

111 FERC ¶ 61,078
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

California Independent System Operator
Corporation

Docket No. EL02-45-001

ORDER DENYING REHEARING

(Issued April 18, 2005)

1. This order denies the California Independent System Operator Corporation's (ISO) request for rehearing of the Commission's May 10, 2004 Order in this proceeding. *California Independent System Operator Corporation*, 107 FERC ¶ 61,152 (2004) (May Order). In the May Order the Commission denied the ISO's petition for review of an arbitrator's award that granted Pacific Gas & Electric Company's (PG&E) claim for reimbursement of \$14,172,337.08, the amount PG&E paid to the ISO for ancillary services during the period between April 1998 and April 1999.
2. This order benefits customers because it clarifies the ISO's duties and obligations under its Open Access Transmission Tariff (ISO Tariff), and reaffirms the Commission's policy of relying on alternative dispute resolution (ADR) procedures to more efficiently use limited time and resources.

Background

3. In the May Order the Commission agreed with the arbitrator's analysis of the ISO Tariff, that the ISO Tariff limited the ISO's authority to procure ancillary services to ISO-controlled grid transactions. We found that the arbitrator correctly concluded that the ISO Tariff did not authorize the ISO to impose upon PG&E charges for ancillary services in connection with the California-Oregon Transmission Project (COTP)-facility transactions and Sacramento Municipal Utility District (SMUD) and Western Area Power Administration (WAPA) (Bubble)-facility transactions since the facilities were not part of

the ISO-controlled grid, but rather were non-ISO controlled grid, or off-grid, facilities and transactions.¹

4. In the May Order, we also noted that, in *California Independent System Operator Corporation*, 82 FERC ¶ 61,312 (1998) (March Order), we had effectively denied the ISO's request to extend its authority to procure ancillary services to non-ISO-controlled grid transactions by rejecting the ISO's Amendment No. 2. Thus, we found that, in this proceeding, the ISO was essentially attempting to relitigate the merits of the March Order.²

5. Pursuant to the ISO Tariff, we also gave substantial deference to the arbitrator's factual findings that considered the extrinsic evidence relating to the meaning of the ISO Tariff provisions in dispute, and the arbitrator's finding that PG&E had agreements in place that included ancillary service self-provision arrangements for the Bubble transactions. We also upheld the arbitrator's finding that PG&E was not a scheduling coordinator for COTP and Bubble transactions.³

6. In addition, we found that we need not address the ISO's argument that it procured ancillary services to maintain the reliability of the ISO-controlled grid because that argument had not been timely raised. We explained that the ISO could have presented to the arbitrator specific evidence showing that it procures ancillary services to maintain the reliability of the ISO-controlled grid, but that the ISO did not do so.⁴ Finally, we agreed with the arbitrator and dismissed the ISO's cost causation argument since cost causation principles were not relevant in the factual context presented here. We stated that the ISO simply had not shown it had a right under a tariff or on equitable grounds to assess or recover the charges it sought here.⁵

Request For Rehearing

7. On June 9, 2004, the ISO filed a request for rehearing. The ISO asks that the Commission clarify that it did not intend to preclude the ISO from procuring the quantities of ancillary services it determines to be necessary to reliably operate the ISO-controlled grid, and to meet its Western Electricity Coordinating Council (WECC) obligations to manage the control area. The ISO explains that, since the ISO Tariff specifies that the ISO comply with WECC criteria in establishing ancillary services

¹ May Order at P 28-29.

² *Id.* at P 30.

³ *Id.* at P 31.

⁴ *Id.* at P 32.

⁵ *Id.* at P 33.

standards and quantities, the ISO must procure ancillary service capacity based on all control area loads, including non-ISO controlled grid loads.

8. The ISO also asks that the Commission confirm that, as a scheduling coordinator, PG&E is obligated to pay for ancillary services procured by the ISO for the COTP and Bubble transactions. The ISO maintains that the evidence established that PG&E is a scheduling coordinator as defined by the ISO Tariff, citing to *Pacific Gas and Electric Company*, 93 FERC ¶ 61,322 (2000) (PG&E Order).

9. The ISO also argues that the Commission's reliance on the March Order is misplaced since the issue in that case was to clarify that a scheduling coordinator was required for all transactions within the ISO's control area whether or not the transaction took place on the ISO-controlled grid. The ISO argues that this issue has no bearing on the present dispute because PG&E is unquestionably a scheduling coordinator both for COTP schedules and the other schedules it submits to the ISO. Thus, the ISO contends that Amendment No. 2 is irrelevant to the issue in this case and its rejection provides no support for the Commission's affirming the arbitrator's decision.

10. The ISO also argues that the Commission's reliance on the arbitrator's finding that PG&E had agreements in place that included ancillary service self-provision arrangements for the COTP and Bubble transactions does not support the May Order. The ISO contends that the only relevant evidence establishes that PG&E's contracts do not cover all of its ancillary service obligations, and PG&E did not comply with the ISO Tariff's requirements to self-provide ancillary services. Therefore, the ISO asserts that the provisions in PG&E's contracts, to which the ISO is not a party, did not relieve the ISO of its obligations to procure ancillary services in this situation.

11. In addition, the ISO contends that the May Order failed to address the ISO's cost causation argument, to require PG&E to pay a share of the ISO's ancillary service costs associated with the loads on its schedules.

12. Finally, the ISO argues that, under section 13.4.4 of the ISO Tariff, the arbitrator's award requiring the ISO to reimburse PG&E \$14,172,337.08, plus interest, for ancillary services remains stayed, and it is unnecessary for the ISO to seek a stay of the May Order. The ISO adds that, out of an abundance of caution, if the Commission disagrees that the automatic stay imposed by section 13.4.4 remains in effect, the ISO requests that the Commission reinstate the stay pending the Commission's disposition of the ISO's instant request for rehearing.

Answers

PG&E

13. On June 24, 2004, PG&E filed an answer. PG&E maintains that the ISO is rearguing the same positions the ISO had previously unsuccessfully litigated in the arbitration proceeding and on appeal to the Commission. PG&E also argues that the ISO's arguments about self-provision of ancillary services are irrelevant. PG&E contends that the only issue properly before the arbitrator and this Commission is whether the ISO had authority under the ISO Tariff to charge PG&E for ancillary services and other reliability costs the ISO incurred with respect to loads served in connection with the COTP and Bubble transactions. PG&E argues that the arbitrator and the Commission unambiguously found that the ISO had no such ISO authority under the ISO Tariff, and thus clarification of that ruling is not needed. PG&E also asserts that the arbitrator and the Commission unambiguously determined that PG&E is not the scheduling coordinator for these loads, and that the ISO does not have authority under the ISO tariff to charge PG&E for the ancillary services the ISO procured with respect to the COTP and Bubble transactions since they are not on the ISO-controlled grid.

14. PG&E also claims that the ISO's determination that a stay is still in effect with respect to this dispute is groundless. PG&E asserts that the stay under section 13.4.4 of the ISO Tariff only applies during the period of time when an arbitrator's award is pending an appeal, and PG&E contends that the May Order was the order on appeal. Thus, PG&E asks that the Commission deny the ISO's motion, and clarify that in future awards of arbitral awards under ADR procedures of the ISO Tariff, the automatic stay does not extend beyond the date of the Commission order resolving any such future appeal. In addition, PG&E claims that the stay under section 13.4.4 of the ISO Tariff is clearly no longer in effect, and the ISO has not met the standards for issuing a new stay.

Arbitration Intervenors

15. On June 24, 2004, the Transmission Agency of Northern California, the Modesto Irrigation District, the M-S-R Public Power Agency, the California Cities of Santa Clara and Redding, the Sacramento Municipal Utility District, the Northern California Power Agency, and the Turlock Irrigation District (collectively, Arbitration Intervenors) filed an answer. Arbitration Intervenors argue that, contrary to the ISO's assertion, the May Order does not require clarification. They contend that the ISO's attempt to inject a new reliability-related argument that was not raised in the arbitration must be rejected since it is an attempt to avoid the prohibition against raising new arguments on rehearing and to expand the record developed in the arbitration. They also claim that the ISO's reliability argument is without merit because: (1) the May Order clearly upheld the findings of the arbitrator that the authority of the ISO under the ISO Tariff is limited to the ISO-

controlled grid; (2) the ISO is barred under section 13.4.2 of the ISO Tariff from introducing a new argument that it failed to make in the record below; (3) the clarification the ISO seeks is a collateral attack on the May Order's findings that relied on the March Order; and (4) the ISO's position is contrary to the ISO Tariff's reference to the ISO-controlled grid instead of control area.

16. The Arbitration Intervenors add that the evidence in the arbitration record does not support the ISO's position that it is authorized to procure ancillary services for the entire ISO control area to satisfy the ISO's responsibility over the reliable operation of the ISO control area. They assert that the evidence established that the ISO as control area operator can rely on ancillary services that are self-provided by other entities with load within that control area, consistent with the Minimum Operating Reliability Criteria (MORC) requirements of the WECC. Arbitration Intervenors argue that MORC does not give the ISO a monopoly to supply ancillary services for the control area, otherwise the self-provision principle would be rendered a complete nullity, and that the record establishes that MORC criteria do not mandate that the ISO procure ancillary services for non-ISO controlled grid transactions.

17. In addition, Arbitration Intervenors provide the following corrections to the misstatements they claim the ISO made: (1) the self-provision for ancillary services was not relevant to the arbitrator's award nor does the May Order address the issue of self-provision; (2) the arbitration record establishes that the Arbitration Intervenors had the ISO-acknowledged right to self-provide ancillary services under their existing interconnection agreements with PG&E; and (3) the Arbitration Intervenors did self-provide the requisite ancillary services for their load needs, consistent with MORC requirements.

Coalition

18. On June 24, 2004, the Cogeneration Association of California and Energy Producers and Users Coalition filed an answer. They ask that the Commission's clarification recognize that the behind the meter load of qualifying facilities which take standby service from a utility distribution company are not included in the ISO's control area firm load for purposes of determining appropriate reserves.

Discussion

19. Consistent with Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (d)(1) (2004), we will reject the answers to the ISO's request for rehearing.

20. We will deny the ISO's request for rehearing, as discussed below. We find that the ISO's principal arguments are essentially re-statements of its reliability arguments

(*i.e.*, that the ISO procured the ancillary services in question to maintain the reliability of the ISO-controlled grid), which we stated that we need not address because they were not timely raised. Indeed, we noted that the ISO could have presented to the arbitrator specific evidence that it procured ancillary services to maintain the reliability of the ISO-controlled grid, but that it did not do so.⁶ In short, we did not need to address the merits of such arguments in the May Order, and we did not do so. Likewise, here, we do not need to address them and we do not do so.

21. In its request for rehearing, the ISO again argues that the evidence established that PG&E is a scheduling coordinator as defined by the ISO Tariff, and the ISO's argument that the Commission's reliance on the March Order was misplaced.⁷ We deny the ISO's request for rehearing on this point. In the May Order we agreed with the arbitrator's finding that there was no basis to conclude that PG&E was an ISO Tariff-defined Scheduling Coordinator for the COTP and Bubble transactions.⁸ The ISO has not convinced us that we misinterpreted our prior decision. In the May Order we discussed our rejection of Amendment No. 2, and found that in the March Order we effectively rejected the ISO's request to extend its authority to procure ancillary services to non-ISO controlled grid transactions when we rejected the ISO's Amendment No. 2. We did not allow relitigation of the merits of the March Order in the May Order, and we will not relitigate them in this order.

22. Moreover, in agreeing with the arbitrator's decision, we also upheld the arbitrator's determination that any discussion of scheduling coordinator duties in the PG&E Order could not be regarded as a recognition that PG&E was a Scheduling Coordinator under the ISO Tariff, and that, in rejecting Amendment No. 2, the Commission understood that PG&E was not willing to be a scheduling coordinator under the ISO Tariff for the COTP and Bubble transactions.⁹ Therefore, we continue to uphold the arbitrator's conclusion that PG&E is a Scheduling Coordinator under the tariff for

⁶ May Order at P 32. If the ISO believes that there are reliability issues regarding the procurement of ancillary services in connection with the COTP and Bubble transactions, the ISO may file with the Commission amendments to the ISO Tariff to unambiguously address its concerns.

⁷ *Id.* at P 11.

⁸ Indeed, under the terms of the December 9, 1997 Scheduling Coordinator Agreement between PG&E and the ISO in the record, PG&E agreed to be the Scheduling Coordinator under the ISO Tariff and agreed to schedule energy and ancillary services on the ISO-controlled grid. Arbitration Decision at 17, exhibit 6. However, we have not found a Scheduling Coordinator Agreement in the record under which PG&E agreed to be the Scheduling Coordinator for non-ISO controlled grid transactions.

⁹ Arbitration Decision at 17.

transactions on the ISO-controlled grid, but is not with respect to the COTP and Bubble transactions.

23. The ISO again argues that the arbitrator's finding that PG&E had agreements in place that included ancillary service self-provision arrangements for the COTP and Bubble transactions does not relieve the ISO of its obligations to procure ancillary services for the transactions in question.¹⁰ As we stated in the May Order, consistent with section 13.4.2 of the ISO Tariff, we will give substantial deference to the arbitrator's factual findings that PG&E had agreements in place that included ancillary service self-provision arrangements for the COTP and Bubble transactions.¹¹ The ISO's attempt to tie these agreements to its reliability concerns (belatedly) does not convince us that the arbitrator's factual findings in this regard were incorrect.

24. In addition, the ISO again contends that the May Order failed to address the ISO's cost causation argument, to require PG&E to pay a share of the ISO's ancillary service costs associated with loads on its schedules.¹² In the May Order we stated that we agreed with the arbitrator and dismissed the ISO's cost causation argument since these principles were not relevant in the factual context presented here.¹³ The ISO has not convinced us to reverse our finding on this issue.

25. Finally, with regard to the automatic stay, section 13.4.4 of the ISO Tariff states that: "Implementation of the award shall be deemed stayed *pending an appeal* unless and until, at the request of a party, the FERC or the court of competent jurisdiction to which an appeal has been filed, issues an order dissolving, shortening, or extending such stay." In context, especially given the reference to the stay potentially being dissolved by "the court of competent jurisdiction to which an appeal has been filed," the phrase "pending an appeal" means not just the appeal of the arbitrator's award to the Commission but any subsequent appeal of the Commission's orders to "the court of competent jurisdiction." In this regard, section 13.4.5 of the ISO Tariff expressly provides that "FERC orders resulting from appeals shall be subject to judicial review pursuant to the FPA." Thus, taken together, these provisions in the ISO Tariff contemplate that the stay will remain in effect (unless dissolved or shortened) until after "the court of competent jurisdiction" rules.

¹⁰ May Order at P 11.

¹¹ *Id.* at P 26, 31; Arbitration Decision at 13.

¹² May Order at P 16.

¹³ *Id.* at P 32. Arbitration Decision at 20-21.

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The Commission orders:

The ISO's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.