

107 FERC ¶ 61,152
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

California Independent System Operator Corporation

Docket No. EL02-45-000

ORDER DENYING PETITION FOR REVIEW

(Issued May 10, 2004)

1. This order denies the California Independent System Operator Corporation's (ISO) 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. PG&E initiated arbitration against the ISO pursuant to section 13.2.2 of the ISO Tariff claiming, among other things, that it improperly paid the ISO more than \$14 million in ancillary service charges during the period between April 1998 and April 1999. Specifically, PG&E argued that the ISO improperly procured ancillary services in connection with transactions scheduled on the California-Oregon Transmission Project (COTP) and on transmission facilities owned and operated by Sacramento Municipal Utility District (SMUD) and the Western Area Power Administration (WAPA) (collectively, the Bubble). PG&E asserted that these facilities were off-grid facilities that, while geographically located in the ISO control area, were not turned over to the ISO's operational control. PG&E maintained that since these facilities were not turned over to the ISO's control, they were not part of the ISO- controlled grid and not subject to the ISO Tariff, and thus the ISO was not entitled to assess ancillary service charges for transmission over them. In response, the ISO denied that PG&E was entitled to

reimbursement of ancillary service costs, and also sought recovery from PG&E for additional ancillary service costs since May 1, 1999, including interest.

4. On December 13, 2001, the arbitrator issued a final order and award that granted PG&E's claim. The arbitrator framed the issue as whether the ISO had the requisite legal authority to impose upon PG&E charges for ancillary services in connection with transactions scheduled on the COTP and Bubble facilities. The arbitrator concluded that the ISO Tariff did not provide the ISO with authority to impose charges related to these transactions.

5. Specifically, the arbitrator found that the ISO Tariff provided the ISO authority to procure ancillary services only for the ISO-controlled grid, and the ISO-controlled grid did not include the COTP and Bubble facilities. The arbitrator also found that there was no language within the four corners of the ISO Tariff that authorized the ISO on the basis of its control area responsibilities to impose charges on scheduling coordinators for transactions that were within the control area but did not use the ISO-controlled grid.

6. The arbitrator concluded that the ISO Tariff language was strongly reinforced by the history of Amendment No. 2. The arbitrator stated that, if the ISO Tariff changes proposed by the ISO in its filing of Amendment No. 2 had been approved by the Commission, it would have resolved the issues which arose in this arbitration and there would have been no dispute. However, the arbitrator found that the Commission rejected the ISO's amendment in California Independent System Operator Corporation, 82 FERC ¶ 61,312 (1998) (March Order).

7. The arbitrator also considered other extrinsic evidence concerning the intent of the tariff provisions (e.g., discussions between the parties relating to scheduling COTP and Bubble transactions, as well as associated settlements and billing) and found that this evidence supported PG&E's position, rather than the ISO's claim. The arbitrator noted that the evidence showed that PG&E had agreements in place with, e.g., SMUD, that included ancillary service self-provision arrangements concerning COTP and Bubble transactions. Regarding the ISO's contention that PG&E was the scheduling coordinator for COTP and Bubble transactions and thus subject to the obligation to pay for ancillary services procured by the ISO, the arbitrator reviewed the extrinsic evidence and concluded that PG&E was the scheduling coordinator under the ISO Tariff for transactions on the ISO-controlled grid, but was not with respect to COTP and Bubble transactions.

8. Furthermore, the arbitrator considered the ISO's alternative basis for the legal authority that there was an exception to the filed rate doctrine, i.e., that utilities are

entitled to recover the actual costs they incur when they have failed to file the necessary rate information, and found no support for the proposition.

9. The arbitrator also rejected the ISO's assertion that PG&E was time-barred from contesting the validity of the charges. The arbitrator found, as a factual matter, that PG&E did not discover the billing treatment being given the disputed charges until April 1999, and taking into account further findings the arbitrator found no basis on which to conclude that PG&E was deficient in not discovering these facts earlier and that PG&E's invocation of the dispute procedures was timely. The arbitrator concluded 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 the ISO's exercises of judgment regarding how the ISO should meet its responsibilities as a control area operator. Finally, the arbitrator denied the ISO's counterclaim, concluding that the ISO did not have the legal authority to impose ancillary services charges for COTP and Bubble transactions.

Petition

10. On January 4, 2002, the ISO filed a petition with the Commission to initiate a proceeding for review of the arbitrator's final order and award, and asserts that the arbitrator improperly granted PG&E's claim. The ISO states that it is entitled to Commission review of the award under section 13.4 of the ISO Tariff, and also petitions the Commission to establish a procedural schedule for such review. The ISO states that its petition presents fundamental issues concerning the ability of a control area operator to fulfill its responsibility to maintain the reliability of the electric system within its control area, but fulfills its ancillary services obligations with regard to loads served by facilities that are not under its operational control but are owned by municipal utilities. The ISO explains that, although the COTP and the Bubble facilities are not part of the ISO-controlled grid, they are part of the Western Systems Coordinating Council (WSCC) control area for which the ISO is the control area operator.

11. First, the ISO argues that the arbitrator erred in concluding that the references in the ISO Tariff to the ISO-controlled grid, rather than to the control area, limit the ISO's ability to recover from PG&E the costs of ancillary services procured in connection with schedules on facilities that are within the control area but not part of the ISO-controlled grid. Second, the ISO claims that the arbitrator erred in concluding the Commission's rejection of Amendment No. 2 to the ISO Tariff barred the ISO from recovering from PG&E the costs of procurement of ancillary services in connection with the COTP and Bubble transactions. Third, the ISO asserts that the arbitrator's conclusion that PG&E is not the scheduling coordinator for COTP and Bubble transactions under the terms of the ISO Tariff is not supported by the language of the ISO Tariff or by substantial evidence.

Fourth, the ISO claims that the arbitrator's conclusion that the ISO did not properly take into account the self-provision of ancillary services in procuring ancillary services for COTP and the Bubble transactions is erroneous. Fifth, the ISO claims that the arbitrator misinterpreted Commission and judicial precedent that would allow the ISO to recover its variable costs of procuring ancillary services for the COTP and the Bubble transactions even if the ISO Tariff did not authorize charges for those services. Sixth, the ISO contends that the arbitrator's conclusion that PG&E's claim for the period from April 1998 to April 1999 is not time-barred under the ISO Tariff is not supported by substantial evidence.

12. On January 25, 2002, the Commission issued an order establishing a schedule for submission of pleadings in Docket No. EL02-45-000. See California Independent System Operator Corporation, 98 FERC ¶ 61,047 (2002). The Commission stated that: (1) persons seeking to intervene could file interventions within 30 days of the date of the order; (2) 30 days from the date of the issuance of the order, the ISO and intervenors supporting the ISO could file initial briefs addressing the award and the ISO's appeal of the award; (3) 30 days from the date of the initial briefs, PG&E as well as intervenors supporting PG&E could submit reply briefs addressing the award and the ISO's appeal of the award; (4) 20 days thereafter, the ISO as well as intervenors supporting the ISO could file rebuttal briefs.

Interventions and Briefs

Interventions

13. On January 17, 2002, the Cogeneration Association of California and the Energy Producers and Users Coalition (Cogeneration Association) filed a motion to intervene. On January 23, 2002, PG&E filed a motion to intervene and protest. On January 24, 2002, Southern California Edison Company (SoCal Edison) filed a motion to intervene.

14. On January 25, 2002, the ISO submitted the evidentiary record of the arbitration proceeding in Docket No. EL02-45-000. On January 30, 2002, the California Electricity Oversight Board (California Board) filed a motion to intervene. On February 4, 2002, SMUD filed a motion to intervene. On February 6, 2002, the California Public Utilities Commission (California Commission) filed a notice of intervention. On February 14, 2002, the Northern California Power Agency (NCPA) filed a motion to intervene. On February 15, 2002, Turlock Irrigation District (Turlock) filed a motion to intervene. On February 25, 2002, San Diego Gas & Electric Company (SDG&E) filed a motion to intervene and to compel publishing the award decision in compliance with the ISO Tariff. On February 25, 2002, the California Department of Water Resources (California Resources) and the Arizona Public Service Company (Arizona Company) filed motions

to intervene, and on February 25, 2002, the Transmission Agency of Northern California (TANC), M-S-R Public Power Agency (M-S-R Power), Modesto Irrigation District (Modesto), and the California Cities of Santa Clara and Redding (Cities) filed motions to intervene.

Initial Briefs

15. On February 25, 2002, the ISO filed an initial brief arguing that section 2.5.1 of the ISO Tariff unambiguously directs the ISO to ensure adequate ancillary services not simply for the ISO-controlled grid but to maintain the reliability of the ISO-controlled grid and authorizes recovery of the associated costs from scheduling coordinators. In addition, the ISO adds that the ISO Tariff when read as a whole authorizes and requires the ISO to procure ancillary services for transactions within the control area and to recover such ancillary services costs from the scheduling coordinators whose schedules necessitate the procurement, if such transactions have the potential to affect the reliability of the ISO-controlled grid.

16. Furthermore, the ISO contends that Commission's policy that revenue responsibility should follow cost-causation compels the conclusion that those entities who are beneficiaries of the ISO's procurement of ancillary services should bear the costs of those ancillary services. The ISO also argues that under existing agreements PG&E is the scheduling coordinator, and under the ISO Tariff PG&E is responsible for the cost of the ancillary services procured by the ISO in connection with schedules on the COTP. Moreover, the ISO disputes the arbitrator's conclusion that the March Order supports PG&E's claim. The ISO maintains that the evidence does not suggest that the ISO was concerned with its ability to charge scheduling coordinators for costs incurred in connection with the COTP schedules, but was concerned with its ability to collect the grid management charge and ancillary services costs in connection with load that was not scheduled and where there was no scheduling coordinator.

17. On February 25, 2002, SoCal Edison filed an initial brief stating that it does not fully support any of the parties to the ADR proceeding, but argues that it should not bear the responsibility for paying for the ancillary services that the ISO procured for COTP and the Bubble transactions.

Reply Briefs

18. On March 27, 2002, SDG&E filed a reply brief stating that it supports the arbitrator's award. SDG&E states that the Commission should uphold the award because the arbitrator correctly found, based on the ISO Tariff and the March Order, that the ISO charges at issue are improper. SDG&E adds that this is a case of first impression

involving procedures for an appeal to the Commission provided in the ADR provisions of the ISO Tariff, and SDG&E notes that it has filed its own claim and demand for arbitration against the ISO under the ISO Tariff.

19. On March 27, 2002, TANC, Modesto, M-S-R Power, Cities, SMUD, the NCPA, and Turlock (collectively, Intervenors) filed a reply brief supporting PG&E, and requests that the Commission affirm the arbitration award. Intervenors argue that the Commission should give substantial deference to the findings and conclusions of the arbitrator, which were based on the factual assessment of the record evidence, and even if the Commission uses a de novo review, the arbitrator's award is legally sound. Intervenors assert that the arbitrator's award neither contravenes the public interest nor is in any other way inconsistent with statutory requirements.

20. They claim that the arbitrator correctly found that: (1) there was nothing in the ISO Tariff which authorizes the ISO to impose charges for transactions that are within the control area but do not use the ISO-controlled grid, notwithstanding the ISO's responsibility for reliability; (2) there was no extrinsic evidence which would allow the ISO Tariff to be read to encompass the costs at issue, including the history of Amendment No. 2 which would have expanded ISO control over non-jurisdictional facilities at issue here; (3) since PG&E is not the scheduling coordinator for COTP and Bubble transactions, the ISO has no authority to assess ancillary charges on those transactions; (4) the ISO's contractual obligations buttress the conclusion that the ISO's reliability arguments do not justify its claim of authority to assess the disputed charges; and (5) the arbitrator's analysis of these contracts conclusively establishes that the Intervenors had the right to self-provide ancillary services to support COTP and Bubble transactions consistent with WSCC criteria. Intervenors add that the ISO should be barred from raising the reliability issue now, because it was not raised before the arbitrator.

21. Intervenors maintain that, absent a tariff filing, the cost causation principles and exceptions to the filed rate doctrine cited by the ISO fail to support the ISO's authority to recover the cost of ancillary services. They assert that the Commission's ADR policy favors affirming the arbitrator's award. Finally, Intervenors state that SoCal Edison's brief exceeds the appropriate scope of review since it focuses on who, if not PG&E, should pay for the ancillary services.

22. On March 27, 2002, PG&E filed a reply brief arguing that the ISO's appeal is another attempt by the ISO to attempt to disregard the provisions of the ISO Tariff by imposing charges on PG&E for costs incurred in connection with transactions that did not occur on the ISO-controlled grid. PG&E argues that the Commission must afford substantial deference to the factual findings of the arbitrator, including the finding that

the PG&E never agreed to schedule COTP transactions as an ISO Tariff certified scheduling coordinator nor did PG&E ever agree to pay for any charges, including the ancillary services charges, related to those transactions. PG&E claims that section 2.5.1 of the ISO Tariff plainly does not permit the ISO to procure, and then assess charges for, ancillary services on off-grid transactions. Moreover, PG&E argues that the Commission's denial of Amendment No. 2 in the March Order made the restriction inherent in the already plain language of the ISO Tariff absolutely unambiguous, and that in the March Order the Commission clearly denied the ISO's attempt to expand the ISO's authority to include off-grid facilities.

23. On March 27, 2002, SMUD filed a supplemental reply brief in support of PG&E. SMUD agrees with the arbitrator's determination that the ISO lacks the authority to charge for ancillary services in connection with COTP and Bubble transactions. SMUD states that the Commission has ordered the ISO to honor existing transmission agreements, including various interconnection agreements that predate the ISO. In this regard, SMUD argues that, under an Interim Agreement with PG&E, SMUD has the right to self-provide ancillary services to support COTP and Bubble transactions, consistent with the operating standards and requirements of WSCC and North American Electric Reliability Council (NERC).

Rebuttal Briefs

24. On April 16, 2002, the ISO filed a rebuttal brief arguing that nothing in the briefs of PG&E, Intervenor, or SMUD contradicts the ISO's authority and obligation under the unambiguous terms of section 2.5.1 of the ISO Tariff to procure the ancillary services that are the subject of this proceeding in order to protect the reliability of the ISO controlled grid in accordance with applicable standards. Thus, the ISO asserts that the Commission should reverse the arbitrator's award.

Discussion

Procedural Matters

25. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F. R. § 385.214 (2003), the notice of intervention of the California Commission and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

The Arbitration Award

26. The Commission has long recognized the value of parties seeking to resolve disputes through means other than formal litigation before the Commission, and thus has stated that it is desirable and appropriate, if otherwise consistent with the public interest, for the Commission to adhere to the results of a binding arbitration award given that arbitration is a valuable way to avoid time-consuming and expensive administrative proceedings.¹ The ISO Tariff thus provides for arbitration and, specifically, section 13 of the ISO Tariff provides the basis of an appeal of an arbitration award. Section 13.4.1 states that: “A party may apply to the FERC . . . to hear an appeal of an arbitration award only upon the grounds that the award is contrary to or beyond the scope of the relevant ISO documents, United States federal law, including, without limitation, the FPA, and any FERC regulations and decisions, or state law.” In addition, section 13.4.2 of the ISO Tariff states that: “The parties intend that FERC should afford substantial deference to the factual findings of the arbitrator.”

27. We will uphold the arbitration award and deny the ISO’s petition for review, as discussed below.

28. We agree with the arbitrator’s analysis as discussed below. Section 2.3.1.1.1 of the ISO Tariff states that “The ISO shall establish a WSCC approved Control Area and control center to direct the operation of all facilities forming part of the ISO Controlled Grid, Reliability Must-Run Units and Generating Units providing Ancillary Services.” Section 2.5.1 of the ISO Tariff states that “The ISO shall be responsible for ensuring that there are sufficient Ancillary Services available to maintain the reliability of the ISO Controlled Grid consistent with WSCC and NERC criteria.” We find that the arbitrator properly concluded that ISO Tariff section 2.3.1.1.1 directs the ISO to establish a control area and control center to direct the operation of all facilities forming part of the ISO-controlled grid, and ISO Tariff section 2.5.1 authorizes the ISO to ensure the adequacy of ancillary services for the ISO-controlled grid and ancillary services, in turn, are defined to mean certain services needed to maintain the reliable operation of the ISO-controlled grid. The ISO Tariff states that the ISO is responsible for procuring ancillary services only for the ISO-controlled grid, and thus it may seek reimbursement of the costs of ancillary services from customers that use the ISO-controlled grid. The ISO Tariff does

¹ E.g., Policy Statement Regarding Regional Transmission Groups, FERC Stats. & Regs. ¶ 30,976 at 30,877 (1993). See also Cities of Anaheim, et al., 107 FERC ¶ 61,070 at P 33 (2004); California Power Exchange Corporation, 88 FERC ¶ 61,112 at 61,266 (1999).

not provide, as the ISO argues, that the ISO can apply those provisions to off-grid transactions within the ISO control area.

29. Therefore, we agree with the arbitrator that the ISO Tariff limits the ISO's authority to procure ancillary services to ISO-controlled grid transactions, and that the arbitrator correctly concluded that the ISO Tariff does not authorize the ISO to impose upon PG&E charges for ancillary services in connection with COTP and Bubble transactions since they are not included within the ISO-controlled grid.

30. In fact, 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. 2.² In this regard, we note that the arbitrator found that the Commission's decision in the March Order supported denying the ISO's claim; in the March Order the Commission, among other things, rejected the ISO's Amendment No. 2 which proposed to revise the ISO Tariff to create a new definition for the ISO control area distinct from the ISO-controlled grid. The ISO stated that adding this term would clarify that the ISO Tariff would apply to entities, such as municipal utilities, that own transmission facilities within the ISO control area but have not yet indicated an intention to join the ISO. In response, we found that the proposed changes were unjust and unreasonable because they would broadly expand ISO control over non-jurisdictional facilities which were not being transferred to the ISO's control, and also inconsistent with our prior orders and would impose additional obligations on participating transmission owners. We will not relitigate the merits of the March Order, which the ISO is essentially now attempting to do in its petition.

31. Following the ISO Tariff, we also give 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 COTP and Bubble transactions, as well as the arbitrator's finding that PG&E was not a scheduling coordinator for COTP and Bubble transactions. We also uphold the arbitrator's factual finding that rejected the ISO's assertion that PG&E was time-barred from contesting the validity of the charges. The arbitrator found, as a factual matter, that PG&E did not discover the billing treatment being given the disputed charges until April 1999, and taking into account further findings the arbitrator found no basis on which to conclude that PG&E was deficient in not discovering these facts earlier and that PG&E's invocation of the dispute procedures was timely.

² March Order, 82 FERC at 62,238, 62,241.

32. Regarding the ISO's argument that it procured ancillary services to maintain the reliability of the ISO-controlled grid, we agree with Intervenors that we need not address this argument because it was not timely raised. Indeed, we note that the ISO could have, but did not, presented to the arbitrator specific evidence showing that it procured ancillary services to maintain the reliability of the ISO-controlled grid.³ We also agree with Intervenors that SoCal Edison's concerns regarding cost responsibility are beyond the scope of this proceeding.

33. Finally, we agree with the arbitrator and dismiss the ISO's cost causation argument as an exception to the filed rate doctrine since these principles are not relevant in the factual context presented here. The ISO simply has not shown that it has a right under a tariff or on equitable grounds to assess or recover the charges it seeks here.

The Commission orders:

The ISO's petition for review is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

³ In this regard, we note that section 13.4.2 of the ISO Tariff provides that "[n]o party shall seek to expand the record before the FERC . . . beyond that assembled by the arbitrator" except in two limited respects not present here. We consider the ISO's reliability-related argument to be inconsistent with this provision.