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

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| California Independent System Operator Corporation | ) | Docket No. EL06-10 |
| Pacific Gas and Electric Company | ) | Docket No. EL06-11 |

# OPENING BRIEF OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION

Pursuant to the schedule established by the Commission in the above-identified dockets in its order of January 12, 2006, the California Independent System Operator Corporation ("ISO") submits its Opening Brief.

## I. INTRODUCTION

This proceeding is an appeal of the Final Order and Award ("Award") in American Arbitration Association Case No. 74 198 Y 00625 04 MAVI. As discussed below, the ISO is not challenging the refunds to Pacific Gas and Electric Company ("PG&E") that are ordered in the Award. The ISO seeks in this appeal only a reversal of the Award's interpretations of Opinion No. 463-A[1] (concerning the ISO's 2001 Grid Management Charges), in order to avoid perpetuation of these rulings which otherwise could be used as precedent. This brief provides explains the reasons for this request (Section I, Introduction), provides background on the arbitration that led to the Award (Section II, Background), includes a Statement of Issues (Section III), and then explains in detail

[1] *California Indep. System Oper. Corp.*, 106 FERC ¶ 61,032 (2004), *reh'g denied*, Opinion No. 463-B, 113 FERC ¶ 61,135 (2005), *reh'g pending* (hereinafter Opinion No. 463-A").

why the conclusory statements in the Award regarding Opinion No. 463-A are incorrect (Section IV, Argument). The arbitration concerned whether the ISO can properly bill PG&E, as the responsible Scheduling Coordinator, the costs of the must-offer obligation for Generators[2] that the ISO allocated to Loads served by the California Oregon Transmission Project ("COTP") and Loads located within the Sacramento Municipal Utility District ("SMUD") "Bubble."[3] The ISO contended that, under the principles regarding the billing of charges allocated to Control Area Gross Load that were enunciated in Opinion No. 463-A, the Commission intended that a Participating Transmission Owner (in this case, PG&E) would be the responsible Scheduling Coordinator for charges allocated to behind-the-meter Control Area Gross Load of the Governmental Entities with whom it has Existing Contracts, including the must-offer charges allocated to COTP and Bubble Loads. PG&E contended that, under Commission orders affirming a prior arbitration that concerned the assessment of Ancillary Services charges in connection with non-Grid transactions to PG&E as the Scheduling Coordinator for COTP and Bubble Loads ("COTP Orders"[4]), the Commission determined that it was not the responsible Scheduling Coordinator for any ISO charges. As discussed below, the Arbitrator found in favor of PG&E.

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[2] In a series of orders in 2001, the Commission established and directed the allocation of the costs of the must-offer obligation, under which Generators must make all excess capacity available in the ISO's Real Time Markets. *See San Diego Gas & Electric Co*., 95 FERC ¶ 61,115 (2001); *San Diego Gas & Elec. Co.*, 95 FERC ¶ 61,418 (2001).

[3] The term "SMUD Bubble" here is used to refer to SMUD Load served by Energy imported using facilities of the Western Area Power Administration that are within the ISO Control Area but not part of the ISO Controlled Grid. See Exh. SMD-1 at 9 (R. 1320), Exh. SMD 5 (R.1405).

[4] *California Indep. System Oper. Corp*., 107 FERC ¶ 61,152 (2004), *reh 'g denied*, 111 FERC ¶ 61,078 (2005).

The Award has consequences on two levels. First, it will affect the actual allocation of the must-offer charges at issue. Second, the Award has precedential significance. The ISO Tariff authorizes an arbitrator, in reaching his or her decision, to consider previous relevant arbitration decisions. *See* ISO Tariff at § 13.3.11.1.

Although the ISO believed, and continues to believe, that it allocated and billed the must-offer charges consistent with the ISO Tariff and the Commission's orders, the ISO's interests are not directly implicated by the ultimate allocation of those charges. Rather, the real parties in interest are those to whom the charges will be reallocated as a result of the Award, such as Southern California Edison Company, which has intervened in this proceeding. The ISO therefore does not intend to challenge in this Brief the finding that the ISO must refund to PG&E the must-offer charges for load served by the COTP. Rather, the ISO will allow the real parties in interest to litigate that issue if they are so inclined.

The ISO is, however, concerned that the Award's interpretation of Opinion No. 463-A may be used as precedent in other arbitration proceedings. As the ISO stated in its Petition for Review, the ISO believes that the Award's interpretation of Opinion No. 463-A ignores entirely both the record in the 2001 GMC proceeding and the Commission's and Presiding Judge's analyses of that record. The reasoning of the Award cannot be reconciled with two key rulings in the 2001 GMC proceeding:

- In ruling on the Control Area Services component of the 2001 Grid Management Charge in Opinion No. 463, the Commission rejected SMUD's arguments that non-Grid Loads should be exempt from the charges because the ISO lacked a contractual relationship with those Loads, concluding that those Loads benefit from the Control Area Services and should not be able to "avoid payment for such service."

Opinion No. 463, *California Independent System Operator Corporation*, 103 FERC ¶ 61,114 at P 39 (2003), *reh'g granted in part, denied in part*, Opinion No. 463-A, *reh'g denied*, Opinion No. 463-B, 113 FERC ¶ 61,135 (2005), *reh'g pending*. (hereinafter Opinion No. 463).

- In Opinion No. 463-A, the Commission directed the ISO to bill charges allocated to the non-Grid Loads of Governmental Entities to the Participating Transmission Owner that has Existing Contracts with those such entities, such as PG&E, as the Scheduling Coordinator, rather than directly to the Governmental Entities.

Opinion No. 463-A at PP 69-73. Under the reasoning of the Award, the ISO could not bill these Control Area Services charges in that manner. Other Market Participants might attempt to use the reasoning of the Award to their advantage in future arbitrations. The ISO believes that the inconsistency of the Award with the Commission's rulings in the Grid Management Charge proceeding must be addressed. The ISO is therefore prosecuting this appeal to obtain a ruling that corrects or vacates the Arbitrator's misstatements, or at least declares that his conclusions on these issues are not precedential in future arbitrations.

## II. BACKGROUND ON THE DISPUTE AND THE AWARD

The must-offer obligation was approved by the Commission to ensure the reliability of the transmission system in the ISO Control Area.[5] The Commission directed that the cost of the must-offer obligation be borne by all Demand within the ISO Control Area and all Demand within California that is served by exports from the ISO Control Area.[6] From June 19, 2001, until October 1, 2004, the effective date of Amendment 60 to the ISO Tariff, the ISO billed these costs to "Scheduling Coordinators

[5] *San Diego Gas & Electric Co.*, 95 FERC ¶ 61,115 at 61,355 (2001).
[6] *San Diego Gas & Elec. Co.*, 95 FERC ¶ 61,418 at 62,562; *San Diego Gas & Elec. Co.*, 97 FERC ¶ 61,293 at 62,370 (2001).

based upon each Scheduling Coordinator's Control Area Gross Load and Demand within California outside of the ISO Control Area that is served by exports from the ISO Control Area."[7] For the purpose of these charges and the Grid Management Charge, the ISO Tariff defines Control Area Gross Load, with exceptions not relevant here, as "all Demand for Energy within the ISO Control Area."[8] The ISO interpreted this language to include Demand served by transactions using the COTP and Demand within the SMUD Bubble and billed PG&E as the Scheduling Coordinator for the Loads with such Demand.

PG&E disputed these charges. After good faith efforts to resolve the dispute were unsuccessful, PG&E initiated this arbitration. SMUD, the Modesto Irrigation District, the City of Redding, and the Transmission Agency of Northern California ("Intervenors") intervened. Other parties that initially intervened have subsequently withdrawn.

The ultimate issue before the Arbitrator was whether PG&E is the Scheduling Coordinator to bill for the Control Area Gross Load and exports from the ISO Control Area of the COTP and SMUD Bubble Loads. The ISO took the position that the Responsible Participating Transmission Owner ("RPTO") (such as PG&E) is the Scheduling Coordinator for the Governmental Entities with whom it has Existing Contracts identified in its RPTO Agreement under Opinion 463-A, and is thus the appropriate party to bill for charges to the Control Area Gross Load of those Governmental Entities. PG&E and Intervenors argued that PG&E was not the

[7] *See* ISO Initial Post-Hearing Brief (hereinafter "ISO Initial Br."). at 6-10 (R. 2280-2284). The ISO continues to bill a portion of these costs on that basis. ISO Tariff Sections 2.5.23.3.6.1; *see also* 2.5.23.3.7.1 and 5.11.6.1.4.
[8] ISO Tariff, Master Definitions Supplement, Appendix A.

responsible Scheduling Coordinator, citing the Commission's ruling in the COTP Orders that PG&E was not the Scheduling Coordinator for COTP transactions, also discussed above.

The Award ruled in favor of PG&E. It rejected the ISO's arguments on the grounds that (1) Opinion 463-A did not mention must-offer charges, Award at 19 (R. 4607); (2) the Commission's decision in Opinion 463-A to assess PG&E did not reflect a conclusion that PG&E was the Scheduling Coordinator by virtue of the RPTO Agreement because the charge at issue (Control Area Services) could also be charged to "other appropriate part[ies]" in addition to Scheduling Coordinators, *id.* (presumably concluding that PG&E was an "other appropriate party"); (3) the ISO conceded that the decision in the COTP Orders would be controlling on its ability to charge the GMC, *id.*; (4) the 2001 Grid Management Charge proceeding excluded application of the Grid Management Charge to the COTP and Bubble Loads, *id.*; and (5) the COTP Orders post-dated Opinion No. 463-A, but the Commission made no mention of Opinion No. 463-A in those Awards, *id.* at 20. (R. 4608)

The Award also ruled that, under the language of the RPTO Agreement, PG&E was a Scheduling Coordinator only for transactions concerning the Existing Contracts specifically identified in the RPTO Agreement, which did not include the Coordinated Operations Agreement, governing operation of the COTP, *id*. It asserted that the ISO had not explained why, if the Coordinated Operations Agreement were not the ISO's basis for billing PG&E, it ceased billing PG&E when the Coordinated Operations Agreement terminated on December 31, 2004, Award at 21 (R. 4609), and why the ISO had not billed PG&E for the Grid Management Charges for the COTP and Bubble

Loads. The Award discussed additional reasons for rejecting the ISO's legal arguments, including the opinion testimony offered by PG&E and Intervenors' witnesses.

In addition, the Award addressed PG&E's and Intervenors' arguments. It concluded that the language of the COTP Orders was unambiguous, and that under those orders PG&E was not responsible as Scheduling Coordinator for any charges allocated Loads served via the COTP and SMUD Bubble. Award at 28 (R. 4616). It also found that PG&E had never agreed, in executing the RPTO Agreement, to be Scheduling Coordinator for the Loads served via the COTP and inside the SMUD Bubble. Award at 34 (R. 4622).

Finally, the Award addressed a number of additional issues that are not relevant to this Petition for Review.

## III. STATEMENT OF ISSUES.

1. Should the conclusions of the Award regarding issues 1.a and 1.b be reversed, vacated, or declared to have no precedential value beyond the allocation of the must offer charges that were in dispute?

   a. Are ISO 2001-2003 Control Area Services charges properly allocated to the Loads served by the COTP and within the SMUD Bubble pursuant to Opinion No. 463-A, contrary to the conclusions of the Award?

   b. Is PG&E the responsible Scheduling Coordinator under the RPTO Agreement for Control Area Services charges allocated to the Loads served by the COTP and within the SMUD Bubble pursuant to Opinion No. 463-A, contrary to the conclusions of the Award?

## IV. ARGUMENT.

### A. THE COMMISSION SHOULD REVIEW THE ARBITRATOR'S INTERPRETATION OF OPINION NO. 463-A *DE NOVO*.

The Commission's review of these issues raised by this appeal must of necessity be *de novo.* The only matters raised on appeal by the ISO concern the interpretation of Commission orders. Although Section 13.4.2 of the ISO Tariff states that the parties intend that the Commission should afford substantial deference to factual findings of the Arbitrator, legal conclusions are by implication not to receive this same deference. This is particularly so in the case of the interpretation of Commission orders. This task draws upon the Commission's institutional knowledge and technical expertise and is essential to discharging the Commission's obligation to ensure that its policies are appropriately implemented.

The Arbitrator himself acknowledged:

> However, the arbitrator acknowledges that in coming to this ultimate result, it was necessary, at times, to engage in difficult interpretation of arguably ambiguous FERC decisions, rendered over many years, touching upon related issues. If a regulatory appeal is taken from this award/decision, which all parties seemed to predict would occur, and the agency has a different view of its own precedent than that presented here because it has the institutional advantage of insights that could not be gleaned fully from its earlier written decisions, as understood by this experienced arbitrator and/or the expert witnesses appearing before him here, then so be it. It appears FERC will have an opportunity to do that. Of course, this award and the analysis could not predict, or be expected to have predicted, if FERC and its Commissioners may have such insights. This award could only be based on the written words in existence as applied to the facts adduced.

Award at 13 (R. 4601). In this proceeding, a *de novo* review is even more compelling because the Award does not demonstrate an application of the written words to the

facts. Rather, as discussed below, the Award consists of conclusory statements, often adopting opinions regarding the meaning of Commission decisions included in the testimony of lay witnesses. The Award stated, "[I]f part of the job for the arbitrator here was to discern FERC's intent in arguably vague technical language and orders interpreting it, how can there be something wrong with relying, to a limited degree, on experts, such as those presented by PG&E and Joint Intervenors here in order to divine FERC's intent and meaning?" Award at 32 (R. 4620).

The ISO, in contrast, agrees with the astute observations of Administrative Law Judge David Miller (who was presented with expert testimony of a former FERC Commissioner, not just a paid consultant):

> The rest of the proposed testimony appears to be based on a reading of various Commission actions, and perhaps other published materials. There is no indication that these are matters that the Presiding Judge or the Commission require an expert to interpret for them. Hence, the guidance of FRE Rule 702 is followed. An expert witness can give opinions where "scientific, technical, or other specialized knowledge will assist the trier of fact." The Presiding Judge and the Commission are as able to interpret the material relied upon by [the Commissioner] in stating his opinions as is [the Commissioner]. . . . The decisionmakers would not be put in any better position than they will if the arguments are presented in post-hearing briefs.

*Sea Robin Pipeline,* 47 FERC ¶ 63,011 at 65,031-32 (1989). Inasmuch as the Award presents no legal analysis in support of its conclusions discussed below, it is all the more incumbent upon the Commission to review those conclusions *de novo.*

### B. OPINION NO. 463-A RULED THAT THE RESPONSBLE PARTICIPATING TRANSMISSION OWNER WAS THE SCHEDULING COORDINATOR RESPONSIBLE FOR CONTROL AREA SERVICES CHARGES ALLOCATED TO LOADS SERVED BY THE COTP AND WITHIN THE SMUD BUBBLE.

As the basis for its position that PG&E was the responsible Scheduling Coordinator for charges allocated to Load served by the COTP and within the SMUD

Bubble, the ISO relied upon the principles regarding the billing of Control Area Services charges allocated to Control Area Gross Load that the Commission enunciated in Opinion No. 463-A (concerning the ISO's 2001 Grid Management Charges). *See* ISO Br. at 18-38 (R. 2292-2312). In Opinion No. 463-A, the Commission definitively stated, "With regard to Governmental Entities, under the relevant Responsible Participating Transmission Owner Agreement, each Governmental Entity has an arrangement with regard to existing contracts that utilizes a Scheduling Coordinator. Accordingly, the Scheduling Coordinator is the appropriate party to be billed."[9] The Award rejected the ISO arguments without ever addressing the clear import of this language. Indeed, the Award never even mentions or cites this unambiguous ruling. The Award does reach a number of legal conclusions regarding Opinion No. 463-A, each of which are addressed specifically in the subsections below. In each instance, the Award provided little explanation, if any, and certainly failed to explain how its conclusions could be reconciled with the actual decision in Opinion No. 463-A regarding the billing of Control Area Services charges.

Because the conclusions in the Award appear to have been lifted directly from arguments presented by PG&E and Intervenors, the ISO will supplement its discussion of the Award with the arguments presented by the other parties in order to provide context.

[9] Opinion No. 463-A at P 73.

### 1. Contrary to the Award, the RPTO Is the Responsible Billing Party as Scheduling Coordinator, Not as an "Other Appropriate Party."

The Arbitrator expressed his first reason[10] that Opinion No. 463-A did not make PG&E the responsible Scheduling Coordinator as follows:

> In reaching this result, the arbitrator was very persuaded by the fact that there was language in the GMC sections of the Tariff, being interpreted in Opinion 463-A, that permitted those charges (as opposed to MOO Charges) to be billed to an "other appropriate party", in addition to an SC. (Exhibit No. CA ISO 24, hereafter "Ex. ISO-24). Significantly, that "other appropriate authority" language as to GMC is <u>not</u> found in the MOO Charges context in the Tariff. Again, the MOO provisions in the Tariff have only SCs as permissible billing entities.

Award at 19 (R. 4607). He provided no elaboration.

This reasoning ignores entirely the actual ruling of the Commission, quoted above, that PG&E was responsible *as a Scheduling Coordinator* for Control Area Gross Load charges. The "other appropriate parties" language does not refer to RPTOs such as PG&E, but rather Governmental Entities themselves – the language was targeted at the possibility of billing the Governmental Entities directly.

The Arbitrator's ruling reflects an argument first raised by PG&E witness Bray, who testified that the ISO's ability to bill "other appropriate parties" for Control Area Services distinguishes Opinion No. 463-A, making it inapplicable to must-offer charges. Exh. PGE-2 at 8. (R. 618) The history of the Grid Management Charge proceeding, however, demonstrates that, contrary to this argument, the ability to bill "other

[10] The Arbitrator initially found that Opinion No. 463-A did not refer specifically to must-offer charges, Award at 22, (R. 4610), an argument made by PG&E witness Bray, Exh. PG&E-2 at 7 (R. 617) This observation was not relevant to the ISO's argument below – that the logic of Opinion No. 463-A applied – and is not relevant to the issues pursued on appeal.

appropriate parties" was not the basis for the Commission's ruling that RPTOs should be billed for the Control Area Services charges of Governmental Entities.

In the Grid Management Charge proceeding, the ISO had contended that the Participating Transmission Owners were responsible for the charges assessed to behind-the-meter Load of Governmental Entities, but had also proposed that the ISO be allowed to bill a Governmental Entity directly as an "other appropriate party" if the Governmental Entity voluntarily agreed to be so billed.[11] The ISO's argument that the Participating Transmission Owner is the responsible billing party was rejected by the Administrative Law Judge, who concluded that the ISO should bill the Governmental Entities directly.[12] The Commission initially affirmed the Initial Decision in this regard in Opinion No 463, specifically concluding that Governmental Entities should be billed directly. The Commission explained:

> [T]he ISO proposed to assess both [Control Area Services] and [Market Operations] charges to "other appropriate parties." While the term is not defined by the ISO's tariff, the ISO has described such entities as Governmental Entities (GEs), generally municipal utilities and government agencies serving behind-the-meter Load "for whom all or a portion of their volumes of Demand are not scheduled, metered, or settled with the ISO by [a Scheduling Coordinator]."[13]

In that ruling, the Commission instructed the ISO to define "other appropriate parties" and provide a factual and legal basis for billing them.[14] The Commission was responding to SMUD's complaint that the term "other appropriate parties" was vague and potentially could be used to impose costs on entities outside the ISO's footprint. SMUD argued that parties with whom the ISO does not have a contractual relationship

[11] *California Ind. System Oper. Corp.,* 99 FERC ¶ 63,020 at 65,137, 65,146 (2002) ("Initial Decision"), Exh. ISO-15 at 73, 83.
[12] Initial Decision at 65,146, Exh. ISO-15 at 83.
[13] Opinion No. 463, at P 36.
[14] *Id*. at P 39, Exh. ISO-25 at 11.

should not be charged. *Id*. at P 38. The Commission rejected arguments, such as SMUD's, to the effect that certain parties that benefit from ISO services should nevertheless avoid payment. *Id.* at P 39.

The ISO sought rehearing "with regard to billing Governmental Entities directly for their behind-the-meter Load not otherwise scheduled." Opinion No. 463-A at P 69. As discussed at greater length below, the Commission reversed its initial ruling and agreed with the ISO that "the Scheduling Coordinator is the appropriate entity to be billed." *Id.* at P 73.

Thus, the ISO's authority to bill ***other*** appropriate parties was an ability to bill Governmental Entities directly; it did not affect the Commission's rulings on the ISO's authority to bill RPTOs as Scheduling Coordinators. Moreover, although the Commission initially determined that the ISO should be able to bill those entities involuntarily, it reversed itself in Opinion No. 463-A when it determined that the ISO should bill the Responsible Participating Transmission Owner. *Id.* at PP 70-73. Indeed, when pressed, even Mr. Bray – the witness who introduced the "other appropriate parties" language from the GMC proceeding – was unable to explain the relevance of the ISO ability to bill other appropriate parties to the Commission's ruling that the Responsible Participating Transmission Owner was the appropriate party to bill for the behind-the-meter Load of Governmental Entities. Tr. 286:14-16 (R. 4253).

PG&E nonetheless raised this argument in its Initial Post-Hearing Brief. PG&E Initial Post-Hearing Brief (hereinafter "PG&E Br.") at 3, 11, 16 (R.653, 661, 666). In addition to ignoring the context summarized above, PG&E's argument also was contrary to the plain language of the Tariff and the Commission's order. The Tariff provision at

issue authorized billing the Scheduling Coordinator or "other appropriate party." "Other," to mean anything, must mean "other than the Scheduling Coordinator." The Commission said that in this case the Scheduling Coordinator is "***the*** appropriate *entity*." Opinion No. 463-A at P 73 (emphasis added). The Scheduling Coordinator cannot be both the appropriate party and the other appropriate party.

PG&E's argument was inconsistent with its position in the Grid Management Charge proceeding. Endorsing the reasoning of the Initial Decision's rejection of the ISO's argument regarding the RPTO Agreement, PG&E's Motion for Rehearing or Clarification of Opinion No. 463-A contended that PG&E is only the Scheduling Coordinator to the extent that it actually schedules Energy for a Governmental Entity and that it does not schedule behind-the-meter Load. Exh. ISO-21 at 6-7 (R. 3308-3309). PG&E would not have made this argument if the issue were whether it is an "other appropriate party." Contrary to the statement in PG&E's Brief, PG&E did not ask the Commission to direct the ISO to define "other appropriate party" as Governmental Entities "and not PG&E," PG&E Br. at 16-17 (R. 666-667); it never mentioned PG&E in connection with "other appropriate parties." Rather, as an alternative to billing "[a Scheduling Coordinator] that has no privity of contract with the Governmental Entity for the unscheduled behind-the-meter load," it asked the Commission to direct the ISO to define "other appropriate party" so that the ISO will have the authority to bill Governmental Entities. Exh. ISO-21 at 7. (R. 3309).

The ISO presented all of this information to the Arbitrator. ISO Initial Br. At 21-23, 32 (R. 2295-2297, 2305); ISO Reply Br. At 12-14 (R. 2594-2696). Despite this overwhelming demonstration that the term "other appropriate party" had nothing to do

with the Commission's decision that PG&E should be responsible for the Control Area Services charges allocated to the Governmental Entities, the Arbitrator never discussed the evidence. Rather, for unexplained reasons, he found the existence of the term in the ISO Tariff "persuasive." Even if the Commission were not to review this matter *de novo,* it would need to conclude that the Award failed to reflect reasoned decision-making.

### 2. The Arbitrator's Reasoning Is Contradicted by Opinion No. 463-A's Rulings on Issues Concerning the Applicability of Grid Management Charges to Loads Served by the COTP and Located Within the SMUD Bubble

As his second reason, the Arbitrator stated:

> [A] close reading of the Initial Decision of the Administrative Law Judge in the GMC case, (Exhibit No. CA ISO 15, hereafter "Ex. ISO-15"), made it clear that the GMC case specifically excluded application of the GMC charges to the COTP or Bubble transactions. While there was a great deal of debate here as to whether that was the case when all is said and done that Initial Decision had to be interpreted to say that, and it was not established that FERC disagreed on its review there.

Award at 19 (R. 4607). Again, the Arbitrator does not explain his "close reading," but one must assume he is relying upon the arguments of PG&E and Intervenors. They were referring to a portion of the Initial Decision in which the Administrative Law Judge stated, "I concur with TANC's position that it is inappropriate to attempt to raise the applicability of the GMC to COTP transactions at this late date; accordingly, arguments will not be considered as to this issue" and another similar statement as evidence that the assessment of Control Area Services charges to Loads served by COTP and Bubble transactions was not at issue in the 2001 Grid Management Charge proceeding. PG&E's Initial Post-Hearing Brief at 15 (R. 665), Joint Intervenors' Brief (hereinafter "Interv. Br.") at 28 (R. 1072).

There is no basis for the Arbitrator's conclusion. The statements must be read in the context of the legal issues being addressed in that portion of the Initial Decision in which they appear. In the statements cited by PG&E and Intervenors, the Presiding Judge was addressing the permissibility of arguments regarding the allocation of charges to *exports* on the COTP to support discrimination arguments regarding the allocation of charges to exports on other transmission lines. In contrast, in the portion of the Initial Decision addressing the allocation of Control Area Service charges to Control Area Gross Load – which is the issue for which the ISO cites the rulings – the Presiding Judge specifically ruled on arguments that were made regarding the allocation of those costs to Loads served by imports on the COTP and within the SMUD Bubble.

The first statement appears in a section of the decision entitled "Is it Just and Reasonable to Assess Components of the GMC on Mohave Participant Energy?" Initial Decision at 65,131. Under the ISO's proposal, the GMC components would be assessed on the Mohave Participant Energy not as Control Area Gross Load, but as exports, because it was Energy being transported from the Control Area to serve Load outside the Control Area. *Id*. In its Initial Brief, Southern California Edison ("SCE") contended that Mohave Participant Energy was being treated discriminatorily. One instance it cited was COTP exports. SCE specifically distinguished exports and Control Area Gross Load:

> Apparently, only as a result of SCE's questioning did the ISO remember that COTP <u>exports</u> should be assessed the [Control Area Services] Charge. In contrast, the ISO indicated that [Control Area Gross Load] served over the COTP was definitely supposed to be assessed the [Control Area Services] Charge.

Exh. ISO-22 at 41 n. 54 (R. 3359).

The second statement appears in a section entitled "Is it Just and Reasonable to Assess Components of the GMC on SWPL Energy?" Initial Decision at 65,135. Although it is not readily apparent from the Initial Decision, this section concerns only those portions of the Southwest Power Link owned by Arizona Power Service Company and the Imperial Irrigation District, which are not used to service Load in the ISO Control Area. Opinion No. 463-A at P 44. The transactions are all wheel-throughs through the ISO Control Area, i.e., an import combined with an export. The issue presented was thus the same as with regard to the first statement.

In each case, the applicability of the charges to exports on these facilities had been specifically identified in the Joint Stipulation of Issues (to which the Initial Decision conforms). Initial Decision at 65,073, ISO-15 at 4. The Initial Decision was simply ruling that parties could not use claims of discrimination to add the specific applicability to COTP exports as an issue. As such, the ruling has no bearing on the applicability of the Control Area Service charge to the Control Area Gross Load served by COTP and Bubble facilities. The ISO explained these matters in its Briefs, but the Arbitrator never addresses the distinctions in his "close reading." ISO Initial Br. At 29-31 (R. 2303-2305); ISO Reply Br. At 7-8 (R. 2589-2590).

Moreover, the Arbitrator never explains why that reference, in context, causes him to ignore arguments that SMUD made to the Presiding Judge (and later to the Commission)[15] regarding whether the Control Area Services Charge should apply to Loads served by COTP and Bubble facilities, and to pretend that the Initial Decision's

[15] *See* Exh. ISO-13 at 27-30, Exh. ISO-14 at 18-29, Exh. ISO-16 at 9, 54, Exh. ISO-17 at 18, 27.

rejection of those arguments[16] was an idle gesture. In its Initial Brief to the Administrative Law Judge, SMUD devoted over six pages to a section entitled "The ISO is contractually barred from assessing [Control Area Services] Charge against the Bubble and COTP transactions." Exh. ISO-13 at 30 (R. 3011-3017). Four pages argued that SMUD's Restated Interim Agreement with the ISO precluded those charges. *Id.* at 27-30 (R. 3014-3017). SMUD reiterated these arguments in its Reply Brief. Exh. ISO-14 at 18-29 (R. 3061-3072). In the Initial Decision, ***citing those specific pages of SMUD's Brief,*** the Administrative Law Judge rejected SMUD's arguments. Initial Decision at 65,111. It is important to note that SMUD's arguments in these sections specifically concerned COTP and Bubble transactions.

Apparently at that time SMUD has no doubts about the scope of the Initial Decision. In its Brief on Exceptions, SMUD informed the Commission, ***"Contrary to the finding in the [Initial Decision],*** the ISO lacks the authority to assess the [Control Area Services] charge against Bubble and COTP transactions." Exh. ISO-16 at 9 (R. 3151) (emphasis added). SMUD went on to argue that the Initial Decision erred by failing to conclude that the Restated Interim Agreement, *inter alia*, "compels the conclusion that the [Control Area Services Charge] is inapplicable to Bubble and COTP transactions . . . ." *Id.* at 54. Despite SMUD's arguments, the Commission affirmed the Initial Decision in this regard without comment.[17]

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[16] Initial Decision at 65,111, Exh. ISO-15 at 65.

[17] The Commission affirmed the Control Area Gross Load billing determinate for Control Area Services, Opinion No. 463 at PP. 25-27, Exh. ISO-25 at 8-9. but discussed only cost causation and Amendment No. 2, *id*. at PP 19-27, Exh. ISO-25 at 6-9. Based on cost causation issues, it made a limited exception for some behind-the-meter load. *Id.* at P. 28, Exh. ISO-25 at 9. It affirmed the Initial Decision in all matters not discussed. *Id.* at P 7, Exh. ISO-25 at 3. *See also California Ind. System Oper. Corp.*, 109 FERC ¶ 61, 162 at P 13 (2004) ("In Opinion Nos.

In its Request for Rehearing of Opinion No. 463, SMUD again acknowledged that, under the Commission's ruling, the Loads with Demand served over COTP and Bubble facilities would pay the Control Area Services charges. In its discussion of cost causation, SMUD specifically included its COTP and Bubble Loads. Exh. ISO 17 at 18 (R. 3207). Later, in protesting the direct billing of Governmental Entities, SMUD argued, "For all intents and purposes, SMUD's Bubble and COTP transactions, which do not use the ISO's services or the ISO Controlled Grid, will bear charges as if they indeed rely on the ISO Controlled Grid." *Id.* at 27. In Opinion No. 463-A, the Commission denied these arguments without comment. Opinion No. 463-A at ordering paragraph (E), ISO-7 at 14 (R. 2815).

The ISO presented all of this information to the Arbitrator and argued that it cannot, therefore, reasonably be gainsaid that the parties, the Administrative Law Judge, and the Commission understood that the issue of whether the Control Area Services Charge applied to the Demand of Load served by COTP and Bubble facilities was among those issues litigated in the 2001 Grid Management proceeding. ISO Initial Br. At 24-25 (R. 2298-2299). Yet the Arbitrator *never* addresses these filings.

The only reference to the Grid Management Charge rulings in this regard is the Arbitrator's contention, at a different point, that Opinion No. 463-A is not applicable to the Loads served by the COTP or within the SMUD Bubble because the Presiding Judge and the Commission used the term "behind-the-meter," which the Arbitrator concludes is not applicable to those Loads. The apparent basis for this conclusion was testimony by SMUD's Mr. Jobson that "behind-the meter" Load did not include Load

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463 and 463-A, the Commission found that the Control Area Gross Load approach was just and reasonable, and we have not and are not deviating from this holding.").

served by the COTP. After initially stating, "The behind-the-meter term started out applying to generation behind-the-meter. And these are meters between ***the ISO controlled grid*** and the system within which the generator is located," Tr. at 707-18-21 (R. 4360) (emphasis added), Mr. Jobson goes on to state, "COTPs are imports to our system from the Pacific Northwest, they are wheeled through the Western system, but they are not behind the meters that establish the perimeter of the SMUD system and within which our generators are located" Tr. at 707:23 – 708:2 (R. 4360).

This argument fails to recognize the relevant meters. An attempt to define the relevant meters as those establishing the perimeter of the SMUD (or other Governmental Entity) system would make little sense in the context of the Grid Management Charge proceeding. The issue there was whether the Control Area Services Charges should be assessed to Loads served by transactions that do not use the ISO Controlled Grid. *See* Opinion No. 463 at PP 20, 24. It is the meters at the boundary of the ISO Controlled Grid that determine such transactions, not those at the boundary of SMUD's system.

The relevant facts and context of the Initial Decision and Commission Orders compel the conclusion that the Administrative Law Judge and the Commission understood "behind-the-meter" as encompassing Load served by the COTP and Western Bubble facilities. In Exhibit SMD-5, SMUD provided an illustration of SMUD's system.[18] As depicted in the diagram, and described in Mr. Jobson's testimony, Exh. SMD 1 at 9-10 (R. 1320-1321), Tr. 673:1-25 (R. 4352), SMUD's system is

[18] The SMUD Bubble in this illustration would include both SMUD's internal Load served internally and that served by Western facilities. *See* Exh. SMD-1 at 9, Exh. SMD-5. Even by Mr. Jobson's definition, the internal Load is behind-the meter.

interconnected to the ISO at the Lake and Rancho Seco Interconnections. The interconnections with the Western transmission and Generation, and the COTP are at Hurley and Elverta, on the other side of the SMUD system. *Id.* Thus, under the Restated Interim Agreement, settlements with the ISO are based on meters at the Lake and Rancho Seco Interconnections. *See e.g.,* § 5.1.5, Appendix B, Appendix E. With regard to Control Area Service, Energy using the COTP or Western Bubble facilities to travel from Generation to SMUD Load is no less "behind-the-meter" with regard to the ISO than is SMUD Load served internally. Indeed, Mr. Metague so described non-ISO Controlled Grid facilities, including the COTP in response to questions from the Arbitrator in the COTP Ancillary Services arbitration:

> THE ARBITRATOR: So are the non-ISO controlled facilities with which they're serving their load, are they in effect behind the meters that would be measuring what's coming in –
>
> THE WITNESS: That's correct.
>
> THE ARBITRATOR: -- from the ISO controlled facilities?
>
> THE WITNESS: That's correct.

Exh. PGE-1-1G at 30:6-13 (R. 362). Ms. Eshbach agreed with that characterization. Tr. at 95:5-12 (R. 4205).

Indeed, as discussed above, SMUD's arguments based on the Restated Interim Agreement to which the Initial Decision responded involved Load served by the Western and COTP facilities, as well as internally served Load that Mr. Jobson would define as behind-the-meter. Indeed, the Initial Decision ***specifically*** describes SMUD's argument that the Restated Interim Agreement precludes assessment of the Control Area Services charges to COTP and Bubble transactions. Initial Decision at 65,101.

Therefore, one would expect that, if the Administrative Law Judge accepted SMUD's argument with regard to the Load served by COTP and Bubble facilities, but rejected with regard to Load served by internal generation, the Initial Decision would so indicate and explain the distinction. It does not. Rather, the Initial Decision's ruling was straight forward:

> SMUD also contends that the Restated Interim Agreement prohibits the ISO from allocating [Control Area Services] based on [Control Area Gross Load], which includes SMUD's behind-the-meter Load that is not served over the ISO Controlled Grid. SMUD Br. at 28. However, I concur with the ISO's position that nothing in that Agreement prohibits the ISO from seeking tariff authority, or the Commission from approving, the [Control Area Services] charges at issue here. In point of fact, Section 4.3 of that Agreement provides:
>
> > If FERC issues any rulings or orders with respect to issues included in this Agreement, including the Grid Management Charge settlement, other ISO charges and Scheduling Coordinator requirements, the impacted Parties agree to abide by such rulings or orders once they are finalized.
>
> Exh. SMD-23.
>
> > Accordingly, SMUD has failed to demonstrate that the allocation of [Control Area Services] charges based on [Control Area Gross Load], which includes SMUD's behind-the-meter Load that is not served over the ISO Controlled Grid, violates the Restated Interim Agreement.

Initial Decision at 65,112.

In light of SMUD's pleadings and the Initial Decision's previous discussion, no reasonable reading would limit "behind-the-meter Load" to that served by SMUD's internal Generation.[19] Even SMUD, apparently, did not so read it. In its Brief on Exceptions, SMUD asked the Commission to reverse the Initial Decision's ruling that the

[19] Even if the term were so limited, it does not limit the meaning of Control Area Gross Load, which by definition includes the Loads served by the COTP and Bubble facilities. The Initial Decision's rejection of SMUD's arguments would thus remain controlling even under Mr. Jobson's new interpretation.

Restated Agreement did not bar the assessment of Control Area Services Charges to the Demand of Loads served by the COTP and Bubble facilities. Exh. ISO-16 at 47-49, 54 (R. 3170-3171).

Once again, the ISO alerted the Arbitrator to all these deficiencies regarding Mr. Jobson's assertion. ISO Initial Br. At 26-29 (R. 2300-2303). Nonetheless, the Award does not discuss any of these considerations.

### 3. Contrary to the Award, the ISO Has Made No "Concessions" Relevant to the Impact of the COTP Orders on the Ability to Bill Control Area Services Charges to Loads Served by the COTP or Within the SMUD Bubble.

The Arbitrator's next contends:

> CA ISO conceded in the GMC case (in contrast to its position here in one of the inconsistencies that does make a difference) that the then-pending COTP I case (before it was decided and CA ISO lost the issue) would be controlling of whether it could impose any charges on the COTP or Bubble.

The Award is apparently relying upon a Mr. Bray's interpretation of statement in the Initial Decision summarizing a portion of an ISO argument: "Until the Commission has determined the outcome of the [COTP Ancillary Services arbitration] appeal proceeding, the GMC [Market Operations] costs are being held in abeyance." Initial Decision at 65,135.

That statement is actually quite unremarkable. The billing determinant for the Market Operations charge is sales and purchases in the ISO's markets, including the Ancillary Services markets. *Id.* Whether COTP participants are liable for Market Operations charges thus depends on whether the ISO can charge them for Ancillary Services. That , of course, is the precise issue in the COTP Ancillary Services arbitration. The ISO's statement regarding the impact on the COTP Ancillary Services

Arbitration on the *Market Operations charges* thus has nothing whatsoever to do with the impact of the COTP Ancillary Services arbitration on the ISO's ability to allocate *Control Area Services charges* – which have a different billing determinant, Control Area Gross Load – to Loads served by the COTP and Bubble facilities, or to bill PG&E for those charges. Although this ISO explained this difference to the Arbitrator, ISO Initial Br. At 33 (R. 2307), he does not mention it.

#### 4. Nothing in the COTP Orders Suggests that the Commission Intended to Overrule or Limit Opinion No. 463-A.

The Arbitrator relied upon the timing of the COTP Orders as his fourth rationale:

> [I]f FERC had meant in Opinion 463-A to be ruling that indeed the CA ISO could bill MOO Charges (as well as GMC) as to COTP/Bubble transactions based on the "logic" of that opinion, as CA ISO urged here, surely FERC would not have ruled, as it did, in May 2004, only four months after Opinion 463-A was issued (when it upheld the arbitrator's decision in COTP I) that PG&E is <u>not</u> the SC in regard to the COTP and the Bubble. One has to assume that when FERC rules, it has full knowledge of its earlier decisions and their full implications. If the "logic extension" argument CA ISO urged to be derived from Opinion 463-A was correct, then it would be hard to see how it would not have been raised and disposed of in the COTP I decisions. It also is important to note that <u>all</u> of the agreements and FERC decisions/cases upon which CA ISO relied on, even beyond Opinion 463-A, <u>predated</u> the COTP I decision.

Award at 20 (R. 4608) (Emphasis in original.)

Throughout the Arbitration that is the subject of this appeal, the ISO argued that the COTP Orders were distinguishable and should not be extended beyond their specific circumstances. The Commission confirmed this in a most recent order in the docket involving the COTP Orders. Southern California Edison Company had asked the Commission for clarification regarding the impact of the COTP Orders on the ISO's billing to, inter alia, RPTOs as Scheduling Coordinators, of charges allocated to Control Area Gross Load. The Commission responded: "[W]e find that the arbitration only

addressed whether the ISO had the requisite legal authority to impose on PG&E certain charges for ancillary services in connection with transactions scheduled on the COTP and on transmission facilities owned and operated by SMUD and WAPA." *California Ind. System Oper. Corp.,* 113 FERC ¶61,133 at P. 27 (2005). Because the specific and limited scope of the COTP Orders thus did not implicate the billing of charges allocated to Control Area Gross Load, the Commission had no reason to address Opinion No. 463-A in those orders.

**5. Under the RPTO Agreement, the RPTO is the Scheduling Coordinator for Charges Allocated to the Control Area Gross Load of the *Parties* Identified in Schedule A.**

The Arbitrator next found no support for the ISO's position in the RPTO Agreement:

> The [RPTO Agreement's] language is clearly limiting in scope. It states that PG&E will be the SC for transactions under the contracts listed in the agreement's Appendix A, exclusively; that is for Existing Contracts of the Existing Rightholders. (Ex. PGE-1, Ex. 3 at 1, Whereas Clause E). For ISO to have authority through the RPTOA to bill PG&E as an SC, the Coordinated Operations Agreement ("COA"), (Exhibit No. SMUD 19, hereafter "Ex. SMUD-19"), governing PG&E's relationship to the COTP through 2004, would have to have been listed in [RPTO Agreement] Appendix A. It was not and CA ISO, in effect, did not dispute that here. (Exhibit No. PGE 8 at JP-ISO-3-11, hereafter "Ex. PGE-8). It is important to note that the arbitrator's decision in COTP I, in essence, reached a similar conclusion based on the RPTOA's coverage through the COA. (Ex. SMUD-16 at 17-18).

Award at 20-21 (R. 4608-4609) (emphasis added).

The Arbitrator's conclusion, however, although taken almost verbatim from arguments presented by PG&E and Intervenors,[20] is contrary to the Commission's own reading of the RPTO Agreement, and the facts. As noted above, the ISO sought

[20] See Intervenor's Br. at 22-26 (R. 1066-1070) (contending RPTO Agreement *expressly* limits PG&E's role to scheduling for Existing Contracts).

rehearing of Opinion No. 463. The Commission noted that "ISO once again argues that the GMC should be assessed to the entities that act as Scheduling Coordinators for those entities." *Id.* Despite its length, it is worthwhile reproducing the Commission's full discussion, because it fully explains the context of the Commission's order:

> The ISO states that under Section 2.3 of its Responsible Participating Transmission Owner Agreement, ***PG&E has agreed to be the Scheduling Coordinator for certain Governmental Entities with which it has existing contracts.*** The ISO states that ***while arguments have been made that a Responsible Participating Transmission Owner is only a Scheduling Coordinator to the extent that it actually schedules energy for a Load with generation behind a meter, no such limitation appears in the Responsible Participating Transmission Owner Agreement***. Moreover, the ISO argues that such a limitation would make little sense given that the existing contracts identified in the Agreements may require the Governmental Entity and Responsible Participating Transmission Owner to perform various tasks that assist, or are necessary for, the Control Area Operator's fulfillment of its reliability functions, and may also establish the cost responsibility for those tasks.
>
> The ISO states that since it has assumed the functions of the Control Area Operator, but not the assignment of the Existing Contracts, it must rely upon the former control area operator (i.e., the Participating Transmission Owner that is the contracting party for the Existing Contract) to fulfill its responsibilities under the Existing Contracts and to ensure the Governmental Entities fulfill theirs. The ISO asserts that these responsibilities pertain to the entire Load of the Governmental Entity, not just to the portion scheduled, and that the appropriate Commission-approved agreements are in place to allow the Scheduling Coordinators for the Governmental Entities to be the billing representatives for those entities' entire portion of the GMC, including any portion assessed on behind-the-meter Load.

*Id*. at PP 70-71, (emphasis added). The Commission agreed with the ISO, stating:

> ***We agree with the ISO that the Scheduling Coordinator [for the Existing Contracts] is the appropriate entity to be billed,*** since the Scheduling Coordinator acts as the billing representative for the customers its serves. As such, the Scheduling Coordinator is obligated to pay the ISO's charges in accordance with the ISO Tariff. . . . ***With regard to Governmental Entities, under the relevant Responsible Participating Transmission Owner Agreement, each Governmental Entity has an arrangement with regard to existing contracts that***

> ***utilizes a Scheduling Coordinator***. Accordingly, the Scheduling Coordinator is the appropriate party to be billed.

*Id*. at P 73.

Unlike the Award's adoption of argument of PG&E and Intervenors, the Commission's interpretation is supported by the language of the RPTO Agreement. Section 2.3 unambiguously provides that "The Responsible PTO will be the Scheduling Coordinator ***for the Existing Rightholders*** listed in Appendix A, ***notwithstanding anything to the contrary in the ISO Tariff or the [Scheduling Coordinator] Agreement***." Exh. ISO-24 at 5 (R. 3377). The RPTO Agreement defines the Existing Rightholder as "the holder of Existing Rights and/or Non-Converted Rights under Existing Contracts with the Responsible PTO as listed in Appendix A." *Id.* at 2 (R. 3374). Appendix A, as stated in the RPTO Agreement, identifies the ***parties,*** not the contracts, for whom PG&E has agreed to act as Scheduling Coordinator. There is no ambiguity in Section 2.3 and no limitation on the Scheduling Coordinator responsibilities in Section 2.3. Accordingly, it is irrelevant whether the Coordinated Operations Agreement is listed in Appendix A

Thus, the Arbitrator's reliance on clause E of the Preamble of the RPTOA, which refers to the Existing Contracts in Appendix A in discussing the purpose of the RPTOA, is misplaced. As an initial matter, there is nothing to suggest that the clause establishes the exclusive purpose of the agreement. Moreover, however, recitals cannot prevail over unambiguous tariff language or create ambiguity where it does not exist. *See Grynberg v. FERC,* 71 F.3d 413 (D.C. Cir. 1995); *El Paso Natural Gas Co.*, 81 FERC ¶ 61,014 at 61,100-01 (1997) (applying Texas law); *see also Emeryville Redevelopment Co. v. Hacros Pigments, Inc.*, 125 Cal. Rptr. 2d 12, 24 (2002).

The Arbitrator's reliance on the Award in the previous COTP Arbitration is even more misguided. He cites the testimony of SMUD witness Jobson for the proposition that "the arbitrator's decision in COTP I, in essence, reached a similar conclusion based on the [RPTO Agreement's coverage through the COA." When questioned, Mr. Jobson could identify no such statement by the Arbitrator. Tr. 479:3-6. (R. 4303). In fact, the Award in the previous Arbitration includes no mention of the Agreement. Exh. SMUD-15 (R. 1503-1525).[21]

The ISO presented the Arbitrator with the full context of Opinion No. 463-A and text of the RPTO Agreement. ISO Initial Br. At 18-23 (R. 2292-2297); ISO Reply Br. At 17-20 (R. 2599-2602). The Arbitrator's failure to even address this unambiguous language of the Commission's ruling in Opinion No. 463-A, let alone attempt to reconcile it with his conclusions in the Award requires reversal of his findings regarding Opinion No. 463-A.

### 6. The Billing Practices Identified by the Arbitrator Are Irrelevant to the Interpretation of Opinion No. 463-A.

The Arbitrator also concluded that certain ISO billing decisions were inconsistent with its arguments regarding Opinion No. 463-A. He states:

> [I]t is important to note that the [must-offer] billings in dispute here ended in December of 2004 when the COA terminated. If those charges were not tied to the COA in the first place, why would CA ISO have needed to end

[21] The ISO's three briefs before the Arbitrator include no such argument. *See* Exh. ISO-28 (R. 3420-3485). SMUD has included as Exh. SMUD-20 (R. 1597-1706) a transcript of the proceedings in the COTP Ancillary Services arbitration in which it has highlighted two passage of the testimony. The ISO does not believe that testimony constitutes arguments placed before the Arbitrator. Nonetheless, the first passage merely describes the RPTOA in the context of the meaning of the Commission's rejection of Amendment No. 2, without specific reference to PG&E's responsibilities regarding the COTP, or the Bubble. Exh. SMUD-20 at 264-65 (R. 1602). In the second passage and related portions, the witness specifically rejects any assertion that the responsibilities at issue comes specifically from the RPTOA. Id. at 297:15 – 300:17 (R. 1618-1620). Moreover, the latter discussion focused on whether the Coordinated Operations Agreement was an Existing Contract, not on Control Area Gross Load.

> them when the COA terminated? That query was never adequately answered here, further undermining CA ISO's second key argument.

Award at 21 (R. 4609). As the ISO has stated, it is not challenged the ruling that it must refund PG&E the must-offer charges at issue. It is important to note, however, that the cessation of must-offer billings was not the result of the termination of the COA. As the ISO explained to the Arbitrator, under the Commission-approved successor agreements to the Coordinated Operations Agreement, the ISO agreed to exempt the COTP from Must-Offer charges on an interim basis. *California Indep. System Oper. Corp.,* 111 FERC 61,363 at P 17 (2005), Exh. ISO-10 at 8 (R. 2962). The successor agreements themselves ended the ISO's imposition of charges. Thus, as the ISO explained to the Arbitrator, because there were no charges to bill to PG&E, the ISO's failure to bill PG&E is quite unremarkable. *See* ISO Reply Br. at 21 (R. 2603).

The Arbitrator further states:

> Additionally, both PG&E and Joint Intervenors pointed out that despite the authority that CA ISO asserted it finds in Opinion 463-A to bill GMC charges for COTP/Bubble transactions, for which PG&E relayed information as the proxy SC, it has done no such billing in fact. (See Ex. PG&E-3, Att. 1 and Ex. SMUD-18). PG&E and Joint Intervenors argued that this undermined the credibility of CA ISO's overall position on the RPTOA and Opinion 463-A extending to MOO Charges. While CA ISO attempted to explain this "non-billing" of GMC away, the arbitrator did find it of some value (not determinative but supportive, again) in that it made the CA ISO's construct here, as to the [RPTO Agreement] and Opinion 463-A, appear a bit "strained". If the GMC decisions were so clear from day one (eight years ago, when the GMC was approved) why haven't the GMC charges been applied? In effect, that was an open question when this case ended.
>
> The failure to bill GMC was more compatible, as a conceptual matter, with the conclusions above that Opinion 463-A did not reach the application of charges to COTP/Bubble transactions and, therefore, the GMC case history does not support CA ISO's claim that it can impose MOO Charges on PG&E for the COTP or Bubble.

Award at 23 (R. 4611).

The Arbitrator had ample evidence before him (which the ISO noted, ISO Reply Br. At 15, n. 13 (R. 2597), that the Loads served by the COTP and within the SMUD bubble were exempt from the Grid Management Charge prior to 2001, *See e.g.* Exh. SMD-16 at 14 (R. 1540); Exh. ISO-15 (Initial Decision at 65,071-072) (R. 3090), but apparently disregarded it in this evaluation. With regard to the period after 2001, the ISO attempted in its Reply Brief to avoid the introduction of extra-record evidence, but simply pointed out that speculation as the ISO's strategy for dealing with such issues had no place in this proceeding. *See* ISO Reply Br. At 15-16 (R. 2597-2598) The ISO stated that, in fact, there was absolutely no evidence in this proceeding regarding the reasons that the ISO has abstained from billing the Grid Management Charge to PG&E since 2001. Mr. Jobson was not able to testify as to the ISO's reasons, but only as to his "assumption." the ISO pointed out that it should be readily apparent that there can be reasons for the ISO's abstention that do not in any manner "impugn" the ISO's argument. For example, the ISO stated in its Answer to Southern California Edison's Motion for Clarification in Docket No. EL02-45 (the COTP Ancillary Services Arbitration appeal):

> SCE's assertion that the ISO has chosen to spread the CAS and CRS charges to the market rather than allocate and bill them consistent with these Commission orders is not correct. PG&E has contended that the Commission's decisions in this docket bar the ISO from billing PG&E for CAS and CRS, despite the earlier Commission orders cited by SCE and discussed above in this answer. Although the ISO is currently interpreting the Commission's orders contrary to PG&E's contention, the ISO has agreed to hold these charges in abeyance until the final resolution of this docket. Unless the Commission rules definitely, in response to SCE's motion, that its decisions in this docket do preclude the ISO from billing PG&E for those charges, the ISO intends to bill PG&E after a final order is issued in this docket.

Answer of the California Independent System Operator Corporation to the Motion for Clarification of the Southern California Edison Corporation, filed June 2, 2005 in Docket No. EL02-45 at 12-13 (provided as addendum to this brief.)[22]

Even though there was no evidence to support a conclusion that the ISO's failure to bill the Grid Management Charge to PG&E with regard to COTP and Bubble transactions reflects any doubts about PG&E's liability for the charges under the RPTO Agreement, the Arbitrator pressed for an explanation at oral argument. Counsel for the ISO explained that, because of PG&E's contentions regarding the effect of the COTP Orders on its liability, and to avoid another dispute at this time in light of the possibility that the ISO could prevail in appeals of the COTP Orders, it was deferring billing until the conclusion of proceedings regarding the first COTP arbitration, but fully intends to bill the 2001-2003 GMC to PG&E when COTP Orders are final regardless of the outcome. The Arbitrator's suggestion that the ISO is withholding Grid Management Charge billings because it believes it lacks authority under the Opinion No. 463-A, but invested significant legal resources to arbitrate the validity of its must-offer charges based on that same authority strains credibility. The Arbitrator's refusal to acknowledge the legitimacy of the reasons for the ISO's deferral of Grid Management Charge billings does not lend support to his Award.

[22] The ISO noted that, recognizing this issue was not litigated and also in light of the relevance of matters in documents of which the Arbitrator takes official notice, the ISO did not offer this information as evidence of the ISO's reasons. Rather, the ISO simply asked the Arbitrator to note that the ISO has offered this explanation in an official filing with the Commission. The ISO noted that the parties agreed that this document could be attached to post-hearing briefs. ISO Reply Br. at 16 (R. 2614-2627).

## VI. CONCLUSION

For the reasons discussed above, the ISO therefore requests a ruling that corrects or vacates the Arbitrator's misstatements, or at least declares that his conclusions on the issues identified in this Brief are not precedential in future arbitrations.

Respectfully submitted,

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February 13, 2006

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this document upon all parties listed on the official service list compiled by the Secretary in the above-captioned proceedings, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated this 13th day of February, 2006 at Folsom in the State of California.

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