, had SWP performed even a rudimentary investigation of SCE's position on "participant funding," it would have found statements such as the following:

> The [SMD] NOPR proposes that both ITPs and existing ISOs encourage "participant funding" (*e.g.,* "such as a generator building to export power or load building to reduce congestion" (NOPR at ¶ 197)) for new transmission projects that reduce congestion. This approach is highly unlikely to stimulate transmission investment, as it lacks any assurance of cost recovery and investment return. If fully-regulated TOs, entitled to cost-of-service rates, are unwilling to invest in transmission due to the existing regulatory uncertainty, implementing a system that imposes market uncertainty, which is even greater than regulatory uncertainty, on cost recovery will lead to virtually nothing being built.[1/]

Some of the more disingenuous statements in the Offer of Proof regard the ongoing discussions between the ISO and the California Public Utilities Commission -- the entity informally acting as the Regional State Committee (RSC) for California -- concerning participant funding as well as other ISO efforts in regard to considering participant funding. SWP alleges that the ISO is not working with the RSC "to establish

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[1/] January 2003 Comments of Southern California Edison Company on Standard Market Design Notice of Proposed Rulemaking at 12, Dkt. No. RM01-12 (Jan. 10, 2003).

criteria to determine which Transmission system upgrades should be participant funded and which should not" and that it has no current plans to do so. Offer of Proof, D.4-5. In actuality, the ISO and CPUC (and all other interested stakeholders) are working together on **all** interconnection pricing issues, including whether participant funding is appropriate for California. The ISO has posted a Whitepaper on its website concerning pricing issues that even discusses an option involving participant funding. FERC Large Generator Interconnection Rule -- Pricing and Service Issues at 11-12 (Oct. 1, 2003), available at <http://www.caiso.com/docs/09003a6080/27/97/09003a60802797ab.pdf>. This document itself is proof that the statement in Section D.10 of the Offer of Proof that the "ISO is not currently developing a policy on participant funding for Network Upgrades" is simply false. More ironically, the current ISO Tariff actually calls for participant funding for Reliability Upgrades (a form of network upgrades) associated with new generator interconnections, but **the Commission** has effectively rejected the ISO Tariff's participant funding provisions by requiring the Participating TOs to provide levelized monthly payments (i.e., credits) to generators funding such network upgrades. *See id.* at 10-12*; see also Duke Hinds: Entergy Services, Inc.*, 98 FERC ¶ 61,290 (2002).

Another example relates to SWP's facial misuse of documents that it seeks to include in its Offer of Proof. SWP's statements at Section A.1 and A.2 on page 2 of its Offer that "PG&E does not yet know which facilities it has transferred to ISO control," and "At the time that it requested wholesale rate treatment for facilities turned over to ISO control in its TO3 case, PG&E did not know which facilities it had transferred to ISO control," are simply unsupported and erroneous. In supposed support of these

factually incorrect statements, SWP offers SWP-OP-2, which is a PG&E request for an extension of time to make a compliance filing. That filing simply does not say what SWP suggests it says. What that document does say is that "additional time is required to complete the filing and verify the status of the facilities." The whole purpose behind the Commission's ordering of the compliance filing was to be sure that the record accurately reflects the description and current status of facilities under the ISO's control. Given the multitude of other proceedings currently on-going, and the need to coordinate with, and validate information through the ISO, and given the likelihood that one or more party would file for rehearing of the Commission's decision (which, in fact, occurred -- effectively mooting PG&E's request for an extension), PG&E requested more time.

III. CONCLUSION

For all of the foregoing reasons, the Commission should reject the SWP Offer of Proof and, at most, permit SWP to leave in the record its pre-filed materials.

Respectfully submitted on behalf of the Joint Movants,

/Jennifer L. Key/

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on those parties on the official service list compiled by the Secretary in these proceedings.

Dated at Washington, DC, this 12th day of November, 2003.

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