UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

REBUTTAL 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 Rebuttal 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. In its Opening Brief, the ISO stated that is not challenging the refunds to Pacific Gas and Electric Company ("PG&E") that are ordered in the Award. Rather, 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 erroneous interpretations of Commission rulings which otherwise could be cited as precedent in future disputes.

[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").

In its Opening Brief, the ISO stated that the reasoning of the Award cannot be reconciled with two key rulings in the 2001 Grid Management Charge proceeding regarding the Control Area Services portion of the Grid Management Charge:

- In ruling on the Control Area Services component of the 2001 Grid Management Charge in Opinion No. 463, the Commission rejected [Sacramento Municipal Utility District's] arguments that non-Grid Loads should be exempt from the charges due to the lack of a contractual relationship between these Loads and the ISO. The Commission concluded that those Loads benefit from the Control Area Services and should not be able to "avoid payment for such service."[2]

- 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 entities (such as PG&E) as the Scheduling Coordinator, rather than directly to the Governmental Entities.[3]

Because of its concern that Market Participants might attempt to use the reasoning of the Award to their advantage in future arbitrations, the ISO concluded that the inconsistency of the Award with the Commission's rulings in the Grid Management Charge proceeding must be addressed. The ISO asked for an order that corrects or vacates the Arbitrator's misstatements, or at least declares that his conclusions on these issues are not precedential in future arbitrations. In their Reply Brief, Joint Intervenors[4] assert that these conclusions are indeed nonprecedential dicta, and PG&E presents no argument to the contrary. Unfortunately, it remains necessary for the ISO

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[2] 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").

[3] Opinion No. 463-A at PP 69-73.

[4] The Sacramento Municipal Utility District ("SMUD"), the Modesto Irrigation District, the City of Redding, California, and the Transmission Agency of Northern California ("TANC").

to file this Rebuttal Brief because both parties object to a Commission determination to that effect.

In its Reply Brief, PG&E does not contest the merits of the ISO's arguments. Rather, PG&E asserts that the ISO cannot raise these issues in the current docket and that the ISO has not met the standard for vacating the Award's interpretations. The ISO responds to these arguments in Section III.B and III.C of this Rebuttal Brief.

Before they had even seen the ISO's arguments, Joint Intervenors in this proceeding filed an Opening Brief supporting the Award. Although the Commission's order establishing a procedural schedule for this appeal did not explicitly prohibit such a filing, it was certainly intended to implement the standard appellate procedure, in which those parties that challenge an award (the appellants) file briefs stating the arguments for reversal, after which those supporting the award file reply briefs, and finally the appellants file a rebuttal brief. For this reason, and because the ISO does not oppose PG&E's appeal, the ISO did not file a reply brief in response to Joint Intervenors unauthorized brief, but rather is filing this rebuttal brief at the appropriate time.

Having thus devoted an initial brief to contesting arguments that the ISO had not (and has not) proffered, Joint Intervenors have now followed much the same course in their Reply Brief. Much of their Reply Brief is devoted to misstating the ISO's position and defending the Award against arguments the ISO has not made. Two themes pervade the Reply Brief. First, Joint Intervenors contend incorrectly that the ISO is aksing FERC to reverse the Arbitration Award itself (as opposed to the erroneous analysis in the Award). As just one example, they state:

> On brief, the ISO takes issue with the Award's conclusion regarding the lack of a provision concerning MOO Charges

> for the ISO to bill "other appropriate parties" rather than simply SCs, as was proposed in the [Grid Management Charge] proceeding. The objective of the ISO's argument is to apply the ISO's interpretation of the Commission's ruling in Opinion No. 463, to MOO Charges. In other words, the ISO argues that, since the Commission allowed the ISO to bill GMC CAS on the basis of Control Area Gross Load ("CAGL"), even after removal of the "other appropriate parties" provision, the ISO should be able to reach loads served by [California Oregon Transmission Project or "COTP"]/Bubble transactions here. The ISO seeks to relitigate this issue in this case now at the eleventh hour, by conveniently ignoring the fact that the Arbitrator had this very issue before him and rejected it.

Joint Intervenors' Reply Brief (hereinafter "Int. Br.") at 14-15. ***The ISO, however, has expressly disavowed any such intent.*** Rather, in the cited arguments the ISO simply challenged the Award's conclusion about the significance of the term "other appropriate parties" in the Commission's Grid Management Charge orders. The ISO's position is that this language did not provide the basis for the Commission's conclusion that the ISO could bill PG&E for Control Area Services charges allocated to the behind-the-meter Load of those entities for whom it is Scheduling Coordinator under the Responsible Participating Transmission Owner Agreement.

Joint Intervenors state incorrectly that the ISO is seeking a ruling about how it should re-allocate must-offer costs, such as when they state:

> The ISO's request on brief for correction, vacatur or declaration of no-precedent are actually a return to its repeated and unsuccessful argument that the Commission should rule on the issue of, "if not PG&E, then who" is to be assessed [must-offer] Charges. . . . [T]he ISO seeks to pressure the Commission to question the result of the Arbitrator's Award, by raising an issue (i.e., "if not PG&E, then who?") which is beyond the scope of the Arbitration, i.e., the limited question of whether the ISO may appropriately allocate to PG&E [must-offer] Charges for load served by COTP/Bubble-served transactions.

Int. Br. at 16-17. *See also* Int. Br. at 20-22. Yet nowhere in the ISO's Opening Brief is this request made or even implied. The ISO has raised no issues regarding the allocation of must-offer charges. Even Joint Intervenors admit that the ISO did not mention such an issue in its Statement of Issues. *Id.*

The ISO sees no purpose in responding to Joint Intervenors' repeated unsupported descriptions of the ISO's "real" argument and their "replies" to these phantom arguments in defense of the Award. Rather, the ISO will simply respond to Joint Intervenors' arguments that are directed to the issues actually raised by the ISO's Opening Brief: that the Commission should not review the issues raised by the ISO *de novo* (Section III.A); that the ISO cannot bring this appeal under the terms of the ISO Tariff (Section III.B); that the orders in the 2001 Grid Management Charge proceeding did not hold that the ISO could bill Control Area Services charges related to the COTP and Bubble Loads to PG&E (Section III.D); and that the ISO's deferral of such charges is an admission that the ISO lacks the authority to bill the charges (Section III.E).

II. SUMMARY

1. Joint Intervenors contend that the Commission should not undertake a *de novo* review because the Award determined that the arbitration involved mixed issues of law and fact. Joint Intervenors fail to recognize that the issues raised in the ISO's appeal do not encompass any of the factual issues that the Award addressed, but only involve legal questions. The Commission should therefore proceed *de novo.*

2. Contrary to PG&E's and Joint Intervenors' arguments, the ISO's appeal is neither beyond the scope of the proceeding nor unauthorized by the ISO Tariff. The appeal concerns conclusions reached in the Award that gave rise to this proceeding; therefore, this is the appropriate proceeding in which to contest them. The ISO

contends that the conclusions are contrary to Commission decision, a basis for appeal specifically recognized in Section 13.4.1 of the ISO Tariff.

3. PG&E's argument that the ISO has failed to meet the standards for vacating opinions is misplaced. The decisions cited by PG&E only apply to the vacatur of nonfinal orders following a settlement. Reversal and vacatur of portions of an order are routine actions of an appellate body that concludes the decisions are erroneous.

4. Joint Intervenors contend that the 2001 Grid Management Orders did not authorize the ISO to allocate Control Area Services charges to Loads served by the COTP or are within the SMUD Bubble.[5] These arguments continue to ignore the Commission's rejection of SMUD arguments that Loads that are served by the COTP or are within the SMUD Bubble should be excluded from such charges and the Commission's explicit identification of PG&E as the party to be billed.

5. Despite Joint Intervenors' arguments, the ISO's deferred billing of COTP- and Bubble-related Control Area Services charges to PG&E is not an admission that such charges are unauthorized. Rather, the deferral is a reasonable response to the potential for avoiding disputes while an appeal is pending.

III. ARGUMENT

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

In its Opening Brief, the ISO asserted that the Commission's review of the issues raised by this appeal must of necessity be *de novo* because they are legal issues. Joint

[5] 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).

Intervenors contend that the ISO ignores the requirement of Section 13.4.2 of the ISO Tariff, which states that the parties intend that the Commission should afford substantial deference to factual findings of the Arbitrator. They note that the Arbitrator concluded that the issues addressed in the Award were mixed law and fact. Int. Br. at 12. Joint Intervenors argue that certain alleged factual issues were critical to the Award.

Although the ISO contended during the arbitration that there were no contested issues of fact that were relevant to the resolution of the issues (and continues to so believe), the ISO acknowledges that the Award concludes otherwise and makes certain factual findings. But none of the alleged factual issues cited by Intervenors and none of the factual findings of the Arbitrator is challenged by the ISO's arguments on appeal. The ISO is ***only*** challenging the Award's interpretation of Opinions No. 463 and 463-A (and the underlying Initial Decision). The meaning of these decisions is a purely legal issue. It involves solely the interpretation of the orders, relying upon the undisputed record before the Commission.

Joint Intervenors recognize that questions of law are reviewed *de novo.* Int. Br. at 10 n.25. The fact that the Award may include some factual findings that the ISO does not contest does not, and cannot, justify the application of a deferential standard of review to the legal conclusions of the Award.

B. THE ISO'S APPEAL IS PROPERLY BEFORE THE COMMISSION

Both PG&E and Joint Intervenors challenge the ISO's ability to seek reversal or vacatur of the Award's interpretations of Opinion No. 463-A. PG&E asserts that the issues on which the ISO seeks reversal are outside the scope of the proceeding, and not within the appealable issues under the ISO Tariff, because the ISO "is actually only concerned with how the ISO may collect charges for the now-outdated GMC [Control

Area Services] charge." PG&E Reply Br. at 6. PG&E contends that such issues should be addressed in the Grid Management Charge docket.

PG&E ignores the fact that the erroneous interpretations of the Grid Management Charge orders are in the Award, not in the Grid Management Charge docket, and the Award is before the Commission in this proceeding.[6] The ISO is not asking the Commission to issue any ruling regarding the ISO's allocation and collection of Control Area Services charges; the Commission issued those rulings in Opinions No. 463, 463-A and 463-B. The ISO is simply asking the Commission to reverse conclusions of the Arbitrator that are contrary to those rulings.[7] If parties wish to challenge the ISO's allocation and billing of Control Area Services charges in an arbitration or in rehearing of Opinion No. 463-B, they are free to do so. They should not, however, be allowed to rely upon the erroneous statements in this Arbitration as precedent about the meaning of the Grid Management Charge orders.

Contrary to PG&E's assertions, the ISO is not challenging "the law requiring it to pay" the Award. PG&E Br. at 6. Although it disagrees with them, the ISO is not appealing the conclusions that the billing and allocation rulings of Opinions No. 463 and

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[6] Contrary to PG&E's assertion, the ISO's concerns are not addressed by Opinion No. 463-B, which rejected PG&E challenges to its responsibility for Control Area Services charges assessed to the behind-the-meter Load of entities for whom it is a Scheduling Coordinator under the Responsible Participating Transmission Owner Agreement. *See* PG&E Reply Br. at 2 n.2; *California Ind. System Oper. Corp.,* 113 FERC ¶ 61,135 at P 94 (2005). The portions of the Award with which the ISO is concerned would allow PG&E and Joint Intervenors to argue that Load that is served by the COTP or is within SMUD Bubble is an exception either to the allocation of Control Area Services charges to Control Area Gross Load or to PG&E's responsibility for such charges.

[7] PG&E's corollary argument that the ISO cannot appeal these matters because it is a "non-aggrieved party," relying on *Panhandle Eastern*, 198 F.3d at 268, PG&E Br. at 6, is baseless. The court in *Panhandle Eastern* was concerned with standing to seek appellate review under Section 313 of the Federal Power Act, 16 U.S.C. § 825*l.* Section 313 has no relevance to appeals of arbitration orders, and certainly does not limit the Commission's ability to correct erroneous interpretations of its orders.

463-A are not applicable to must-offer charges. Moreover, the ISO's arguments do not constitute a collateral attack on Commission orders affirming a prior arbitration that concerned the assessment of Ancillary Services changes in connection with non-Grid transactions to PG&E as the Scheduling coordinator for COTP and Bubble Loads ("COTP Orders").[8] *See* PG&E Reply Br. at 8. As the Commission stated, the previous 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 32 (2005). Unlike the Award on appeal, the COTP Orders do not address the ISO's allocation and billing of Control Area Services charges; the Commission's reversal of the Award's erroneous statements regarding Grid Management Charge orders is not relevant to the COTP Orders.

Joint Intervenors state:

> The Award does not either: (1) state that the ISO's imposition of [Control Area Services] charges on PG&E for COTP and Bubble transactions is improper; or (2) direct the ISO to make a refund to PG&E for [Control Area Services] charges. The question of the ISO's authority to allocate [Control Area Services] charges was outside of the scope of the proceeding before the Arbitrator.

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

Int. Brief at 8.[9] They challenge the ISO's authority under Section 13.4.1 to bring the appeal because "the issues . . . relate to dicta in the Arbitrator's decision, and not the Award itself." Int. Br. at 6. Later, Joint Intervenors state that "anything the Award had to say about the ISO's authority to allocate GMC charges is non-precedential dicta and is unappealable." *Id.* at 8-9 (footnote omitted). The issues raised in the ISO's Opening Brief, however, do not concern an order by the Arbitrator that the ISO cannot collect Control Area Services charges; rather the issues concern interpretations of the Grid Management Charge that could be used as precedent in another arbitration challenging the ISO's ability to do so.

Of course, if the ISO had assurances that the Award's conclusions regarding Opinion No. 463-A would be treated by all parties as "non-precedential dicta," there would be no need for this appeal. The ISO, however, can not be so assured absent a Commission order ensuring such treatment. One reason is that *dicta* in a previous arbitration award concerning the ISO's authority to bill PG&E in connection with COTP and SMUD Bubble transactions (the "COTP I" arbitration) was a significant issue in the arbitration that gives rise to this appeal. In the COTP I arbitration, the arbitrator concluded that the ISO lacked the authority under the plain language of the ISO Tariff and the Scheduling Coordinator Agreement to bill the Ancillary Services charges in question to PG&E. Exh. SMD-16 at 7-8; 12 (R. 1533-34, 1538). He went on to discuss extrinsic evidence and other issues only because of the possibility that the Commission

[9] Contrary to the Joint Intervenors' contention, Int. Br. at 8 n. 21, the ISO did not "attempt to interject[ ] issues related to [the Grid Management Charge] in the proceeding." Rather, the ISO simply relied upon Opinion No. 463-A's interpretation of the Responsible Participating Transmission Owner Agreement as the basis for the ISO's authority to bill PG&E for the charges at issue. It is PG&E and Intervenors that raised the contention that Opinion No. 463-A did not apply to Load served by the COTP and in the SMUD Bubble. ISO Pre-hearing Br. at 13-17; PG&E Pre-hearing Br. at 7; Int. Initial Post-hearing Br. at 28-30.

would disagree with his conclusion about the plain meaning of the ISO Tariff and Scheduling Coordinator agreement. *Id*. at 12 (R. 1538). Under such circumstances, the discussions of extrinsic evidence and other issues were *dicta.* Yet that did not stop PG&E from asserting in this proceeding that those latter conclusions were binding precedent. *See, e.g.*, PG&E Initial Pre-Hearing Brief at 18 (R. 668).

Further, there is nothing in Section 13.4.1 of the ISO Tariff to support Joint Intervenors' contention that appeal of the Award is limited to appeal of liability, and does not include the decision included in the Award. Section 13.4.1 allows appeal of an arbitration award on the grounds that it is ***contrary to FERC decisions***. That is precisely the basis of the ISO's appeal of portions of the Award.

C. REVERSAL OR VACATUR IS APPROPRIATE FOR ERRONEOUS PORTIONS OF THE AWARD.

Citing various Commission orders, PG&E contends that the ISO has not met the standard for vacatur. PG&E's arguments, however, are inapplicable to the ISO's appeal. All of the orders cited involve requests that the Commission vacate orders (in all but one case, its own orders) that were rendered moot by settlements. The Commission in these cases was applying the policy set forth in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994) ("*U.S. Bancorp*"), which precludes such vacaturs except in extraordinary circumstances.[10] That policy, however, applies only to orders rendered moot by settlements. Moreover, it is an *exception* to the

[10] *Town of Neligh*, 94 FERC ¶ 61,075 at 61,348 (2001); *Panhandle Eastern Pipe Line Co.*, 83 FERC ¶ 61,008 at 61,030 (1998), *review denied for lack of standing*, 193 F.3d 266 (D.C. Cir. 1999); *Arcadia Corp. v. Southern Natural Gas Co.*, 77 FERC ¶ 61,210 at 61,859-60 (1996). The Court of Appeals for the District of Columbia Circuit has stated in *dicta* that this rule does not govern Commission decisions, but only applies to Article III courts. *Panhandle Eastern Pipe Line Co. v. FERC,* 193 F.3d at 267 (D.C. Cir. 1999). The Commission, however, has continued to apply those principles. *Town of Neligh,* 94 FERC at 61,348-49.

general rule, set forth in *United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950), that decisions rendered moot during the appellate process should be vacated. *Id.* The considerations that govern the *U.S. Bancorp* exception do not apply here, where there is no settlement. Indeed, the policies supporting *Munsingwear* are even more compelling when the rulings are erroneous rather than moot.

In the one instance cited by PG&E in which the decision did not involve a request to vacate the Commission's own orders, *KeySpan Energy Development Corp. v. New York Independent System Operator, Inc.,* 108 FERC ¶ 61,201 (2004), the Commission was asked to vacate, following a settlement, an initial decision that the Commission had not as yet reviewed. The Commission declined to do so, noting that the mere fact of settlement does not justify vacatur,[11] that the issues addressed would be moot, and that, because the initial decision would not become a final Commission decision, it has no precedential value. *Id.* Even in cases (unlike this proceeding) where the *U.S. Bancorp* rule would apply to initial decisions, however, the Commission may vacate orders to preclude inappropriate reliance on those orders. In contrast to its decision in *KeySpan*, the Commission that same year affirmed its vacatur of two initial decisions in accepting a settlement in *Public Utilities Commission of California v. El Paso Natural Gas Co.*, 106 FERC ¶ 61,315 (2004), *aff'ing* 105 FERC ¶ 61,201 (2003). The Commission noted that it "vacated the [initial decisions] to avoid the possibility that parties would attempt to rely in other proceedings on the [initial decisions], to which the Commission accords no precedential value." *Id.* at P 51. That is the same possibility that the ISO is asking the Commission to avoid in the appeal.

[11] The Commission cited for this proposition *Panhandle Eastern Pipe Line Co.*, 83 FERC ¶ 61,008 at 61,030 (1998), *review denied for lack of standing*, 193 F.3d 266 (D.C. Cir. 1999), which in turn relied on *U.S. Bancorp*.

Not only are PG&E's authorities inapplicable because this proceeding does not involve a settlement, but also because the ISO has asked the Commission to "reverse or vacate" portions of the Award not on the basis that they are moot, but on the basis that they are ***erroneous*** interpretations of a Commission order. There is nothing in PG&E's authority that suggests the Commission would let stand orders that are contrary to Commission policy and precedent. To the contrary, the Commission considers it appropriate to vacate such orders. In *Sunoco, Inc. v. Transcontinental Gas Pipe Line Corp.*, 111 FERC ¶ 61,400, PP 9, 30 (2005), for example, the Commission, on voluntary remand from the Court of Appeals, vacated the orders that had been appealed to the extent they were inconsistent with the Order on Remand, in particular because they erroneously imposed remedies beyond the Commission's jurisdiction.

More importantly, none of the orders or cases cited by PG&E addresses the Commission's actions when it is sitting as a reviewing or appellate body. In this proceeding, the ISO has asked the Commission to ***reverse*** or vacate portions of the order in an ***appeal*** under the ISO Tariff. As a practical matter, there is no difference between an appellate body's reversal or vacatur of an order. Vacatur or reversal is the typical result of a court's conclusion that the reviewed decision is erroneous. *See, e.g., BP West Coast Products, L.L.C. v. FERC*, 374 F.3d 1263 (D. C. Cir. 2004) (vacating and remanding Commission order); *California Indep. Sys. Oper. Corp. v. FERC*, 372 F.3d 395 (D.C. Cir. 2004) (same). Vacatur is necessary to preclude other bodies from relying on the rulings made in the reversed decision. When a court reverses an order, the order is considered repealed and revoked. *See Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940). The Supreme Court has

pronounced that a reversed judgment is "without any validity, force or effect, and ought never to have existed." *Butler v. Eaton*, 141 U.S. 240, 244 (1891) (emphasis added).[12] Further, a court may choose to vacate only a portion of order, as the ISO requests in the appeal. *See Boston Edison Co. v. FERC,* 233 F.3d 60, 71 (D.C. Cir. 2000) (vacating orders only to the extent that they held that the utility's rates of return on common equity were unlawfully high under the just and reasonable standard and to the extent that they ordered refunds on that premise). Particularly relevant here, the Court of Appeals for the Fifth Circuit has vacated portions of a Federal Power Commission decision that were erroneous *dicta*. *International Paper Co. v. FPC*, 475 F.2d 121, 125 (5th Cir. 1973).[13]

Similarly, the Commission routinely vacates portions of initial decisions upon review. The Commission has vacated portions of an initial decision because they were *dicta* on issues that the Commission did not need to reach,[14] because they were on issues beyond the scope of the proceeding,[15] and because they were moot.[16] No

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[12] This is significant because, as the U.S. Court of Appeals for the D.C. Circuit has explained, there is a distinction between invalidating a lower order and merely remanding it, without vacating it. *See, e.g., Commonwealth of Massachusetts v. NRC*, 924 F.2d 311, 336 (D.C. Cir. 1991) ("In appropriate cases we will remand without vacating an agency's order where the reason for the remand is a lack of reasoned decisionmaking. . . . 'Relevant to the choice are the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency decided correctly) and the disruptive consequences of an interim change that may itself be changed,'" quoting *UMW v. Mine Safety and Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990).)

[13] Although the court did not use the term "vacate," the Commission has recognized that this was the effect of the decision. *United Gas Pipe Line, Inc.,* 35 FERC ¶ 61,344 at 61,791 (1986).

[14] *See, e.g., Cajun Electric Power Cooperative, Inc. v. Gulf States Utility Company*, 66 FERC ¶ 61,325 at 62,036 (1994).

[15] *See, e.g., Sierra Pacific Power Co.* 104 FERC ¶ 61,223 at P 36 (2003); *Village of Belmont*, 95 FERC ¶ 61,334 at 62,198 (2001).

"extraordinary circumstances" are required for vacating or reversing such portions of an initial decision, because such action is a fundamental function of the Commission's review of an initial decision. The same considerations apply to the review of an Arbitrator's decision. For example, in ruling on the New York ISO's motion to vacate an arbitration award, the Commission imposed no special rules for vacatur, but simply asserted its primary jurisdiction and applied its standards for the review of an arbitration award. *New York Independent System Operator Corp. v. Dynegy Power Marketing, Inc.,* 109 FERC ¶ 61,163 at PP 21, 38, 43. If the Commission concludes that the challenged portions of the Award are erroneous, that conclusion provides sufficient grounds for reversing or vacating the Award.

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

The fundamental issue in this appeal is the impact of the Award's interpretations of the Grid Management Charge orders on the ISO's authority to bill PG&E for Control Area Services charges for Loads that are served by the COTP or are in the SMUD Bubble. According to the Award, the Commission's rulings regarding the ISO's authority to bill the Responsible Participating Transmission Owner for Control Area Services allocated to the Control Area Gross Load of Governmental Entities would not apply to the COTP and Bubble Loads. Although Joint Intervenors contend that these Award conclusions do not preclude the ISO's billing PG&E for Control Area Services charges for Loads that is served by the COTP or are in the SMUD Bubble, they still attempt to

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[16] *See, e.g., Consumers Energy Co.,* 85 FERC ¶ 61,100 at 61,359 (1998); *Southern California Edison Co.*, 92 FERC ¶ 61,070 at 61,253 (2000).

defend the Award's conclusions that would support a challenge to such billing: namely, that the 2001 Grid Management orders do not address COTP or Bubble Loads. First, Joint Intervenors state:

> The ISO misleadingly implies that the [Grid Management Charge] Initial Decision reached the determination that the ISO Tariff authorized the ISO to impose COTP and Bubble-related [Control Area Services charges] to PG&E. In the [Grid Management Charge] Initial Decision passages that the ISO cites, the ALJ rejected SMUD's argument that its [Existing Contracts] prevented the ISO from allocating [Control Area Services charges] to SMUD's ISO Controlled Grid transactions and that the Restated Interim Agreement prevented the Commission from authorizing the ISO to allocate the [Control Area Service] charge on the basis of [Control Area Gross Load], "which includes SMUD's behind-the-meter Load that is not served over the ISO Controlled Grid." The ALJ did not, however, hold that the ISO Tariff authorized the ISO to bill PG&E for COTP and Bubble related [Control Area Services charges].

Int. Br. at 39. Joint Intervenors misstate the ISO's arguments and conflate two aspects of the Control Area Services issues relating to the COTP and Bubble Loads. Despite Joint Intervenors' contention, the ISO's discussion of the Grid Management Charge Initial Decision only addresses the ***allocation*** of the Control Area Services charges. *See* ISO Opening Brief at 15-23. As the ISO explained in its Opening Brief, *id.* at 16-17, and as Southern California Edison has also documented in its Brief, *passim*, the SMUD arguments rejected by the Initial Decision specifically concerned that allocation of Control Area Services charges to COTP and Bubble Loads. Contrary to Joint Intervenors' argument, Int. Br. at 40, the Initial Decision's conclusion that the ISO could not ***bill*** Scheduling Coordinators for charges to behind-the-meter Load (but rather

should bill Governmental Entities directly)[17] does not in any way suggest that the Initial Decision failed to "clearly reject" SMUD's arguments regarding the ***allocation*** of Control Area Services charges.

Joint Intervenors' suggestion that the Initial Decision rejected SMUD's arguments only with regard to behind-the-meter Load (which Intervenors have consistently contended does not include COTP or Bubble Loads), *id*., is thus also misleading. Contrary to Joint Intervenors' statement, *id*., behind-the-meter was not defined in the Initial Decision. Although the Commission has recently defined behind-the-meter for the purposes of its limited exception to the allocation of Control Area Services charges to behind-the-meter Loads, Opinion No. 463-B at P 62, the ISO maintains that, read in the context of SMUD's arguments, the Initial Decision's references to behind-the-meter Load in rejecting SMUD's arguments necessarily included COTP and Bubble Loads. *See, e.g., California Indep. System Oper. Corp.*, 99 FERC ¶ 63,020 at 61,101, 61,112; *see generally* ISO Opening Br. at 21-23.

Regardless of how one reads the term "behind-the-meter", neither the Initial Decision nor Opinion No. 463 can be read to exclude COTP and Bubble Loads from the definition of Control Area Gross Load, which by its terms applies to *all* Demand in the ISO Control Area. ISO Tariff, Appendix A, Master Definitions Supplement, as in effect January 1, 2001. In its Brief on Exceptions, SMUD understood the Initial Decision to allocate Control Area Services charges to COTP and Bubble Loads and included an Exception to that allocation. *See, e.g.*, Exh. ISO-16 at 9, 54 (R. 3151, 3174). The Commission did not address COTP and Bubble Loads directly in Opinion No. 463, but

[17] Which conclusion Joint Intervenors admit was reversed by the Commission. Int. Br. at 40.

simply rejected SMUD's arguments that its Loads should be exempted. *California Indep. System Oper. Corp.*, 103 FERC ¶ 61,114 at P 25 (2003). Had the Commission believed that COTP and Bubble Loads were not included, it certainly would have so ruled in response to SMUD's arguments.

Joint Intervenors also present arguments, ostensibly directed to the ISO's ability to bill PG&E for must-offer charges, that on their face also challenge the ISO's ability to bill PG&E for Control Area Services charges. Joint Intervenors first note that Opinion No. 463-A states that Scheduling Coordinators are the appropriate parties to bill for the Control Area Services charge, and then state that the Commission concluded in the COTP Orders that PG&E is not the Scheduling Coordinator for the COTP or Bubble transactions. The also note that Opinion No. 463-A refers to arrangements regarding Existing Contracts, and that PG&E's Existing Contracts with TANC Members and SMUD "did not relate to COTP and Bubble transactions, and only concerned transactions over what was to become the ISO Controlled Grid." Int. Br. at 41-42.

This misses the entire point of the Commission's ruling in Opinion No. 463-A. The Commission was presented with the question of the appropriate billing party for Control Area Gross Load that was not scheduled on the ISO Controlled Grid, such as behind-the-meter Load. There is no more a Scheduling Coordinator for transactions behind-the-meter than there is a Scheduling Coordinator for COTP or Bubble transactions. The Commission ruled that the Scheduling Coordinator for a Governmental Entity's Existing Contracts (*i.e.,* the Responsible Participating Transmission Owner) is the entity to bill for that Governmental Entity's behind-the-meter Load. Opinion No. 463-A at P 73. Thus, the question of whether there is a Scheduling

Coordinator for the transactions by which Control Area Gross Load is served and whether those transactions are pursuant to an Existing Contract is irrelevant to the ISO's ability to bill a Responsible Participating Transmission Owner for the Control Area Services charges allocated to a Governmental Entity's Control Area Gross Load.

Further, despite Joint Intervenors' argument to the contrary, the ruling in Opinion No. 463-A is not inconsistent with the COTP Orders and the ISO's request in this appeal is not a collateral attack on those orders. *See* Int. Br. at 43-44. The COTP Orders did not hold that "PG&E was ***not*** the Scheduling Coordinator 'to bill' for charges related to COTP and Bubble transactions, in any regard." *Id.* at 44 (emphasis in original). As noted above, the Commission has stated that the COTP I proceeding "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 32 (2005) (emphasis added). While the ISO is not contesting the Award's extension of this ruling to must-offer charges, there is no legal basis to conclude that the COTP Orders affect the ISO's ability to charge PG&E for Control Area Services charges allocated to COTP and Bubble Loads.

E. THE ISO'S DEFERRED BILLING OF COTP- AND BUBBLE-RELATED CONTROL AREA SERVICES CHARGES TO PG&E IS NOT AN ADMISSION THAT SUCH CHARGES ARE UNAUTHORIZED.

Joint Intervenors contend, "[N]o matter how hard the ISO tries, the ISO cannot explain away the fact that it never billed GMC to COTP/Bubble transactions . . . , and if it had the clear authority to do so, why it refrained from billing GMC." Int. Br. at 42. Joint Intervenors are incorrect when they assert the ISO has been silent on this issue,

Int. Br. at 43. Rather, the ISO's reasons are part of the record and fully explain the deferral.

As the evidence showed in the arbitration, and the ISO explained in its Opening Brief, the ISO, by settlement, agreed not to charge the original Grid Management Charge for COTP and Bubble Loads to PG&E, s*ee, e.g.* Exh. SMD-16 at 14 (R. 1540); Exh. ISO-15 (Initial Decision at 65,071-072) (R. 3090); the ISO's failure to charge PG&E during this period is irrelevant - a fact which the Award ignores.

That settlement does not apply to the new Grid Management Charge implemented in 2001. *See* Initial Decision at 65,106 (R. 3109.)[18] As further noted in the ISO's Opening Brief, the ISO has explained to both the Commission and the Arbitrator its current deferral of the billing of the COTP- and Bubble-related Control Area Services charges to PG&E. ISO Opening Brief at 30-31; 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 (R. 2625-26); Tr. at 1061-68 (R. 4451-52). The ISO recognizes that such charges might well be challenged on the basis of the COTP Orders – as is apparent from the arguments presented in Joint Intervenors' Reply Brief. Challenges to the charges on this basis would not be possible if the ISO prevailed on appeal of the COTP Orders (which, as Joint Intervenors note, the ISO has recently decided to abandon after the COTP I Award is implemented). Rather than instigate a possibly unnecessary arbitration, it made good sense for the ISO to defer the charges until the COTP Orders were final.

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[18] Intervenors do not, and cannot, claim that the verbal agreement they assert had any broader application than the settlement. *See* Int. Br. at 43. This verbal agreement thus does not constitute any evidence regarding the ISO's reasons for deferring COTP- and Bubble-related Control Area Services charges to PG&E.

As the testimony before the Arbitrator showed, the ISO has tracked these charges throughout the period. Tr. 792-801 (R. 4383-85). Joint Intervenors do not explain why the ISO would expend the resources to track these charges if the ISO did not intend to impose them. Joint Intervenors' arguments about the deferral are simply a red herring.

IV. CONCLUSION

For the reasons stated in the ISO's Opening Brief and 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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April 4, 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 4th day of April, 2006 at Folsom in the State of California.

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