

**UNITED STATES OF AMERICA 105 FERC ¶ 63,008
FEDERAL ENERGY REGULATORY COMMISSION**

**California Independent System
Operator Corporation**

**Docket Nos. ER00-2019-013
ER01-819-006
ER03-608-004**

PARTIAL INITIAL DECISION

(Issued October 21, 2003)

APPEARANCES

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Jennifer Key, Esq., on behalf of Southern California Edison Company

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Charles Middlekauff, Esq., Mark Patrizio, Esq., Stuart Gardiner, Esq., on behalf of Pacific Gas & Electric Company.

Peter Roberts, Esq., on behalf of Sempra Energy and on behalf of San Diego Gas & Electric Company.

Michael Postar, Esq., Tamir Ben Joseph, Esq., Monica Gonzalez, Esq., on behalf of State Water Contractors and Metropolitan Water District

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Grant Rosenblum, Esq., on behalf of Electricity Oversight Board

Channing Strother, Esq., on behalf of City of Vernon, California

Bonnie Blair, Esq., on behalf of the Cities of Anaheim, Azusa, Banning, Coulton, and Riverside, California

Joanne Scott, Esq., Hollis Alpert Esq., on behalf of Commission Staff

BOBBIE J. McCARTNEY, Presiding Administrative Law Judge

INTRODUCTION

1. On October 9, 2003, the undersigned Presiding Administrative Law Judge (ALJ) issued an Order Granting Motion for Partial Summary Disposition. Pursuant to Rule 217 (d) (1) (i) and (ii) (A)-(B),¹ the undersigned hereby addresses those same issues through this Partial Initial Decision.

BACKGROUND

2. Some procedural background is helpful in addressing this dispute. In the California Independent System Operator Corporation's ("ISO") Tariff filing in this docket, the ISO amended the definition of Transmission Revenue Requirement ("TRR") to clarify that "[t]he costs of any transmission facility turned over to the Operational Control of the ISO shall be fully included in the Participating T[ransmission] O[rganization]'s TRR." ISO Tariff, Master Definition Appendix. This approach was similar to the ISO's original Access Charge proposal. The Commission described the ISO's original Transmission Access Charge ("TAC") proposal as follows:

The Access Charge is designed to recover the transmission revenue requirement associated with the facilities that the Participating Transmission Owners transfer to the ISO.

Pacific Gas and Elec. Co., 81 FERC ¶ 61,122 at 61,500 (1997).

3. The standard for which facilities may be turned over to ISO Operational Control is found in the Transmission Control Agreement (TCA) among the ISO and all Participating Transmission Organizations ("TOs"). The Commission ruled that the TCA controls what facilities are placed under ISO Operational Control. The Commission explained that the TCA "specifies: 1) the transmission facilities that are to be transferred to the ISO's control; and 2) the extent of the ISO's operational control." *Id.* at 61,559. The subject TCA provides, in pertinent parts of Section 4.1.1, as follows:

[E]ach Participating TO shall place under the ISO's Operational Control the transmission lines and associated facilities forming part of the transmission

¹ 18 C.F.R. § 385.217(d) (1) (i) and (ii)(A)-(B) (2003).

network that it owns or to which it has Entitlements. . . . Any transmission lines or associated facilities that the ISO determines not to be necessary to fulfill the ISO's responsibilities under the ISO Tariff in accordance with Section 4.1.3 of this Agreement shall not be treated as part of a Participating TO's network for purposes of this Section 4.1. . . . The following transmission lines and associated facilities are also deemed not to form part of a Participating TO's transmission network:

- i. directly assignable radial lines and associated facilities interconnecting generation (other than those facilities which may be identified from time to time interconnecting ISO Controlled Grid Critical Protective Systems or Generators contracted to provide Black Start or Voltage Support) and
- ii. lines and associated facilities classified as "local distribution" facilities in accordance with FERC's applicable technical and functional test and other facilities excluded consistent with FERC established criteria for determining facilities subject to ISO Operational Control.

As referenced, TCA Section 4.1.3 permits the ISO to refuse transmission facilities that cannot be integrated into the ISO Controlled Grid:

Refusal of facilities. The ISO may refuse to exercise Operational Control over certain of an applicant's transmission lines, associated facilities or Entitlements if it determine during the processing of an application under Section 2.2 that one or more of the following conditions exist:

- i. The transmission lines, associated facilities or Entitlements do not meet or do not permit the ISO to meet the Applicable Reliability Criteria and the applicant fails to give the ISO a written undertaking to take all good faith actions necessary to ensure that those transmission lines, facilities or Entitlements, as the case may be, meet the Applicable Reliability Criteria within a reasonable period from the date of the applicant's application under Section 2.2 as determined by the ISO.
- ii. The transmission lines, associated facilities or Entitlements are subject to Encumbrances that unduly impair the ISO's ability to exercise its Operational Control over them in accordance with the ISO Tariff and the applicant fails to give the ISO a written undertaking to negotiate in good faith to the extent permitted by the applicable contract the removal of the Encumbrances identified by the ISO which preclude it from using unused capacity on the relevant transmission lines. If the applicant provides such written undertaking but is unable to negotiate the removal of such Encumbrances to the extent required by the ISO, the ADR Procedure shall be used to resolve any disputes between the ISO and the applicant.

For this purpose, Non-Participating TOs may utilize ISO ADR procedures on a voluntary basis.

iii. The transmission lines, associated facilities and Entitlements are located in a Control Area outside of California, are operated under the direction of another Control Area or independent system operator, and cannot be integrated into the ISO Controlled Grid due to technical considerations.

In sum, the TCA contains a requirement that the facilities and Entitlements being turned over are integrated, network transmission facilities and excludes directly-assignable radial lines and all distribution facilities,² neither of which, in any case, are network transmission facilities.

4. In this proceeding, in addition to the language contained in the TCA, the ISO amended Section 3.1 of the ISO Tariff to state what facilities a New Participating TO should turn over to the ISO's Operational Control. While the Southern California Edison Company ("SCE") has argued that the amendment is consistent with the TCA, the ISO Tariff does not contain a general standard, like the TCA, for what facilities may be turned over to ISO Operational Control.

5. On June 2, 2003, the California Department of Water Resources, State Water Project ("SWP") filed testimony arguing that to "provide transparency and certainty, the ISO Tariff should contain a clear description of the ISO's standards and criteria to determine whether [] facilities will be accepted for ISO Control and/or in ISO Transmission Access Charge rates." Exh. SWP-1 at 47:16-19. SWP also proposed new standards for determining what facilities should be accepted for ISO Operational Control and thus included in ISO Transmission Access Charge rates. Specifically, SWP sought, among other things, to exclude certain facilities from ISO Operational Control by classifying those facilities as generation-ties, rather than as network transmission, under a standard similar to the primary-use test adopted by Administrative Law Judge Peter Young in Docket No. ER99-2326³ and the standard applied to certain PG&E facilities in wholesale transmission rates prior to PG&E's filing of an open access tariff pursuant to Order No. 888.

6. SCE moved on July 3, 2003 to exclude the issue of what facilities are appropriately placed under ISO Operational Control and how that process works on the grounds that this issue was not determined by the ISO Tariff, but was determined by the

² TCA Section 4.1.1(i) quoted *infra*, does permit the ISO to take control over certain radial generation-related facilities, but that provision has not been exercised to date.

³ Pacific Gas and Elec. Co., 97 FERC ¶ 63,014 (2001).

TCA which, SCE argued, contained clear language on this point. At Oral Argument on July 16, 2003, SWP represented that the standard for determining which facilities were to be placed under ISO Operational Control remains an important issue relevant to the Transmission Access Charge formula at issue in this proceeding, citing primarily Judge Young's Initial Decision in Docket No. ER99-2326. Also, Staff reported that Docket No. ER99-2326 was still pending before the Commission.

7. Due to the expected decision in Docket No. ER99-2326 and the possible impact the Commission's decision in that docket could have on this proceeding, the undersigned Presiding ALJ denied SCE's Motion to Limit the Scope of the Proceeding without prejudice at Oral Argument on July 16, 2003. The undersigned indicated that SCE could refile its motion if the Commission provided further guidance supporting SCE's position on this issue. On July 31, 2003, PG&E sought rehearing of the undersigned's denial of SCE's Motion to Limit Scope, which was also denied.

POSITION OF THE PARTIES AND STAFF

8. On August 27, 2003, SCE filed a Motion for Partial Summary Disposition, which is the subject of this Partial Initial Decision. The Motion contends that the costs of facilities under ISO Operational Control can be included in a Participating TO's TRR and that the ISO's policy as to what facilities can be turned over to ISO Operational Control is clearly set forth in the TCA and mirrors FERC policy; thus the policy cannot be found to be unclear or unjust and unreasonable as a matter of law.

9. On September 11, 2003, SWP and the Pacific Gas & Electric Company (PG&E) both filed their answers to the subject motion. SWP essentially argues that there are still genuine material issues of fact in dispute regarding which facilities are to be included in the ISO's rates and charges. Specifically, SWP argues that its testimony in response to the ISO places squarely in material dispute the issue of which criteria and what policy, if any, guide the ISO's determinations of facilities over which it will exercise operational control, and correspondingly which facilities will be included in the ISO's transmission rates. PG&E's answer supports SCE's Motion citing the Commission's recently issued decision in Docket No. ER99-2326.

10. At Oral Argument to address the subject motion and responsive pleadings conducted on October 7, 2003, Staff agreed with SCE and PG&E regarding the applicability of recent Commission guidance. Staff stated that "at this point, the Commission has ruled clearly that what's been turned over to the ISO is what goes into the TRR" [Transmission Revenue Requirement] (Tr. 6:239, 240). However, Staff expressed some doubt as to the clarity of the standards that determine what facilities are actually in the control of the ISO, citing PG&E's difficulty in figuring out exactly which facilities had been

turned over to the ISO's operational control.⁴

11. After careful consideration of the subject Motion, responsive pleadings, Oral Argument of the parties and recent Commission precedent, the undersigned Presiding ALJ granted SCE's Motion and issued an Order Granting Motion for Partial Summary Judgment on October 9, 2003, confirming the ruling at Oral Argument. Additionally, the undersigned granted SWP's oral motion to proceed with interlocutory appeal to the Commission on this issue to enable the Commission to address the matter prior to the completion of the hearing scheduled to commence on October 21, 2003.

12. In its request for Interlocutory Appeal on October 16, 2003, SWP reiterated the original contentions discussed above from both SWP and Staff, arguing that prompt Commission review of the October 9 Order was necessary to prevent detriment to the public interest and irreparable harm to SWP and other transmission ratepayers. Specifically, SWP contends that it is difficult to tell objectively what facilities are within the ISO's operational control, pointing to PG&E and even the ISO itself as examples of entities professing difficulty with the subject.⁵ SWP also argues that it is the Commission's responsibility to determine what facilities are within the ISO's control.⁶ Additionally, SWP claims that granting summary disposition on issues here would prejudice SWP's due process rights, and that SCE's Motion did not meet the standard required for a grant of summary judgment.

⁴ See Pacific Gas & Electric Co., Docket No. ER99-2326, Motion For Extension Of Time To Make Compliance Filing, at 2 (filed Sept. 23, 2003)(stating that "PG&E is still working to insure that its compliance filing will accurately identify what facilities are under the operational control of the ISO").

⁵ Ex. DWR-15 at 66, 77. See also Ex. DWR-15 at 38 ("the question whether or not a facility has been turned over to the ISO's Operational Control is ultimately a legal matter to be decided by the Commission.").

⁶ See Pacific Gas & Electric Co. v. FERC, 306 F.3d 1112 (D.C. Cir. 2002). In this case, PG&E challenged FERC's failure to review costs associated with facilities that the City of Vernon, California, placed under ISO control. SWP argues that the Court concluded that the Commission's review was inadequate, noting among other things, "[t]he Vernon TRR at issue. . . is filed directly with FERC, and the CAISO has no authority to approve or disapprove it. . . , giving Vernon 'unfettered discretion to set the level of' its TRR. . . ." See *id.* at 1118. SWP claims that the same criticism is applicable here.

DISCUSSION AND FINDINGS

The standard for summary judgment motion and Opinion No. 466 apply here.

13. A decisional authority may grant a motion for summary judgment “if the decisional authority determines that there is no genuine issue of fact material to the decision....”⁷ In acting on a motion for summary disposition, the Commission must view the evidence in the light most favorable to the party against whom the motion is directed, i.e., SWP.⁸

14. Regarding this particular subject motion, the Commission recently provided appropriate guidance in Opinion No. 466. Declining to adopt the same primary-use test SWP argues in favor of here, the Commission ruled that:

The Commission finds that the Initial Decision erred in deciding which facilities were to be included in PG&E's TO-3 rate base (Transmission Revenue Requirement) based on whether these facilities should be classified as transmission or generation under our pre-ISO precedent. The relevant question now is simply whether operational control of the facilities was transferred to the ISO. If control was turned over, the facilities should be included in the TO-3 base. If it was not, they must be excluded.⁹

There are no genuine issues of fact material to the decision here.

15. Relying on the clear language of the TCA, the ISO Tariff, and the guidance provided by the Commission in Opinion No. 466, the undersigned Presiding ALJ has determined that there are no genuine issues of fact regarding the issues which are the subject of SCE's Motion.

16. As the undersigned Presiding ALJ indicated at Oral Argument and in her Order Granting Partial Summary Judgment, while it is strongly recommended that the ISO also

⁷ 18 C.F.R. § 385.217(a)(2003); *see also*, Fed. Rules Civ. Proc. 56(c).

⁸ *Coastal States Marketing, Inc. v. Texas-New Mexico Pipeline Co.*, 25 FERC ¶ 61,164 (1983); *see also*, *Southern Star Central Gas Pipeline*, Docket No. RP98-52-000 (Aug. 14, 2003) (J. Nacy) (“all ambiguities and reasonable inferences must be resolved in favor [sic] the party...against whom summary disposition is sought”) (citing *Heyman v. Commerce and Industry Insurance Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975)).

⁹ *Pacific Gas and Elec. Co.*, 104 FERC ¶ 61,226 at P 13 (2003).

include in its Tariff the relevant language currently contained in its TCA regarding the standard for facilities that could be turned over to ISO Operational Control, failure to have done so does not render the TCA language any less clear or per se unjust and unreasonable. With the additional guidance provided by the recent Commission decision in Opinion No. 466, the TCA was sufficient under the facts of this case to provide the parties with notice of the applicable ISO standard regarding the criteria and policy which guide the ISO's determinations of facilities over which it will exercise operational control, and correspondingly which facilities will be included in the ISO's transmission rates.

17. There are no material facts in dispute regarding what costs should be included within the ISO's Tariff because Opinion No. 466 clarifies that the cost of any facilities turned over to the ISO's Operational Control should be included in the ISO's Tariff. As for what facilities fall within the ISO's Operational Control, the clear language of the TCA, which mirrors Commission policy on this point, is controlling. Further, because SWP has declined to identify any specific facility over which a current dispute exists regarding the applicability of the ISO's criteria and policy, it is difficult to identify a current "case and controversy" regarding this issue. While PG&E may have found it difficult to figure out which of its facilities fall within the ISO's Operational Control in Docket No. ER99-2326, no such difficulty has been identified regarding SWP facilities in this case.

18. For the reasons set forth above, the undersigned Presiding ALJ has granted SCE's Motion for Partial Summary Disposition.

Bobbie J. McCartney
Presiding Administrative Law Judge