

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator
Corporation

Docket No. ER01-313-004

Pacific Gas and Electric Company

Docket No. ER01-424-004

ORDER ON MOTION FOR LEAVE TO FILE INTERLOCUTORY APPEAL

(Issued January 19, 2005)

1. On January 6, 2005, Modesto Irrigation District (MID) filed a motion for leave to file interlocutory appeal and a request for shortened response time.¹ The undersigned granted the request for shortened response time by order issued January 7, 2005, directing responses to be filed by January 13, 2005.²

2. MID seeks permission to file interlocutory appeal of the undersigned's December 22, 2004 "Order on Motion to Clarify Scope" in the above-captioned case. That order denied MID's December 10, 2004 request for clarification regarding the scope of the hearing. Therein, MID requested clarification of one scope issue, which it stated as follows:

whether the exemption from the CAS charge to recognize the more limited impact of behind-the-meter load on the CAISO-Controlled Grid should be as MID has proposed, which is on the basis of the customer with behind-the-meter load's highest monthly demand place on the CAISO-Controlled Grid, if no more than 50 percent of behind-the-meter load is served from the CAISO-Controlled Grid.³

3. MID asserts that interlocutory appeal of the order is appropriate so that a complete record is available to assure that the eligibility test for the control area services exemption

¹ "Motion for Leave to File Interlocutory Appeal and Request for Shortened Response Time of the Modesto Irrigation District," Docket Nos. ER01-313-004, *et al.* (filed Jan. 6, 2005)(MID Jan. 6, 2005 Motion).

² "Order Granting Request for Shortened Response Time," Docket Nos. ER01-313-004, *et al.* (issued Jan. 7, 2005).

³ "Order on Motion to Clarify Scope," at P 2, Docket Nos. ER01-313-004, *et al.* (issued Dec. 22, 2004)(December 22, 2004 Order)(emphasis in original).

satisfies the Commission's reasoning in creating the control area services exemption for behind-the-meter load. MID contends that a Commission ruling on the appropriate scope of the case constitutes extraordinary circumstances necessary to prevent detriment to the public interest under Rule 715.⁴

4. MID generally summarizes its December 10, 2004 motion and reiterates the grounds asserted therein for the clarification that it seeks.⁵ MID stresses that the Commission's intent in creating the control area services exemption is clear and unambiguous. Wholesale and retail customers who primarily rely on behind-the-meter generation to serve load impose a more limited impact on the California Independent Service Operator Corporation's (ISO) grid than those customers that rely primarily on the ISO's grid to serve load, according to MID. MID submits that the Commission did not revise or reverse its intent in its ruling on rehearing in Opinion No. 463-A, but rather that the Commission crafted a revised eligibility test, based on ISO generation modeling, in an attempt to better satisfy Commission intent in establishing the control area services exemption. MID asserts that the remaining question is whether or not an eligibility test based on ISO generation modeling is, in fact, capable of satisfying the Commission's intent in creating the control area services exemption. MID opines that a proceeding that focuses solely on modeling criterion cannot resolve this question. As the undersigned's December 22, 2004 Order also noted, MID observes that Commission Trial Staff (Staff) supported MID's December 10, 2004 motion.

5. As previously stated, the undersigned shortened the response time to allow consideration of answers to the instant motion.⁶ The ISO filed a response on January 12, 2005.⁷ The ISO argues that MID does not meet its burden to show extraordinary circumstances prompting Commission review. The ISO submits that instead, MID only asserts in one sentence that such circumstances exist and simply repeats the arguments that it posed in its December 10, 2004 motion. The ISO adds that the disagreement of

⁴ MID Jan. 6, 2005 Motion at 5, *citing* 18 C.F.R. § 385.715 (a) (2004).

⁵ Both the undersigned's December 22, 2004 Order and MID's January 6, 2005 motion summarize MID's December 10, 2004 motion. For purposes of brevity, most of that summary will not be repeated here.

⁶ As MID correctly points out, the undersigned need not consider answers to the motion for leave to seek interlocutory appeal. MID Jan. 6, 2005 Motion at 10 n.10, *citing* 18 C.F.R. § 385.715 (b) (2) (2004).

⁷ "Answer of the California Independent System Operator Corporation to the Motion for Leave to File Interlocutory Appeal of the Modesto Irrigation District," Docket Nos. ER01-313-004, *et al.* (filed Jan. 12, 2005).

MID and Staff with the undersigned's resolution of the issue is not an extraordinary circumstance and is not detrimental to the public interest.⁸

6. The Commission's regulations regarding interlocutory appeal state that:

A participant may not appeal to the Commission any ruling of a presiding officer during a proceeding, unless the presiding officer . . . or the motions Commissioner . . . finds extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person.⁹

7. For the reasons set forth below, MID has not demonstrated that such extraordinary circumstances exist here. The undersigned concurs with the ISO that although MID asserts that a Commission ruling here is necessary to prevent detriment to the public interest, MID does not convincingly support this assertion. MID generally repeats its arguments for a different eligibility test to be considered within the context of this proceeding. As the undersigned's December 22, 2004 Order noted, and as MID itself acknowledged in its December 10, 2004 motion, the Commission already heard MID's arguments regarding this proposed alternative eligibility test prior to issuing the November 16, 2004 Order establishing the instant proceeding.¹⁰ The undersigned reiterates here that:

Had the Commission intended to include consideration of MID's proposed alternative, or *any* proposed alternative, it would have said so. . . The hearing is neither intended to encompass alternatives to the exemption set forth in Opinion No. 463-A, nor is it intended to include issues that have already been litigated.¹¹

8. The Commission has already rendered its ruling regarding the scope of this hearing, and MID's asserted issue is not included therein. The Commission did not intend to entertain alternatives to the eligibility test that it set forth in Opinion No. 463-A. As discussed above, MID submits that the remaining question is whether or not an eligibility test based on ISO generation modeling is, in fact, capable of satisfying the

⁸ *Id.* at 2, *citing* MID Jan. 6, 2005 Motion at 11.

⁹ 18 C.F.R. § 385.715 (a) (2004).

¹⁰ December 22, 2004 Order at P 9; "Motion to Clarify Scope of the Proceeding and Request for Shortened Response Time of the Modesto Irrigation District," at 3 – 4, Docket Nos. ER01-313-004, *et al.* (filed Dec. 10, 2004).

¹¹ December 22, 2004 Order at P 9.

Commission's intent in creating the control area services exemption. MID further asserts that a proceeding solely focused on modeling criteria cannot answer that question. These assertions lack merit, and do not demonstrate that there are "extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person."¹² First, the Commission has specifically narrowed the scope of the hearing to consider the eligibility test it set forth in Opinion No. 463-A. Second, focusing this proceeding on the eligibility test that the Commission set forth in Opinion No. 463-A will clearly explore whether or not an eligibility test based on ISO generation modeling is, in fact, capable of satisfying the Commission's intent in creating the control area services exemption. If the answer to that question proves to be in the negative, the Commission will be in a better position to revisit the exemption issue in its entirety, including the alternative MID urges here, if appropriate.

9. Had the Commission intended to expand the scope of the hearing to consider alternatives to the eligibility test set forth in Opinion No. 463-A, it is likely that the Commission would have established a longer timeframe for the undersigned and participants to delve into these additional issues. Instead, the November 16, 2004 Order provides an expedited timeframe in which to resolve these issues, with an Initial Decision due by April 15, 2005.¹³ Additionally, the undersigned concurs with the ISO that Staff's support of MID's original motion does not by itself constitute the extraordinary circumstance necessary to permit interlocutory appeal here. The lack of an answer supporting MID's motion for interlocutory appeal by Staff or any other party further supports this finding.

10. Based on the foregoing, the undersigned concludes that MID has not demonstrated the "extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person."¹⁴ Accordingly, MID's request for leave to take interlocutory appeal is hereby DENIED.

SO ORDERED.

Bobbie J. McCartney
Presiding Administrative Law Judge

¹² 18 C.F.R. § 385.715 (a) (2004).

¹³ November 16, 2004 Order at P 19.

¹⁴ 18 C.F.R. § 385.715 (a) (2004).