

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

<b>Duke Energy Moss Landing LLC</b>	)	
	)	
<b>v.</b>	)	
	)	<b>Docket No. EL04-130-002</b>
<b>California Independent System Operator Corp.</b>	)	
	)	
<b>California Independent System Operator Corp.</b>	)	<b>Docket No. ER05-849-010</b>
	)	
		<b>(Not consolidated)</b>

**MOTION FOR LEAVE TO ANSWER AND ANSWER**

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),<sup>1</sup> the Electric Power Supply Association (“EPSA”), Dynegy Moss Landing, LLC (f/k/a Duke Energy Moss Landing, LLC) (“Moss Landing”), the Independent Energy Producers Association (“IEP”), and the Western Power Trading Forum (“WPTF”) (collectively, “Movants”) respectfully move for leave to answer<sup>2</sup> and answer the July 28, 2010 answer of Southern California Edison Company (“SCE”)<sup>3</sup> to

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<sup>1</sup> 18 C.F.R. §§ 385.212, 385.213 (2010).

<sup>2</sup> The Commission regularly allows otherwise impermissible answers where, as here, the answer provides further explanation or otherwise helps ensure a full and complete record and Commission understanding of that record. See, e.g., *PJM Interconnection, L.L.C., et al.*, 104 FERC ¶ 61,154 at P 14 (2003); *Williams Energy Mktg. & Trading Co. v. Southern Co. Servs., Inc.*, 104 FERC ¶ 61,141 at P 10 (2003); *Ameren Servs. Co.*, 100 FERC ¶ 61,135 at P 15 (2002).

<sup>3</sup> Answer of Southern California Edison Company, Docket Nos. EL04-130-002, *et al.* (filed July 28, 2010) (the “SCE Answer”).

Movants' June 28, 2010 motion for expeditious action on remand in the above-captioned proceedings.<sup>4</sup>

For nearly a decade, Commission policy has held that a generator may self-supply station power when its net output is positive over a Commission-approved netting interval (typically, one month), and the Commission has held that state regulators may not impose retail charges for station power that a generator self-supplies based on the Commission-approved netting interval.<sup>5</sup> More specifically, the Commission has held that when it, by virtue of setting a Commission-approved netting interval, deems energy produced by a generator to have been used to self-supply station power, state regulators may not second-guess the Commission and assess retail charges for station power that the Commission has already determined was self-supplied by the generator. In *Southern California Edison Co. v. FERC*,<sup>6</sup> the Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") held that the Commission had not adequately explained the basis for its assertion of jurisdiction. As discussed at length in the Motion, the Commission has exclusive jurisdiction to set the netting interval for station power, and that authority preempts state authority to set a different netting interval or otherwise to adopt station power regulations inconsistent with those of the Commission.<sup>7</sup>

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<sup>4</sup> Joint Motion for Expeditious Action on Remand and for Extension of Time Period for Answers, Docket Nos. EL04-130-002, *et al.* (filed June 28, 2010) (the "Motion").

<sup>5</sup> See *generally id.* at 3-12 (reviewing the Commission's station power precedent).

<sup>6</sup> 603 F.3d 996 (D.C. Cir. 2010) ("SCE").

<sup>7</sup> See *generally* Motion at 16-43.

SCE, the only entity to file in opposition to the Motion,<sup>8</sup> does not meaningfully dispute the core *legal* arguments set forth in the Motion. It does not dispute that the Commission has authority to regulate practices affecting wholesale rates; it does not meaningfully challenge the Motion’s description of controlling preemption case law; and in the end, it does not even meaningfully dispute the proposition that the Commission may preempt state station power requirements if those requirements “trap” energy produced by generators. Instead, SCE is forced to retreat to two demonstrably false assertions: (1) that the D.C. Circuit’s *SCE* decision compels a particular result, and (2) that, as a matter of fact, state regulation of netting of station power self-supply does not have on any effect on rates for wholesale sales. The D.C. Circuit’s decision speaks for itself in leaving the Commission broad latitude in articulating a rationale for its station power policies,<sup>9</sup> but a limited response to SCE’s netting arguments is in order to ensure that the Commission has a complete and clear understanding of the record upon which to base its decision.

Most of the SCE Answer is an attempt to sow confusion and to cast doubt on the self-evident proposition that a generator’s self-supply of station power

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<sup>8</sup> Although the California Public Utilities Commission (the “CPUC”) did not join in the SCE Answer or file a separate answer, SCE represents that the CPUC supports SCE’s arguments. SCE Answer at 1.

<sup>9</sup> For example, SCE implies that an assertion of jurisdiction based on the effect of inconsistent wholesale and retail netting intervals on rates for wholesale sales would be at odds with the D.C. Circuit’s “warning” that “the wholesale energy jurisdictional theory may not be any stronger than the transmission theory. . . .” SCE Answer at 11. To be sure, the D.C. Circuit did not endorse such a rationale. But equally important, it did not foreclose such a rationale. Rather, it recognized, as it had done previously in *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 828 (D.C. Cir. 2006), that the Commission’s prior orders did “not rest on its wholesale jurisdiction but rather only on its jurisdiction over transmission.” SCE at 999 (internal citations omitted).

reduces the amount of energy available for wholesale sale and thus directly impacts rates for wholesale sales of electric energy.<sup>10</sup> The Commission should reject SCE's untenable interpretation of the CAISO Operating Agreement and Tariff (the "CAISO Tariff"), and should expressly recognize that each MW-hour of energy produced by a generator that is deemed, over the Commission-approved netting interval, to be used to meet the generator's station power requirements is one less MW-hour of energy available for wholesale sale.

Fighting valiantly with its own straw man, SCE questions whether Movants "genuinely labor under the mistaken belief that the month-long netting period included in the [Station Power] Protocol has a relationship to the netting interval used to determine how much energy is sold by a CAISO Participating Generator. . . ." <sup>11</sup> Nobody disputes that, in the first instance, "[e]nergy produced by a generator in a given hour is compensated based on **hourly** meter reads and schedules."<sup>12</sup> But that misses the point. If the generator's net output over the monthly netting interval is positive, its station power consumption will be netted by applying "CAISO load-based charges" to the generator's "On-Site Self-Supply Load ID."<sup>13</sup> This netting process reduces payments to the generator in recognition of the fact that the generator was initially paid for the MW-hours it

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<sup>10</sup> SCE Answer at 9-10, 12-17.

<sup>11</sup> *Id.* at 12.

<sup>12</sup> *Id.* at 13 (emphasis in the original).

<sup>13</sup> See California Independent System Operator Corporation, Station Power Program Overview at 4-6 (Version 1.1), *available at* <http://www.caiso.com/17d1/17d1a7c658b70.pdf>. These "CAISO load-based charges," *id.* at 6, are charges for Commission-jurisdictional services applicable to metered Demand under the CAISO Tariff. See CAISO Tariff, App. I, §§ 3.2, 4.1.

consumed for its own station power needs — the netting process thus has the effect of reducing a generator’s energy sales over the month to the extent of its self-supply of station power requirements. Because the CAISO has no way of knowing whether the generator will be self-supplying over the course of the monthly netting interval until the month is over, this netting process necessarily occurs after the energy markets have been run and settled. But the netting still occurs, and the end result is that a generator that self-supplies station power requirements is paid fewer dollars for providing fewer MW-hours of energy.<sup>14</sup>

SCE attempts to brush aside the station power netting process as “impact[ing] loads only” and insists that “the monthly netting interval is only applied to determine if a transmission bill should be sent to a given generator’s load and which entity to bill for CAISO-provided services.”<sup>15</sup> If SCE were right, however, it would mean that no self-supply occurs at all, and energy described as being self-supplied is instead provided by the CAISO. Such an interpretation is irreconcilable with the fact that the CAISO Tariff expressly provides that “Station Power may be voluntarily **self-supplied**” pursuant to the Station Power Protocol.<sup>16</sup> Obviously, if energy is self-supplied for station power requirement — *i.e.*, consumed for heating, lighting, air-conditioning, etc. at the generating

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<sup>14</sup> If SCE believes that the netting process is not adequate, its remedy is to pursue tariff changes through the stakeholder process or a complaint pursuant to Section 206 of the FPA, 16 U.S.C. § 824e (2006). The justness and reasonableness of the CAISO Tariff has no bearing on the Commission’s jurisdiction over the rates, terms and conditions of wholesale sales and transmission services set forth therein.

<sup>15</sup> SCE Answer at 10.

<sup>16</sup> CAISO Tariff, App. I, § 1.1 (emphasis added).

facility's site — that energy is not available for transmission and sale at wholesale, irrespective of how compensation is provided in the first instance.

The unreasonableness of SCE's approach does not end there. If SCE were correct (and it is not), it would mean that the CAISO proposed, and the Commission accepted, tariff provisions under which the CAISO is making, or brokering, **retail sales** to generators. The MW-hours of energy consumed for station power purposes are coming from somewhere, and if SCE were right that they have been sold and that the netting process "impacts loads only,"<sup>17</sup> then the inexorable conclusion is that the "bill for CAISO-provided services"<sup>18</sup> is, in part, a bill for retail sales service. Such an interpretation of the CAISO Tariff would violate the fundamental rule that tariff "language . . . be interpreted in such a way as to avoid unfair, unusual, absurd, or improbable results . . . ."<sup>19</sup>

From a jurisdictional perspective, what matters is the substance of the transactions, not the labels attached to those transactions in the CAISO Tariff.<sup>20</sup>

For example, if there were language in the CAISO Tariff characterizing sales into

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<sup>17</sup> SCE Answer at 10.

<sup>18</sup> *Id.*

<sup>19</sup> *Columbia Gas Trans. Corp.*, 27 FERC ¶ 61,089 at 61,166 (1984) (citing *Norfolk & W.R.R. Co. v. B.I. Holser & Co.*, 629 F.2d 486, 488-89 (7th Cir. 1980); *Ecee Inc. v. FERC*, 611 F.2d 554, 563-564 (5th Cir. 1980); *Penn Cent. Co. v. General Mills Inc.*, 439 F.2d 1338, 1340-41 (8th Cir. 1971); *National Van Lines v. United States*, 355 F.2d 326, 332 (7th Cir. 1966)).

<sup>20</sup> See, e.g., *Luzenac America, Inc.* 121 FERC ¶ 61,084 at P 32 (2007) (explaining that "in determining whether a contract contemplates wholesale transactions subject to our jurisdiction, the Commission is required to focus on the substance of these transactions, not simply the parties' contractual recitations"), *reh'g denied*, 123 FERC ¶ 61,027 (2008); *Potomac Edison Co.*, 79 FERC ¶ 61,185 at 61,877 (1997) ("If we examine the substance, rather than the form, of the transaction, our jurisdiction is clear."); *Central Vermont Pub. Serv. Corp.*, 39 FERC ¶ 61,295 at 61,960 (1987) (stating that the Commission will "focus on the substance rather than the form of corporate transactions and relationships when making jurisdictional determinations").

the CAISO markets as retail sales subject to the exclusive jurisdiction of the CPUC, such language would obviously not alter the fact that those sales are, in fact, wholesale sales or diminish the Commission's jurisdiction over those sales in the slightest. Similarly, language discussing sales narrowly in the context of describing how the CAISO energy markets are settled does not compel an absurd reading of the broader CAISO Tariff as meaning that "self-supply" is not self-supply at all, but rather a retail purchase from the CAISO (or some unknown seller on whose behalf it is alleged to be brokering retail sales). To the extent that SCE has concerns about the precision of the relevant language in the CAISO Tariff or other matters pertaining to the implementation of the station power program, those concerns go to the justness and reasonableness of the CAISO Tariff and the application of that tariff, and have no bearing on the question of whether the Commission possesses jurisdiction over the rates, terms, and conditions of the CAISO Tariff.

Once one recognizes that self-supply and monthly netting are (and that retail sales are not) occurring when a self-supplying generator's output is positive over the monthly netting interval, it should be obvious that there is no inconsistency between Movants' position in these proceedings and EPSA's position in the "veritable legal treatises"<sup>21</sup> it filed in response to the Commission's notice of proposed rulemaking on demand response compensation (the "DR NOPR").<sup>22</sup> As discussed above and in the Motion, the netting interval for

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<sup>21</sup> SCE Answer at 4.

<sup>22</sup> Comments Of The Electric Power Supply Association, Docket No. RM10-17-000 (filed May 12, 2010) ("EPSA DR Comments"); Reply Comments Of The Electric Power

determining whether self-supply of station power requirements directly affects rates for wholesale sales — specifically, the compensation to generators for wholesale sales into the CAISO markets, including the offsets to that compensation for energy self-supplied for station power requirements — because a MW-hour of energy deemed to be consumed for station power requirements at the generating facility’s site is a MW-hour of energy not transmitted on the CAISO grid or available for wholesale sale into the CAISO markets. In contrast, the DR NOPR contemplates payments to demand response suppliers for what the Commission has specifically recognized as non-jurisdictional transactions.<sup>23</sup>

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Supply Association, Docket No. RM10-17-000 (filed June 30, 2010) (“EPSA DR Reply Comments”).

<sup>23</sup> See EPSA DR Comments at 31-33 (discussing *EnergyConnect, Inc.*, 130 FERC ¶ 61,031 (2010)); EPSA DR Reply Comments at 49-50 (same).





**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary in these proceedings.

Dated at Washington, D.C. this 12th day of August, 2010..

/s/  
David G. Tewksbury