

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

California Independent System Operator
Corporation

Docket No. EL02-45-002

ORDER DENYING MOTIONS FOR CLARIFICATION

(Issued November 4, 2005)

1. This order denies the California Independent System Operator Corporation's (ISO) and Southern California Edison's (Edison) motions for clarification of the Commission's April 18, 2005 Order denying rehearing in this proceeding.¹

Background

Order Denying Petition for Review -- May 2004 Order

2. In a prior order in this proceeding, 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

3. In the May 2004 Order we 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

¹ *California Independent System Operator Corporation*, 111 FERC ¶ 61,078 (2005) (April 2005 Order).

² *California Independent System Operator Corporation*, 107 FERC ¶ 61,152 (2004) (May 2004 Order).

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.³

4. In the May 2004 Order, we also found that, in *California Independent System Operator Corporation*, 82 FERC ¶ 61,312 (1998) (March 1998 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 1998 Order.⁴ Pursuant to the ISO Tariff, we also gave substantial deference to the arbitrator's factual findings that considered 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 the COTP and Bubble transactions.⁵

5. In addition, we found that we did not need to 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 procured ancillary services to maintain the reliability of the ISO-controlled grid, but that the ISO did not do so. We also agreed with parties that argued that concerns regarding cost responsibility were beyond the scope of this proceeding.⁶ 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.⁷

Order Denying Rehearing -- April 2005 Order

6. In the April 2005 Order we denied the ISO's request for rehearing, finding that the ISO's principal arguments were 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). We again found that the ISO could have presented to the arbitrator specific evidence that it procured ancillary services to maintain the reliability of the ISO-

³ *Id.* at P 28-29.

⁴ *Id.* at P 30.

⁵ *Id.* at P 31.

⁶ *Id.* at P 32.

⁷ *Id.* at P 33.

controlled grid, but that it did not do so. Therefore, we stated that we did not need to address the merits of such arguments in the May 2004 Order, and thus, we did not need to address them in the April 2005 Order. We also noted that if the ISO believed that there were reliability issues regarding the procurement of ancillary services in connection with the COTP and Bubble transactions, the ISO could file with the Commission amendments to the ISO Tariff to unambiguously address these concerns.⁸

7. We also denied the ISO's request for rehearing on whether PG&E was a scheduling coordinator, and the Commission's reliance on the March 1998 Order.⁹ In addition, we reiterated that we would 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. We stated that the ISO's attempt to tie these agreements to its reliability concerns (belatedly) did not convince us that the arbitrator's factual findings in this regard were incorrect.¹⁰

8. Furthermore, we noted that in its request for rehearing the ISO again contended that the Commission failed to address the ISO's cost causation argument. In response, we stated that in the May 2004 Order 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, and added that the ISO had not convinced us to reverse our finding on this issue.¹¹

9. Finally, we found that under the ISO Tariff, an automatic stay of the implementation of an award would remain in effect, unless dissolved or shortened, until after "the court of competent jurisdiction" (*i.e.*, an appellate court) ruled.¹²

Motions For Clarification

The ISO's Motion for Clarification

10. On May 18, 2005, the ISO filed a motion for clarification of the May 2004 Order and the April 2005 Order. The ISO states that the Commission concluded that in those orders that the ISO lacked authority under its tariff to bill PG&E for ancillary services procured in connection with certain "off grid" transactions. The ISO states that, in so concluding, the Commission left unanswered questions concerning: (1) which party or

⁸ April 2005 Order at P 20 & n. 6.

⁹ *Id.* at P 21-22.

¹⁰ *Id.* at P 23.

¹¹ *Id.* at P 24.

¹² *Id.* at P 25.

parties should be billed for the reliability services at issue; and (2) the ISO's authority generally to consider "off grid" transactions in setting requirements for and procuring ancillary services to meet its legal obligations. Therefore, the ISO states that it seeks a further order from the Commission clarifying that, under the May 2004 Order and April 2005 Order: (1) the ISO is entitled to seek recovery of the costs at issue from all users of the ISO-controlled grid, consistent with relevant tariff provisions; and (2) the ISO is not precluded, under such orders, from taking "off grid" transactions into account in setting requirements for and procuring reliability services to meet its legal obligations.

11. The ISO argues that it is entitled to charge the costs at issue to all users of the ISO-controlled grid because section 13.5.3.1 of the ISO Tariff states that the ISO will use its best efforts to determine which market participants are responsible for, and benefit from, the payment of an award by or to the ISO and to allocate the receipt of, or payment for, the award equitably to such market participants.¹³ The ISO asserts that under this provision the costs of ancillary services at issue must be borne pro rata by all users of the ISO-controlled grid. The ISO also contends that the arbitrator concluded that spreading the costs across all participants was not unreasonable, and that the Commission affirmed the arbitrator's findings that it was improper for the ISO to bill the cost of the ancillary services in question to those who did not use the ISO-controlled grid. Therefore, the ISO asks the Commission to clarify that the ISO may allocate the costs of the ancillary services it procures to users of the grid.

12. The ISO also maintains that the May 2004 Order and the April 2005 Order contain language that could be construed to undermine the ISO's ability to procure reliability services in a manner consistent with long-established industry standards. The ISO maintains that the ISO Tariff makes clear that the ISO must consider schedules off the ISO-controlled grid but within the control area in determining the amount of ancillary service to procure. The ISO asks the Commission to clarify that the May 2004 and April 2005 Orders do not preclude the ISO from taking into account off ISO-controlled grid schedules in setting standards for and procuring reliability services for the ISO-controlled grid.

Edison's Motion for Clarification

13. On May 18, 2005, Southern California Edison Company (Edison) filed a motion for clarification of the April 2005 Order. Edison states that it seeks clarification as to what entity, if any, the ISO should bill for ISO charge types that are, or were, billed on

¹³ Specifically, section 13.5.3.1 of the ISO Tariff states that "[t]he ISO will use best efforts to determine which Market Participant(s) is or are responsible for and/or benefit from payment of an award by or to the ISO and to allocate receipt of or payment for the award equitably to such Market Participant(s)."

the basis of: “control area gross load” or “exports.” Edison states that the clarification is necessary because, by finding that PG&E is not the scheduling coordinator for the COTP and Bubble transactions, the ISO arguably has no one to bill for those charge types assessed to the control area gross load and exports that are served via the COTP and Bubble facilities. Edison offers three solutions to the ISO’s billing dilemma: (1) bill the actual party that serves the control area gross load or is responsible for scheduling the export; (2) bill a scheduling coordinator that can be associated with the control area gross load or exports, even if that scheduling coordinator did not schedule the load or exports; or (3) not bill the control area gross load and exports that lack a scheduling coordinator and instead require all scheduling coordinators to subsidize such control area gross load and exports by increasing the rates for such charge types.

Responsive Pleadings

14. On June 2, 2005, the ISO filed an answer to Edison’s motion for clarification, stating that it agrees with Edison that the Commission needs to clarify the billing of charges to control area gross load and exports that are served via the COTP. The ISO also requests that the Commission respond to Edison’s motion, by clarifying whether PG&E is responsible under the Responsible Participating Transmission Owner Agreement for paying charges allocated to control area gross load of those governmental entities with which it has existing transmission contracts.

15. On June 2, 2005, the Transmission Agency of Northern California (TANC), the City of Redding, California (Redding), the City of Santa Clara, California (Santa Clara), the Modesto Irrigation District (Modesto), the M-S-R Public Power Agency (M-S-R), the Sacramento Municipal Utility District (SMUD), and the Turlock Irrigation District (Turlock) (collectively, Joint Intervenors) filed an answer in opposition to the ISO’s motion for clarification. Joint Intervenors state that it will comment on the merits of whether the ISO Tariff permits the ISO to recover the costs at issue from all users of the ISO-controlled grid when the ISO properly submits a section 205 filing to recover those costs, consistent with the previous rulings of the Commission. Joint Intervenors add that the ISO’s motion for clarification should be rejected as outside the scope of the proceeding.

16. Specifically, Joint Intervenors maintain that the arbitrator explicitly found that which entities, if not PG&E, should be responsible for the costs in dispute here was an issue that was outside the scope of this proceeding. They also argue that the Commission ruled in the May 2004 Order that the issue of cost responsibility was outside the scope of the proceeding. In addition, Joint Intervenors claim that the Commission has already answered the ISO’s reliability concerns in its prior orders. They assert that the Commission stated in the May 2004 Order that the ISO failed to raise the reliability argument before the arbitrator, and thus the Commission found that the issue was not timely raised. Therefore, Joint Intervenors state that the Commission did not need to

address the merits of the reliability argument in the May 2004 Order, or on rehearing in the April 2005 Order.

17. On June 2, 2005, Joint Intervenors separately filed an answer in opposition to Edison's motion for clarification. Joint Intervenors ask that Edison's motion for clarification be rejected since Edison seeks clarification as to an issue that: (1) is outside the scope of the proceeding; (2) is already the subject of another, ongoing ISO arbitration;¹⁴ and (3) the Commission has already ruled is outside the scope of the instant proceeding. Joint Intervenors add that, when the ISO makes a section 205 filing to recover any costs, Joint Intervenors will comment on the merits of Edison's claim and proposed solutions, if Edison raises them in response to a properly submitted section 205 filing by the ISO to recover those costs.

18. Specifically, Joint Intervenors contend that Edison's motion for clarification is outside the scope of this proceeding because the instant proceeding dealt only with the question of whether PG&E was responsible for costs incurred by the ISO for procuring ancillary services for the COTP and Bubble transactions, and that the Commission has already found that the cost responsibility issue is outside the scope of this proceeding. They assert that in its initial brief in this proceeding Edison argued that it should not bear the cost responsibility for the ancillary services that the ISO procured for the COTP and Bubble transactions, and that Joint Intervenors replied that Edison's brief exceeded the appropriate scope of review since Edison's responsibility to pay costs incurred by the ISO was not at issue in the arbitration. Joint Intervenors assert that the Commission ruled in the May 2004 Order that concerns regarding cost responsibility were outside the scope of this proceeding. Joint Intervenors also claim that Edison is attempting to expand the scope of the proceeding beyond the issues which the arbitrator addressed, contrary to the express terms of the ISO Tariff.

19. On June 2, 2005, PG&E filed an answer to the motions for clarification of the ISO and Edison. PG&E states that it does not object to the ISO's request to the extent that the ISO believes that the May 2004 Order and the April 2005 Order need clarification, and to the extent that the ISO is not acting on these orders until it receives clarification from the Commission. PG&E agrees with the ISO that the allocation of charges for the disputed ancillary services should be pro rata among market participants. However, PG&E requests that the Commission clarify that pro rata does not mean that PG&E would have to pay 100 percent of the costs under any formulation. PG&E also asks that the Commission order the ISO to: (1) immediately refund to PG&E all charges improperly billed to PG&E plus interest; and (2) make a compliance filing demonstrating that it

¹⁴ Joint Intervenors assert that the issue Edison raises is already the subject of an ongoing ISO arbitration under section 13 of the ISO Tariff, and that Edison was a party to that arbitration until it withdrew from the proceeding.

obtained the funds necessary for such refund by following section 13.5.1 of the ISO Tariff. PG&E adds that it does not take a position on the ISO's request that the Commission clarify that the May 2004 Order and the April 2005 Order preclude the ISO from taking "off grid" transactions into account in setting reliability requirements and procuring reliability services to meet its legal obligations.

20. With respect to Edison's motion for clarification, PG&E asserts that Edison's argument is incorrect because the ISO allocates charge types under the ISO Tariff to scheduling coordinators so that there is nothing to clarify. PG&E also maintains that Edison is inappropriately attempting to bring into this docket the issues to be resolved in a currently-pending arbitration between the ISO and PG&E under the ISO's Tariff. Therefore, PG&E argues that Edison's motion is procedurally improper.

21. On June 2, 2005, the Cogeneration Association of California (CAC) and Energy Producers and Users Coalition (EPUC) (collectively, Coalitions) filed an answer to the ISO's motion for clarification. Coalitions state that they are responding to the ISO's motion to ensure that any clarification which may be granted is consistent with the Commission's decisions that for qualifying facilities (QFs) which take stand-by service from a utility distribution company: (1) ancillary services costs may be allocated only for a QF's net load; and (2) only the QF's net load may be included in the ISO's control area firm load for purposes of determining the ISO's responsibility under relevant reliability criteria.

22. On June 16, 2005, as corrected on June 17, 2005, TANC, Redding, Santa Clara, Modesto, M-S-R, SMUD, Turlock, and PG&E (collectively, Joint Respondents) filed a motion for leave to file a response to the ISO's answer, and a response to the ISO's answer. Joint Respondents submit that good cause exists for the Commission to accept this response in order to compile a complete record to assist the Commission in understanding the parties' position, and that the ISO and Edison seek to raise issues that were not raised in the arbitration and were not raised in any of the proceedings in this docket. Moreover, they maintain that the ISO is attempting to end-run issues in dispute and subject to decision by the arbitrator in *Pacific Gas & Electric Company, et al. v. California Independent System Operator Corporation, et al.*, American Arbitration Association Case No. 74 198 Y 00625 04 (COTP II arbitration), which they state is progressing according to the arbitration procedures set forth in the ISO's Tariff.

Discussion

Procedural Issue

23. Under Rule 213 (a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), an answer may not be made to an answer, unless

ordered by the decisional authority. We are not persuaded to allow Joint Respondents' answer and, therefore, we will reject Joint Respondents' answer.

ISO's Motion for Clarification

24. The ISO states that it seeks clarification from the Commission that under the May 2004 Order and the April 2005 Order: (1) the ISO is entitled to seek recovery of the costs at issue from all users of the ISO-controlled grid; and (2) the ISO is not precluded, under such orders, from taking "off grid" transactions into account in setting requirements for and procuring reliability services to meet its legal obligations. We will deny the ISO's motion for clarification. The issues the ISO now raises either are beyond the scope of the arbitration proceeding and thus this proceeding, or were addressed in our prior orders, as discussed below.

25. First, the ISO asks that the Commission clarify that the ISO is entitled to seek recovery of the costs at issue from all users of the ISO-controlled grid. In support of this position, the ISO argues that the arbitrator found that spreading the costs across all participants was not unreasonable, and that section 13.5.3.1 of the ISO Tariff provides that the costs of ancillary services at issue be borne pro rata by all users of the ISO-controlled grid.

26. We disagree with the ISO's argument that the arbitrator found that spreading the costs across all participants was not unreasonable. Instead, we find that the arbitrator stated that it was neither fair and equitable, nor consistent with controlling legal standards as to the ISO's Tariff authority, to find that PG&E should bear the cost of these exercises of judgment as to how the ISO should meet its responsibilities as control area operator. Moreover, while the arbitrator indeed stated that spreading the costs at issue here across all participants was not unreasonable under the circumstances, the arbitrator also concluded that it was not within the scope of the arbitrator's authority in this arbitration to require this result. The arbitrator added that it was recording this conclusion as a factor in rejecting the ISO's claim that it should prevail, in part, because the costs it seeks to recover were the product of the discharge of its responsibility as control area operator to satisfy certain applicable standards.¹⁵ Therefore, contrary to the ISO's assertion, we find that the issue of who should bear the costs of the ancillary services was not addressed by the arbitrator and, more importantly, was not within the scope of the arbitration proceeding and thus this proceeding.

27. Moreover, we find that the ISO is barred from raising the argument regarding section 13.5.3.1 of the ISO Tariff given the current procedural posture of the proceeding, *i.e.*, on clarification of an order denying rehearing of an earlier order on an appeal from

¹⁵ Arbitration Decision at 20-21.

an arbitrator's decision.¹⁶ Under section 13.4.2 of the ISO Tariff no party shall seek to expand the record before the Commission beyond that assembled by the arbitrator except for two limited exceptions which are not relevant here.¹⁷ At this stage of the proceeding, the ISO asks that we determine how the ISO should seek recovery for the costs at issue. However, we 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.¹⁸ Therefore, since the issue the ISO now raises in its motion for clarification was not raised in the underlying arbitration proceeding, consistent with the terms of the ISO Tariff, the ISO is barred from raising the argument here.

28. Second, the ISO asks the Commission to clarify that the ISO is not barred from taking "off grid" transactions into account in setting requirements and procuring reliability services to meet its legal obligations. We agree with the Joint Intervenors that the ISO is again essentially raising reliability concerns that it raised earlier in this proceeding. We denied those concerns earlier and we will deny them here.

29. In the May 2004 Order we stated that, consistent with section 13.4.2 of the ISO Tariff, we did not need to 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 procured ancillary services to maintain the reliability of the ISO-controlled grid, but that the ISO did not do so.¹⁹ In the April 2005 Order we denied the ISO's request for rehearing, finding that the ISO's principal arguments were 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). We also 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. Thus, we did not address the merits of the reliability arguments in the May 2004 Order,

¹⁶ We also note that the ISO has already filed an appeal in court of the May 2004 Order and April 2005 Orders in *California Independent System Operator Corp. v. FERC*, No. 05-1213 (D.C. Cir. June 17, 2005).

¹⁷ Specifically, section 13.4.2 of the ISO Tariff states that "[n]o party shall seek to expand the record before the FERC or court of competent jurisdiction beyond that assembled by the arbitrator, except (i) by making reference to legal authority which did not exist at the time of the arbitrator's decision, or (ii) if such party contends the decision was based upon or affected by fraud, collusion, corruption, misconduct or misrepresentation."

¹⁸ Arbitration Decision at 1-2.

¹⁹ May 2004 Order at P 32.

and we did not address them in the April 2005 Order.²⁰ Likewise, consistent with the ISO tariff, we will not address them here.²¹

Edison's Motion for Clarification

30. Edison states that it seeks clarification as to what entity, if any, the ISO should bill for ISO charge types that are (or were) billed on the basis of: "control area gross load" or "exports." We will deny Edison's motion for clarification.

31. The Commission found in the May 2004 Order that the issue for which Edison requests clarification (*i.e.*, which entities have cost responsibility, if not PG&E) is outside the scope of this proceeding. Specifically, in response to Edison's argument that it should not bear the responsibility for paying for the ancillary services that the ISO procured for the COTP and Bubble transactions,²² Intervenors²³ replied that Edison's brief exceeded the appropriate scope of review since it focused on who, if not PG&E, should pay for the ancillary services.²⁴ In the May 2004 Order the Commission agreed with Intervenors that Edison's concerns regarding cost responsibility were beyond the scope of this proceeding.

32. Edison now requests that we clarify what entity the ISO should bill for ISO charge types that are billed on the basis of control area gross load or exports. We find that this cost responsibility issue was not an issue in the arbitration proceeding, which 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. Therefore, as

²⁰ April 2005 Order at P 20. We reiterate that, 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. *Id.* at P 20 n. 6.

²¹ Similarly, since we found in the April 2005 Order that under the ISO Tariff an automatic stay of the implementation of an award is in effect until after a court of competent jurisdiction rules, we will deny PG&E's request that the Commission order the ISO to immediately refund to PG&E all charges improperly billed plus interest and to make a compliance filing under section 13.5.1 of the ISO Tariff. *See infra* note 12 and accompanying text .

²² Edison's initial brief at 4-8.

²³ TANC, Modesto, M-S-R, Redding, Santa Clara, SMUD, Turlock, and the Northern California Power Agency.

²⁴ Intervenors' reply brief at 67-68.

Edison is attempting to expand the scope of the instant proceeding beyond the issues which the arbitrator addressed, contrary to section 13.4.2 of the ISO Tariff,²⁵ we will deny Edison's motion for clarification.

The Commission orders:

(A) The ISO's motion for clarification is hereby denied, as discussed in the body of this order.

(B) Edison's motion for clarification is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²⁵ In addition, we note that PG&E and Joint Intervenors generally maintain that Edison is inappropriately attempting to bring into this docket the issues to be resolved in a currently-pending arbitration between the ISO and PG&E under the ISO Tariff, and that Edison has not rebutted these statements.