

## DOCKETED

<b>Docket Number:</b>	16-RGO-01
<b>Project Title:</b>	Regional Grid Operator and Governance
<b>TN #:</b>	212669
<b>Document Title:</b>	Imperial Irrigation District Comments: Following Report and Legal Opinion
<b>Description:</b>	N/A
<b>Filer:</b>	System
<b>Organization:</b>	Imperial Irrigation District
<b>Submitter Role:</b>	Public
<b>Submission Date:</b>	8/5/2016 4:55:26 PM
<b>Docketed Date:</b>	8/5/2016

*Comment Received From: Imperial Irrigation District*  
*Submitted On: 8/5/2016*  
*Docket Number: 16-RGO-01*

**Following Report and Legal Opinion**

*Additional submitted attachment is included below.*

**CALIFORNIA ENERGY COMMISSION**

**In the matter of:**

Docket No. 16-RGO-01

**REGIONAL GRID OPERATOR  
AND GOVERNANCE**

**IMPERIAL IRRIGATION DISTRICT'S COMMENTS  
FOLLOWING REPORT AND LEGAL OPINION**

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Submitted August 5, 2016

## **1. INTRODUCTION**

The Imperial Irrigation District (IID) offers the following comments following the July 26, 2016 Sacramento meeting held before the California Public Utilities Commission (CPUC) and presided over by the chairperson of the California Energy Commission (CEC). The California Independent Systems Operator (CAISO) has aggressively blocked IID's access to the grid it manages. This has impaired job creation in the impoverished territory served by IID.

CAISO and the Governor of the State of California argue that California can achieve the 50% renewable portfolio standard (RPS) goal if California allows PacifiCorp, a for-profit corporation that owns large amounts of carbon fuel, to merge with CAISO. CAISO's electric transmission grid would be owned and controlled by SDG&E, PG&E, SCE and PacifiCorp. CAISO and the Governor propose to expand the California grid to the states in which PacifiCorp operates: Oregon, Washington, Idaho, Wyoming and Utah. PacifiCorp obtains its power mostly from coal and natural gas.

## **2. ENERGY TRANSITION**

California needs to transition from a carbon-based to a renewable and sustainable-based energy system.<sup>1</sup> The California Legislature has adopted an RPS that requires 50% of electricity sales be procured from renewable energy resources by 2030. The three investor-owned utilities (IOUs) collectively served 22.7% of their 2013 retail electricity sales with renewable power.<sup>2</sup> The CPUC has determined that the following utilities have contracted the following renewable procurement for 2020: PG&E 37%; SCE 36.9%' and SDG&E 43.1%.

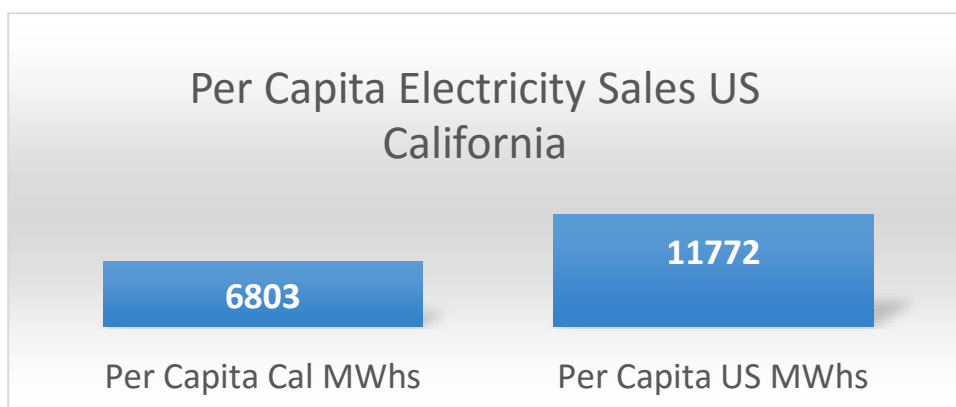
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<sup>1</sup> <http://energytransition.de/>

<sup>2</sup> [http://www.cpuc.ca.gov/RPS\\_Homepage/](http://www.cpuc.ca.gov/RPS_Homepage/)

CAISO should have requested its consultants address the question of how quickly California could reach the 50% RPS goal based on renewables located in California. The report should have started with the fact that California IOUs are, on average, 11 percent away from the 50 percent RPS. There is evidence that the expansion and privatization proposal may have slowed renewable development in California. Two utilities, SDG&E and PG&E declined to conduct 2015 RPS procurement plans.<sup>3</sup>

The CAISO report failed to adequately take into account reductions in electricity consumptions. In January 2016, the CPUC estimated that California's three big utilities' retail sales would decrease between 2016 to 2020 from 166,841 GWh to 151,081 GWh -- a reduction of 15,760 GWh. The CAISO report continues the discredited practice of computing supply to serve load, instead of load serving supply.<sup>4</sup> This is a key issue when you consider the fact that California's per capita already shows the potential for reducing load:



<sup>3</sup> <http://eq-research.com/blog/ca-pge-sdge-see-to-avoid-2015-rps-procurements/>

<sup>4</sup> <http://energytransition.de/>

### 3. THE TELEPHONE BOOK REPORT

At the July 26, 2016 meeting in Sacramento, CAISO consultants presented its phone book size report supporting the merger. The phone book report does not contain the data upon which its conclusions are based, and it relies on secret data from the stakeholders who stand to benefit from the scheme.

The report claims that in 14 years, California ratepayers will receive \$1.5 billion per year in savings; the ratepayers will then spend that money for services, which will then create thousands of jobs in disadvantaged communities, according to the report. The report claims the \$1.5 billion benefit to ratepayers will come from reduced renewable capital spending, less spending on energy procurement, and reduced grid management fees. However, the CAISO report does not contain the mathematical calculations showing how the \$1.5 billion was calculated. The \$1.5 billion benefit the report claimed to occur in 14 years is speculative on its face.

This Final Report is an advocacy piece, not an independent study.<sup>5</sup> It lacks objectivity in that it does not identify questions to be examined, give alternative outcomes, nor provide a reasoned conclusion. This report states it “was prepared for the California Independent System Operator.” However, it contains this disclaimer: “All results and any errors are the responsibility of the authors and do **not** represent the opinion of The Brattle Group, E3, BEAR, Aspen, or their clients.” (Second page of Report) In other words, if California adopts the course of action urged in the Final Report, CAISO’s consultants – The Brattle Group, E3, BEAR, and Aspen, or their clients (PacifiCorp, Berkshire Hathaway Energy) -- are not accountable.






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<sup>5</sup> <http://academicguides.waldenu.edu/writingcenter/scholarlyvoice/avoidingbias>

The report and proposal provide for no exit strategy, should the plan end in catastrophic results. Proponents are showing the same imprudence that led to the 2000 electricity deregulation price disaster in which California electricity prices went from \$7 billion to \$28.5 billion, causing one the largest wealth transfers in America history.

**4. ENERGY OWNERS TO APPOINT CAISO BOARD**

The report presented by CAISO’s consultants advocates in favor of CAISO and PacifiCorp’s plan to place the authority to appoint the CAISO board in the hands of energy resource owners, similar to what was done in the case of the CAISO Energy Imbalance Market (EIM) board shown here:

				
<b>Val Fong</b> PG&E 22 Years	<b>Doug Howe</b> Author Electricity Deregulation	<b>Carl Linvill</b> Former Lawyer PacifiCorp Counsel	<b>John Prescott</b> Idaho Power 23 Years Co	<b>Kristine Schmidt Career</b> Energy including Excel Energy

**5. LEGAL OPINION**

Professors at the University of California have used their professorships to advance the proposal to expand CAISO and place control of its board in the hands of energy resource owners. This continues a troubling record of the University of California’s involvement in questionable utility industry practices. In February 2015, the Dean of Berkeley’s public policy school was caught up in an embarrassing incident in which he used the school’s name to sponsor an opulent

dinner for the disgraced former President of the CPUC. The celebratory dinner came just after criminal investigators found in the President's home office incriminating evidence of a \$3 billion utility customer fraud.

In December 2015, an affidavit used to obtain a criminal search warrant related to the former CPUC president was released. In the affidavit, the criminal investigator reported the former CPUC President conspired to obstruct justice by illegally engaging in ex parte communications, concealing ex parte communications, and inappropriately interfering with the settlement process on behalf of the **California Center for Sustainable Communities** at UCLA.

Some proponents of the merger holding important positions at the University of California have provided a legal opinion supporting the merger. One of the attorneys pushing the merger is Ken Alex, the Director of the Office of Planning and Research and Senior Policy Advisor to Governor Jerry Brown. On May 6, 2016, a Governor staff member told participants at a related workshop the proposal has "been [a] priority for Governor Brown."<sup>6</sup>

The Director of Climate Change and Business Program at UC Berkeley and UCLA law schools signed a supporting legal opinion which is also a merger proponent:

A grid based largely on renewable energy will be tough to manage, given the intermittency of solar and wind power. That's why **it's in California's interest to expand its grid to cover the greater western United States**. With a western market, California can sell cheap surplus renewables to other states and import their renewables when we don't have enough. To that end, California's grid operator, the

<sup>6</sup> [http://docketpublic.energy.ca.gov/PublicDocuments/16-RGO-01/TN211652\\_20160525T155659\\_Transcript\\_of\\_the\\_Lead\\_Commissioner\\_Workshop\\_RE\\_Regional\\_Grid\\_O.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/16-RGO-01/TN211652_20160525T155659_Transcript_of_the_Lead_Commissioner_Workshop_RE_Regional_Grid_O.pdf)



California Independent System Operator (CAISO) has proposed expanding to acquire PacifiCorp, a grid operator with transmission assets in five additional western states.<sup>7</sup>

One of the two University of California professors who gave an opinion favoring the merger explained the opinion was issued because “California officials are also worried that grid expansion could open up avenues for legal challenges and loss of sovereignty over the state’s domestic climate policies, particularly on renewable energy procurement.”<sup>8</sup> The professor states it was to “evaluate these concerns, CAISO commissioned a legal analysis.”<sup>9</sup>

The professors concluded the proposal 1) would not alter FERC’s jurisdiction and would not displace any existing state authority over environmental matters; and 2) would not alter the constitutionality of California’s environmental and clean energy laws under the Commerce Clause of the United States Constitution because the policies are already subject to Commerce Clause scrutiny. The professors represent that their legal opinion “does provide assurance that expansion will not call into question California’s sovereignty over its clean energy policies, in terms of its constitutionality and ability to operate under federal jurisdiction.”

The legal opinion avoids the key issue of whether the California legislature would have control over the new CAISO governing board. Also not addressed is the legal question of whether the for-profit energy companies’ control of the CAISO board would put CAISO’s tax exempt status at risk.

<sup>7</sup> <http://www.ethanelkind.com/category/renewable-energy/>

<sup>8</sup> <http://www.ethanelkind.com/category/renewable-energy/>

<sup>9</sup> <http://www.ethanelkind.com/category/renewable-energy/>

The legal opinion does not identify the professors' client; it does not identify what "California officials \*\* worried that grid expansion could open up avenues for legal challenges and loss of sovereignty over the state's domestic climate policies, particularly on renewable energy procurement." The legal opinion is not compatible with the neutral posture the authors are supposed to respect based on the privilege of their service as university professors. The professors did not disclose whether they had obtained consent from their employers before issuing the opinion. [See ABA Model Rule 2.3(a)(2)]

If the professors are acting in their personal capacity, and the decision makers rely on their opinion, and the opinion is proven wrong, California will be left with no remedy. Moreover, there is nothing in the record showing what California officials' concerns these professors address in their opinion. There is nothing in the record showing CAISO's request for the opinion or the scope of any such request. There is no disclosure about whether any compensation was paid to the professors directly or indirectly.

The opinion is also misleading. The opinion states expansion of CAISO to include PacifiCorp as a participating transmission owner does not change either California's authority over energy and environmental matters or the constitutionality of its energy and environmental policies. However, the proposal is not limited to PacifiCorp becoming a participating transmission owner. The proposal is to transfer the power to appoint the CAISO board from the Governor to the energy resource owner. The opinion omits this key fact.

Although it does not state so in the opinion, one of its authors admits in a August 3, 2016 post: "To be clear, this memo doesn't address other potentially thorny issues, such as how the governance structures will be arranged in this future

entity.”<sup>10</sup> The current proposal is to have energy owners and not the governor appoint the CAISO board. The opinion does not address the scenario of the new board adopting policies inconsistent with California policy. If so, will the California Legislature reinstate the policy? This is the legal question that needs to be addressed. The professors may have innocently gone along with the subterfuge of addressing a straw person legal question, rather than focusing on the one that matters innocently. However, they can be held accountable for weighing in on a complex issue without understanding the full context within which they were rendering an opinion.

The opinion also fails to address the issue of whether the State Legislature could require the CAISO board to limit the use of coal-derived power over CAISO lines. Again, one of the authors admits the opinion does not address the specific issue like how the coal-fired power plant fleet might be treated.<sup>11</sup> Instead, one of the authors says “the opinion provides assurance that **expansion** will not call into question California’s sovereignty over its clean energy policies, in terms of its constitutionality and ability to operate under federal jurisdiction.”<sup>12</sup> This is not the legal question that needed to be answered. The legal questions before the legislature and the public are: (1) If the new energy resource owner controlled CAISO board deviates from California energy policies, can the California legislature require compliance? (2) If the new CAISO board allows power from coal to be brought into California, can the California legislature force a policy change? Neither of these questions were addressed by the professors.

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<sup>10</sup> <http://www.ethanelkind.com/category/renewable-energy/>

<sup>11</sup> <http://www.ethanelkind.com/category/renewable-energy/>

<sup>12</sup> <http://www.ethanelkind.com/category/renewable-energy/>

## **6. CONCLUSION**

The proposal to merge CAISO into a for-profit corporation to be governed by a board controlled by energy resource owners has been a grotesque abuse of power and a massive waste of funds. The deliberative process has been carried out in secret, and public participation has been nearly non-existent. Many millions of dollars of public funds have been spent to aid the private business plans of the concentrated wealth interests behind the proposal. The CEC, CPUC, and CAISO have remained silent when asked to help to save San Diego from SCE's plan to dump over 3,000,000 pounds of radioactive waste on its beaches, silence and claims of lack of jurisdiction was the response. However, when a billionaire puts forward his plan to take over California's electricity grid, it sets off a "forward march" for the same officials. The plan to privatize and expand the CAISO is a bad idea. Its claimed billionaire benefits in remote years is pure speculation, unworthy of the able firms who put forward the claim.