

170 FERC ¶ 61,194
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Pacific Gas and Electric Company

Docket Nos. ER14-2529-006
ER15-2294-005
ER16-2320-005
(consolidated)

ORDER DENYING REHEARING

(Issued March 17, 2020)

1. On July 18, 2019, the Commission issued an order on remand in which it affirmed its decision to grant, pursuant to section 219 of the Federal Power Act (FPA)¹ and Order No. 679,² Pacific Gas and Electric Company's (PG&E) request for a 50 basis point return-on-equity (ROE) adder to its transmission rates for its continued participation in a Regional Transmission Organization (RTO)/Independent System Operator (ISO) (RTO-Participation Incentive), subject to the RTO-Participation Incentive being applied to a base ROE that has been shown to be just and reasonable, as determined at hearing.³
2. On August 16, 2019, the California Public Utilities Commission (CPUC), the California Department of Water Resources, the Northern California Power Agency, the Sacramento Municipal Utility District, and the Transmission Agency of Northern California (collectively, California Parties) filed a request for rehearing of the Order on Remand.⁴ In this order, we deny that rehearing request.

¹ 16 U.S.C. § 824s (2018).

² *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 (Order No. 679), *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006) (Order No. 679-A), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

³ *Pac. Gas & Elec. Co.*, 168 FERC ¶ 61,038 (2019) (Order on Remand).

⁴ California Parties August 16, 2019 Request for Rehearing (Rehearing Request).

I. Background

3. Following the issuance of Order No. 679 in 2007, PG&E began requesting the RTO-Participation Incentive for its ongoing participation in the California Independent System Operator Corporation (CAISO) as part of its near-annual transmission owner tariff filing.⁵ In a series of Commission orders at issue here,⁶ the Commission summarily granted, pursuant to FPA section 219 and Order No. 679, PG&E's requests for the RTO-Participation Incentive for its continuing membership in CAISO. In granting PG&E's requests, the Commission disagreed with CPUC's argument that PG&E was not eligible for the incentive because California law required PG&E to participate in CAISO.

4. On appeal, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) remanded the underlying proceedings⁷ and instructed the Commission to "inquire into PG&E's specific circumstances, i.e., whether it could unilaterally leave [CAISO] and thus whether an incentive adder could induce it to remain in [CAISO]."⁸ On August 20, 2018, the Commission issued an initial order on remand establishing briefing procedures regarding those issues.⁹

⁵ As relevant here, PG&E requested the RTO-Participation Incentive for its sixteenth transmission owner tariff filing (TO16 Filing), seventeenth transmission owner tariff filing (TO17 Filing), and eighteenth transmission owner filing (TO18 Filing).

⁶ See *Pac. Gas & Elec. Co.*, 148 FERC ¶ 61,245 (2014) (TO16 Order), *reh'g denied*, 154 FERC ¶ 61,119 (2016) (TO16 Rehearing Order), *remanded sub nom. CPUC v. FERC*, 879 F.3d 966 (9th Cir. 2018); *Pac. Gas & Elec. Co.*, 152 FERC ¶ 61,252 (2015) (TO17 Order), *reh'g denied*, 154 FERC ¶ 61,118 (2016) (TO17 Rehearing Order), *remanded sub nom. CPUC v. FERC*, 879 F.3d 966; *Pac. Gas & Elec. Co.*, 156 FERC ¶ 61,238 (2016) (TO18 Order), *reh'g denied*, 160 FERC ¶ 61,090 (2017) (TO18 Rehearing Order), *remanded sub nom. CPUC v. FERC*, No. 17-72853 (9th Cir. Mar. 28, 2018).

⁷ The Ninth Circuit remanded the proceedings involving the TO16 and TO17 Filings. Following the Ninth Circuit's remand, the Commission filed an unopposed motion for voluntary remand of the Commission's orders in the TO18 proceeding in Docket No. ER16-2320-000, which the court granted on March 28, 2018.

⁸ *CPUC v. FERC*, 879 F.3d at 979.

⁹ *Pac. Gas & Elec. Co.*, 164 FERC ¶ 61,121 (2018).

5. Following review of the record, on July 18, 2019, the Commission issued its Order on Remand. The Commission concluded that California law does not mandate PG&E's participation in CAISO, and that the RTO-Participation Incentive induces PG&E to continue its membership.¹⁰ The Commission therefore affirmed its prior grant of PG&E's request for the RTO-Participation Incentive.¹¹

6. As an initial matter, the Commission disagreed with California Parties that the *Erie* doctrine¹² applies to this proceeding and requires the Commission to apply CPUC's preferred interpretation of California law.¹³ The Commission stated that, as a creature of federal statute created by Congress, the Commission's subject matter jurisdiction over proceedings before it arises solely under the acts that the Commission is required to administer (as a federal question under, for example, the FPA).¹⁴ Because the issue in this proceeding involves the transmission and sale at wholesale of electric energy in interstate commerce, over which the FPA provides exclusive jurisdiction to this Commission, the Commission concluded that *Erie* did not apply. The Commission found California Parties failed to cite to any cases involving the Commission or other federal agencies to support their position that *Erie* is relevant to the circumstances in this proceeding.

7. In addition, the Commission found that California Parties pointed to no provision in the California Public Utilities Code (California Code) that mandates RTO/ISO membership, and the Commission's survey of the relevant provisions revealed none.¹⁵ For example, section 330(m) of the California Code provides:

It is the intention of the Legislature that California's publicly owned electric utilities and investor-owned electric utilities *should* commit control of their transmission facilities to the Independent System Operator. These utilities *should* jointly advocate to the *Federal Energy Regulatory Commission* a pricing methodology for the Independent System Operator

¹⁰ Order on Remand, 168 FERC ¶ 61,038 at P 2.

¹¹ *Id.*

¹² *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (*Erie*).

¹³ Order on Remand, 168 FERC ¶ 61,038 at P 41.

¹⁴ *See, e.g., Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 673 (D.C. Cir. 2007) (noting that the Commission is a "creature of statute").

¹⁵ Order on Remand, 168 FERC ¶ 61,038 at P 43.

that results in an equitable return on capital investment in transmission facilities for all Independent System Operator participants.¹⁶

8. Further, section 365 of the California Code provides:

The actions of the [CPUC] pursuant to this chapter shall be consistent with the findings and declarations contained in Section 330. In addition, the [CPUC] *shall do* all of the following: . . . *Facilitate* the efforts of the state's electrical corporations to *develop and obtain authorization from the Federal Energy Regulatory Commission* for the creation and operation of an Independent System Operator and an independent Power Exchange, for the determination of which transmission and distribution facilities are subject to the exclusive jurisdiction of the [CPUC], and for approval, to the extent necessary, of the cost recovery mechanism established as provided in Sections 367 to 376, inclusive. The [CPUC] *shall also participate* fully in all proceedings before the *Federal Energy Regulatory Commission* in connection with the Independent System Operator and the independent Power Exchange, and *shall encourage* the *Federal Energy Regulatory Commission* to adopt protocols and procedures that strengthen the reliability of the interconnected transmission grid, *encourage all publicly owned utilities in California to become full participants*, and maximize enforceability of such protocols and procedures by all market participants.¹⁷

9. In the Order on Remand, the Commission stated that the language of these statutory provisions does not mandate participation in CAISO.¹⁸ Rather, the Commission found that these provisions speak in terms of encouragement and facilitation of participation.¹⁹ The Commission explained that these provisions also did not speak to any requirements regarding PG&E's continuing membership in CAISO, such as any obligation to obtain CPUC approval if it wishes to cease its membership.

¹⁶ Cal. Pub. Util. Code § 330(m) (emphasis added).

¹⁷ *Id.* § 365 (emphasis added).

¹⁸ Order on Remand, 168 FERC ¶ 61,038 at P 45.

¹⁹ *Id.*

10. The Commission also found unpersuasive California Parties' argument that the California Transfer Authorization Order²⁰ interprets section 851 of the California Code as requiring PG&E to seek CPUC approval before withdrawing from CAISO.²¹ The Commission found that California Parties' interpretation of the California Transfer Authorization Order was not supported by, and would be inconsistent with, the California Code, including section 851. Section 851 states:

A public utility . . . shall not sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part of its . . . line, plant, system, or other property necessary or useful in the performance of its duties to the public . . . without first having either secured an order from [CPUC] authorizing it to do so for qualified transactions valued above five million dollars (\$5,000,000), or for qualified transactions valued at five million dollars (\$5,000,000) or less, filed an advice letter and obtained approval from [CPUC] authorizing it to do so.²²

²⁰ CPUC, Decision No. 98-01-053, 78 CPUC 2d 307, 1998 WL 242747 (Jan. 21, 1998) (California Transfer Authorization Order).

²¹ See California Parties Initial Brief, Docket No. ER14-2529-005, at 8-17 (filed Sept. 19, 2018) (California Parties Initial Brief); CPUC Protest, Docket No. ER16-2320-000, at 9-17 (filed Aug. 19, 2016); CPUC Protest, Docket No. ER15-2294-000, at 8-14 (filed Aug. 19, 2015); CPUC Protest, Docket No. ER14-2529-000, at 9-12 (filed Aug. 20, 2014). The relevant passage of the California Transfer Authorization Order states:

[W]e note that any future transfer of operational control of the transmission facilities from the ISO will, itself, be subject to review under [California Code] Section 851, whether it is to the joint applicants or to some other party. We note that Section 3.3.3 of the Transmission Control Agreement provides that any withdrawal from the Transmission Control Agreement is expressly conditioned upon the withdrawing party obtaining any necessary regulatory approvals for such withdrawal.

California Transfer Authorization Order, 1998 WL 242747, at *7. In the California Restructuring Order, CPUC also invoked its authority to approve such transfers under section 851 of the California Code. See CPUC, Decision No. 95-12-063, 64 CPUC 2d 1, 31, 1995 WL 792086 at *15 (Dec. 20, 1995) (California Restructuring Order).

²² Cal. Pub. Util. Code § 851.

11. The Commission disagreed with California Parties' reliance on the language "or otherwise dispose of" in section 851 to assert that CPUC must approve transfers of operational control of PG&E's transmission facilities. The Commission stated that the language of section 851 does not explicitly give CPUC jurisdiction over transfers of *operational* control, and that, when interpreting the language "or otherwise dispose of," the California Supreme Court may, while applying traditional canons of statutory construction,²³ determine that transfers of *operational* control are outside the scope of section 851.²⁴ Thus, the Commission was not persuaded by the argument that section 851 of the California Code requires CPUC to approve transfers of operational control over transmission facilities. Accordingly, the Commission found that section 851 of the California Code did not support California Parties' position, and California Parties had failed to point to any other section of the California Code that requires PG&E to seek CPUC's approval before withdrawing from CAISO.²⁵

12. In light of the voluntary nature of RTO/ISO membership from the Commission's perspective and the lack of any relevant mandate under California law, the Commission concluded that PG&E could unilaterally leave CAISO without obtaining CPUC authorization. As a result, the Commission found that "the RTO-Participation Incentive induces PG&E to remain a participating member of CAISO and is consistent with the directives of FPA section 219."²⁶ Accordingly, the Commission reaffirmed the continuation of PG&E's 50 basis point ROE adder.²⁷

13. On August 16, 2019, California Parties filed their rehearing request.

II. Discussion

14. Before turning to California Parties' individual arguments, we think that it is appropriate to first provide some context for the Order on Remand. These proceedings

²³ Specifically, the courts may apply *noscitur a sociis* (a word is known by the company it keeps) and *ejusdem generis* (general terms in a list are limited by the meaning of specific terms). California courts have often applied these canons of construction. See, e.g., *Sierra Club v. Superior Court*, 57 Cal. 4th 157, 169-70 (2013) (applying *noscitur a sociis*); *In re Corrine W. v. Y.C.*, 45 Cal. 4th 522, 531 (2009) (applying *ejusdem generis*). See also 58 Cal. Jur. 3d Statutes §§ 142-143; 7 Witkin, Summary of Cal. Law, Const. Law § 136 (11th ed. 2019).

²⁴ Order on Remand, 168 FERC ¶ 61,038 at PP 47-50.

²⁵ *Id.* P 50.

²⁶ *Id.* P 52.

²⁷ *Id.*

were initiated before this Commission under FPA sections 205 and 219.²⁸ As noted above, PG&E requested, pursuant to FPA section 219 and Order No. 679, a 50 basis point ROE adder for its continued participation in CAISO. Order No. 679 provides that a utility will be presumed eligible for the RTO-Participation Incentive so long as it can demonstrate that it has joined a Commission-approved transmission organization (including an RTO or ISO), and that its membership is on-going.²⁹ Order No. 679 permits interested parties to rebut this presumption, however, by presenting evidence that the utility is either no longer a member of a Commission-approved transmission organization or demonstrating that such participation is not voluntary.³⁰ California Parties, including CPUC, intervened in these PG&E rate proceedings, and, as part of their protests, offered their interpretation of California law as a means of rebutting PG&E's eligibility for a 50 basis point ROE adder.³¹ Throughout this proceeding, PG&E has been, and continues to be, a member of CAISO.³²

²⁸ PG&E Transmittal, Docket No. ER14-2529-000, at 1, Ex. PGE-1 at 6 (filed July 30, 2014); PG&E Transmittal, Docket No. ER15-2294-000, at 1, Ex. PGE-1 at 6 (filed July 29, 2015); PG&E Transmittal, Docket No. ER16-2320-000, at 1, Ex. PGE-1 at 8 (filed July 29, 2016).

²⁹ Order No. 679, 116 FERC ¶ 61,057 at P 327; Order No. 679-A, 117 FERC ¶ 61,345 at P 86.

³⁰ See Order No. 679, 116 FERC ¶ 61,057 at P 327 (stating that any public utility receiving the RTO-Participation Incentive that withdraws from the transmission organization is no longer eligible for the incentive); *CPUC v. FERC*, 879 F.3d at 974-75 (finding that whether a utility's membership in a transmission organization is voluntary or not is a relevant consideration when determining whether a utility is eligible for the RTO-Participation Incentive).

³¹ See CPUC TO16 Protest, Docket No. ER14-2529-000, at 9-12 (filed Aug. 20, 2014); CPUC TO17 Protest, Docket No. ER15-2294-000, at 8-13 (filed Aug. 19, 2015); CPUC TO18 Protest, Docket No. ER16-2320-000, at 9-17 (filed Aug. 19, 2016); CPUC TO18 Answer, Docket No. ER16-2320-000, at 3-11 (filed Sept. 9, 2016); California Parties Initial Brief at 8-17; California Parties Reply Brief, Docket Nos. ER14-2529-005, et al. at 8-10 (filed Oct. 10, 2018).

³² PG&E TO16 Filing, Docket No. ER14-2529-000, Ex. PGE-1 at 6-7 (filed July 30, 2014); PG&E TO17 Filing, Docket No. ER15-2294-000, Ex. PGE-1 at 6-7 (filed July 29, 2015); PG&E TO18 Filing, Docket No. ER16-2320-000, Ex. PGE-1 at 8-9 (filed July 29, 2016).

15. On remand, the Commission responded to the arguments presented before it by stating that it was not persuaded by California Parties' assertion that California law mandates PG&E's participation in CAISO.³³ In doing so, the Commission reviewed the law that was cited by the California Parties, including statutes, cases, and administrative decisions, to determine whether California law *mandates* PG&E's participation in CAISO.³⁴ Importantly, the Commission's review of this evidence was not an attempt to limit CPUC's authority under the California Code, nor was it an effort to invalidate CPUC's California Restructuring Order or California Transfer Authorization Order. Rather, the Commission simply found that the law cited in support of California Parties' argument that California law mandates PG&E's participation in CAISO, such that PG&E would not be eligible for a transmission rate incentive pursuant to FPA section 219 and Order No. 679, was unpersuasive.

16. With this context in mind, we turn to California Parties' rehearing request. California Parties argue that the Commission erred in the Order on Remand by: (1) interpreting the wrong provisions of the California Code and instead incorrectly interpreting provisions of the California Code that are not relevant; (2) ignoring California case law governing the scope of CPUC's authority; (3) concluding that the *Erie* doctrine's mandate did not apply; and (4) erroneously justifying the grant of the RTO-Participation Incentive based on Commission policy that transmission organization membership is voluntary, regardless of whether state law or regulatory requirements render a utility's continued participation involuntary. We are unpersuaded by these arguments and deny rehearing, as discussed below.

A. California Public Utilities Code

17. On rehearing, California Parties argue that the Commission should have focused on section 1709 of the California Code, which governs the finality of CPUC orders, such as the 1995 and 1998 orders at issue here, rather than other provisions of the California Code, including sections 851, 330(m) and 365. They further question the Commission's interpretation of section 851 in the Order on Remand.

18. As an initial matter, although the California Parties challenge the relevance of sections 851, 330(m) and 365 of the California Code, they brought those sections to the Commission's attention to rebut the presumption that PG&E is entitled to an RTO-Participation Incentive. Having reviewed those sections at the California Parties' behest,

³³ Order on Remand, 168 FERC ¶ 61,038 at P 42.

³⁴ See *id.* PP 43-52 (analyzing the California law cited by California Parties). See also *CPUC v. FERC*, 879 F.3d at 974-75 (finding that the voluntariness of a utility's membership in a transmission organization is relevant when determining whether an entity is eligible for the RTO-Participation Incentive and that an incentive cannot induce behavior that is already legally mandated).

we find them relevant to our determination for the reasons previously discussed and expounded upon below.

19. While California Parties now assert that section 1709 of the California Code is dispositive, we disagree. Section 1709 of the California Code provides: “In all collateral actions or proceedings, the orders and decisions of the [CPUC] which have become final shall be conclusive.”³⁵ California Parties assert that section 1709 made final and binding on PG&E CPUC’s 1995 and 1998 determinations that any transfer of control over PG&E’s transmission facilities would require prior CPUC approval under section 851 of the California Code.³⁶ They contend that PG&E’s continued participation in CAISO is not voluntary because, if PG&E sought to withdraw from CAISO without CPUC’s prior approval, it would be in direct violation of a final and binding CPUC order.

20. We do not and need not challenge the finality of the 1995 and 1998 orders; we disagree with California Parties’ interpretation of them. First, neither order expressly mandates PG&E’s continued participation in CAISO.³⁷ Second, the 1995 and 1998

³⁵ Cal. Pub. Util. Code § 1709.

³⁶ Rehearing Request at 25-29. The California Transfer Authorization Order provides as follows:

We note that any future transfer of operational control of the transmission facilities from the ISO will, itself, be subject to review under [California Code] Section 851, whether it is to the joint applicants or to some other party. We note that Section 3.3.3 of the Transmission Control Agreement provides that any withdrawal from the Transmission Control Agreement is expressly conditioned upon the withdrawing party obtaining any necessary regulatory approvals for such withdrawal.

California Transfer Authorization Order, 1998 WL 242747, at *7 (emphasis added). In the California Restructuring Order, CPUC also invoked its authority to approve such transfers under section 851 of the California Code. *See* California Restructuring Order, 1995 WL 792086 at *15.

³⁷ Specifically, in the 1995 order, the California Restructuring Order, the CPUC initiated a proceeding to restructure California’s energy markets and directed PG&E, San Diego Gas and Electric (SDG&E), and Southern California Edison Company (SoCal Ed) (collectively, Investor-Owned Utilities or IOUs) to develop a proposal to submit to the Commission to establish an ISO and transfer operational control of the utilities’ transmission facilities to the ISO. In the 1998 order, the California Transfer Authorization Order, the CPUC approved the joint application of PG&E, SDG&E, and

orders must be read in conjunction with section 851 of the California Code, which we find does not support California Parties' contention that PG&E needs CPUC approval to join or withdraw from CAISO.

21. Turning to discussion of sections 851, 330(m) and 365 of the California Code, the latter two sections are the only provisions identified in the record in this proceeding which directly address participation in an RTO/ISO. Those provisions do not mandate participation in an RTO/ISO, but rather speak in terms of encouragement and facilitation of participation.³⁸ These provisions also do not speak to any requirements regarding PG&E's continuing membership in CAISO, such as any obligation to obtain CPUC approval if it wishes to cease its membership.³⁹ Thus, in contrast to California Parties' claims,⁴⁰ we find these provisions support a finding that PG&E's participation in CAISO is not mandatory.

22. As to section 851, this provision governs the transfer or encumbrance of utility property and thus also is relevant in determining whether PG&E's membership in CAISO is mandatory. Section 851 states:

A public utility . . . shall not sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part of its . . . line, plant, system, or other property necessary or useful in the performance of its duties to the public . . . without first having either secured an order from [CPUC] authorizing it to do so for qualified transactions valued above five million dollars (\$5,000,000), or for

SoCal Ed for authority to convey operational control of designated transmission lines and associated facilities to CAISO. We note that the California Transfer Authorization Order granted the IOUs' petition and so, PG&E had no need to challenge CPUC's statement that PG&E must seek its review prior to withdrawing from CAISO. But if PG&E were to seek CPUC approval to withdraw from CAISO today or in the future, and CPUC were to deny that request, PG&E would have the opportunity to seek review of those orders as it would be adversely affected. Thus, the finality of the California Transfer Authorization Order would not determine the outcome of that future proceeding; rather, California courts would make that determination based on the language of section 851 of the California Code.

³⁸ Order on Remand, 168 FERC ¶ 61,038 at PP 43-45.

³⁹ *Id.* P 45.

⁴⁰ California Parties argue section 330(m) and 365 are "completely irrelevant" because whether PG&E was initially required to join CAISO or did so voluntarily was not even an issue in the appeal. Rehearing Request at 28-29.

qualified transactions valued at five million dollars (\$5,000,000) or less, filed an advice letter and obtained approval from [CPUC] authorizing it to do so.⁴¹

23. In the Order on Remand, the Commission interpreted the language of section 851 as not explicitly giving CPUC jurisdiction over transfers of *operational* control. The Commission explained that the California Supreme Court may, while applying the traditional canons of construction, determine that transfers of *operational* control are outside the scope of section 851 because the language in that provision relating to “[sales], lease[s], assign[ments], [and] mortgage[s]” refers to exchanges of proprietary rights. We affirm that interpretation and find that the California Supreme Court is likely to reach the same result because the most rational construction of the language “otherwise dispose of” should be limited to only those transactions where parties exchange a *proprietary* right as opposed to transfers of *operational* control.

24. Our interpretation of section 851 continues to be informed by *Atlantic City Electric Co. v. FERC*,⁴² in which the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) found, after examining section 203 of the FPA, the analogous provision to section 851, “[a] utility does not ‘sell, lease, or otherwise dispose’ of its facilities when it agrees to the changes in operational control necessary to initially join or to withdraw from an ISO.”⁴³ Applying *noscitur a sociis*, the D.C. Circuit concluded that the language “otherwise dispose” can only reasonably be read to refer to changes or transfers in proprietary interests or something similar, and could not apply to transfers of operational control where the transmission owner retained ownership over the transmission facilities.⁴⁴ In the Order on Remand, the Commission found that in light of *Atlantic City*, and recognizing that California courts have applied *noscitur a sociis* in other contexts,⁴⁵ section 851 of the California Code does not require CPUC to approve transfers of *operational* control of transmission facilities.⁴⁶

⁴¹ Cal. Pub. Util. Code § 851.

⁴² 295 F.3d 1 (D.C. Cir. 2002).

⁴³ Order on Remand, 168 FERC ¶ 61,038 at P 49 (citing *Atlantic City*, 295 F.3d at 11).

⁴⁴ *Atlantic City*, 295 F.3d at 12.

⁴⁵ *See supra* note 23.

⁴⁶ Order on Remand, 168 FERC ¶ 61,038 at P 49.

25. On rehearing, California Parties take issue with the Commission's interpretation of section 851 and argue that limiting "otherwise dispose of" solely to proprietary interests would defeat the California statute's broader purpose of ensuring that CPUC retains oversight of utility operations.⁴⁷ We disagree. We affirm that, based on a review of applicable D.C. Circuit and California state law precedent, section 851 does not require CPUC to approve transfers of operational control.⁴⁸ We believe that this is a reasonable interpretation of the provision given the evidence provided. In providing the interpretation of section 851, the Commission is not attempting to "frustrate the underlying intent of the statute"⁴⁹ or infringe on CPUC's duty to protect the public interest. The Commission is executing the Ninth Circuit's instruction to "inquire into PG&E's specific circumstances, i.e., whether it could unilaterally leave [CAISO] and thus whether an incentive adder could induce it to remain in [CAISO]."⁵⁰ Moreover, as noted above, we are only reviewing this provision to the extent that it impacts PG&E's eligibility for an incentive pursuant to the FPA.

26. As far as the cases the California Parties cite to assert that CPUC's interpretations must be "liberally construed" and upheld unless they lack "a reasonable relation to statutory purposes and language,"⁵¹ these cases also have bounds. As the California courts have recognized, "the call for deference to agency decision making is not

⁴⁷ In relying on the doctrine *noscitur a sociis*, California Parties assert that the Commission ignored state law: (1) holding that the doctrine is inapplicable if the application of the doctrine or maxim would frustrate the intent underlying the statute; (2) directing that CPUC's interpretation of statutes within its ambit be liberally construed; and (3) holding that CPUC interpretations of the California laws that it administers are to be upheld unless they lack a reasonable relation to statutory purposes and language. Rehearing Request at 35.

⁴⁸ Order on Remand, 168 FERC ¶ 61,038 at PP 47-50.

⁴⁹ Rehearing Request at 35 (citing *Moore v. Cal. State. Bd. of Accountancy*, 831 P.2d 798, 1012-1013 (Cal. 1992)).

⁵⁰ *CPUC v. FERC*, 879 F.3d at 979.

⁵¹ Rehearing Request at 26 (citing *S. Cal. Edison Co. v. Peevey*, 31 Cal. 4th 781, 796 (2003) and *Greyhound Lines, Inc., v. Pub. Utils. Comm'n*, 68 Cal. 2d 406, 410-411 (1968)); see also Rehearing Request at 38 (citing *Robinson v. Fair Employment & Housing Comm'n*, 2 Cal. 4th 226, 234 (Cal. Sup. Ct. 1992) for the proposition that where an ambiguous provision has consistently been applied by an agency its interpretation is entitled to great weight); *id.* (citing *Sara M. v. Superior Court*, 36 Cal. 4th 998, 1014-15 (2005) for the proposition that legislature is presumed to know of agency's longstanding interpretation of the laws it administers).

uniformly compelling in all circumstances” and “[w]here the statute subject to interpretation is one that defines the very scope of the CPUC’s jurisdiction . . . deference is not appropriate.”⁵²

27. Further, we are unpersuaded by California Parties’ assertion that the California legislature has “left undisturbed and thereby implicitly endorsed – the CPUC’s decades-old and consistent interpretation of [section] 851 to give it jurisdiction over transfers of operational control.”⁵³ As the California courts have recognized, legislative silence or acquiescence does not imply legislative approval.⁵⁴ Moreover, as noted above, sections 330(m) and 365 of the California Code speak in terms of facilitation and encouragement of participation in an RTO/ISO. Indeed, these sections could be viewed as an implicit rejection, rather than endorsement, of CPUC’s interpretation of section 851.

28. We also disagree that the Commission has ignored key differences in the texts of section 851 of the California Code and section 203 of the FPA.⁵⁵ Specifically, California Parties argue that the Commission ignored language in section 853 making clear that, except for in the case of certain water company transactions, sections 851 and 854 apply to changes in “control” of facilities.⁵⁶ Section 853(c) provides:

The provisions of Section 851 and 854 that prohibit any assignment, acquisition or change in control without advance authorization from the commission do not apply to the transfer of the ownership interest in a water utility, with 10,000 or fewer service connections, from a decedent to a member of the decedent’s family in the manner provided in

⁵² *New Cingular Wireless PCS LLC v. Pub. Utils. Comm’n*, 246 Cal. App. 4th 784, 806 (2016) (citing *San Pablo Bay Pipeline Co., LLC v. Pub. Utils. Comm’n*, 243 Cal. App. 4th 295, 310 (2015); *PG&E Corp. v. Pub. Utils. Comm’n*, 118 Cal. App. 4th 1174, 1194 (2004)).

⁵³ Rehearing Request at 38-39 & n.60.

⁵⁴ *See, e.g., People v. King*, 5 Cal. 4th 59, 75 (1993) (“legislative inaction alone does not necessarily imply legislative approval”); *Ryan v. Rosenfeld*, 3 Cal. 5th 124, 132 (2017) (“[Legislative] acquiescence does not in all circumstances imply the Legislature’s embrace of a particular holding or doctrine.”).

⁵⁵ Rehearing Request at 39-40.

⁵⁶ *Id.* at 39 & n.61.

Section 240 of the Probate Code or by a will, trust, or other instrument.⁵⁷

29. California Parties argue that the logical reading of this section is that sections 851 and 854 give CPUC jurisdiction over the transfer of operational control of utility facilities other than those owned by water companies.⁵⁸ California Parties make this argument based on evidence presented for the first time on rehearing, and, therefore, we need not consider it.⁵⁹ Nonetheless, we disagree with California Parties' interpretation. Section 854 expressly provides for CPUC authority over "change[s] in control" of a public utility, along with mergers and acquisitions. Thus, section 853's reference to "change in control" is most reasonably read as referring to CPUC's authority in section 854. Further, section 854 is most reasonably interpreted to mean changes in *ownership* control of the entire utility enterprise, not the *operational* control of individual facilities.⁶⁰ Moreover, the inclusion of CPUC authority over changes in "control" in section 854, and the exclusion of such language from section 851, suggests the California legislature intended to exclude changes in operational control from section 851. Accordingly, we continue to interpret the language "otherwise dispose" in section 851 as referring to changes or transfers in proprietary interests or something similar, rather than applying to transfers of *operational* control where the transmission owner retained ownership over the transmission facilities.⁶¹

⁵⁷ Cal. Pub. Util. Code § 853(c).

⁵⁸ Rehearing Request at 39 n.61.

⁵⁹ See, e.g., *PaTu Wind Farm, LLC v. Portland Gen. Elec. Co., LLC*, 151 FERC ¶ 61,223, at P 42 (2015) ("Parties are not permitted to introduce new evidence for the first time on rehearing since such practice would allow an impermissible moving target, and would frustrate needed administrative finality."); see also *S. Shore Energy, LLC*, 168 FERC ¶ 61,118, at P 12 & n.39 (2019) (citing *Calpine Oneta Power v. Am. Elec. Power Serv. Corp.*, 114 FERC ¶ 61,030, at P 7 (2006) ("The Commission looks with disfavor on parties raising new issues on rehearing. Such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision.")).

⁶⁰ See Cal. Pub. Util. Code § 854(a) ("No person or corporation . . . shall *merge, acquire, or control* . . . either directly or indirectly, *any public utility* organized and doing business in this state without first securing authorization to do so from the commission." (emphasis added)).

⁶¹ Order on Remand, 168 FERC ¶ 61,038 at P 49 (citing *Atlantic City*, 295 F.3d at 12).

30. We also disagree with California Parties' contention that section 851's "or other encumbrance" language differentiates it from FPA section 203. California Parties argue that section 851 requires CPUC approval before a public utility may "sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its . . . property" and, according to California Parties, "an encumbrance is not a proprietary interest."⁶² *Black's Law Dictionary* defines encumbrance as:

A claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest. An encumbrance cannot defeat the transfer of possession, but it remains after the property or right is transferred.⁶³

31. Thus, in the ordinary sense of the word, an encumbrance is a liability tied to the specific piece of property or right being transferred, which is consistent with how the Commission has interpreted section 851 of the California Code, i.e., the provision relates to a *proprietary* right as opposed to a transfer of *operational* control. There is no indication by California Parties that anything other than the ordinary meaning of encumbrance was intended here, and they do not explain how an encumbrance signifies a transfer of operational control. Thus, we do not find the Commission has erred in interpreting section 851 of the California Code.

B. The Erie Doctrine

32. On rehearing, California Parties dispute the Commission's finding that the *Erie* doctrine is inapplicable to this proceeding. California Parties argue that the Commission erred by incorrectly asserting that *Erie* only applies "where a federal court's subject matter jurisdiction is based on diversity jurisdiction" and by failing to recognize that the Commission and the federal courts have applied *Erie* in Commission proceedings.⁶⁴ Alternatively, California Parties argue that the Commission erred by applying *Erie* to conclude that CPUC lacks authority over PG&E's withdrawal from CAISO.⁶⁵ Specifically, California Parties state that it is the duty of the Commission "in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of

⁶² Rehearing Request at 39.

⁶³ *Encumbrance*, Black's Law Dictionary (11th ed. 2019).

⁶⁴ Rehearing Request at 20-22.

⁶⁵ *Id.* at 24-26.

the federal courts.”⁶⁶ Finally, California Parties also argue that the Commission ignored the “binding representation made by agency counsel to the Ninth Circuit that the Commission has no independent authority to interpret California substantive law.”⁶⁷

33. We deny rehearing. At the outset, we disagree with California Parties’ interpretation of *Erie* and what should result based on application of the *Erie* doctrine here. Specifically, they assume that *Erie* means the Commission must defer to CPUC’s interpretation of California state law.⁶⁸ However, at its core, *Erie* simply states:

Except in matters governed by the Federal Constitution, or by acts of Congress, the law to be applied in any case is the law of the state. . . . There is no federal general common law.⁶⁹

Under the doctrine as further developed in the courts, absent an unambiguous declaration of the state law by the state legislature or the state’s highest court, federal courts must ascertain from all available data the meaning of the state law.⁷⁰

⁶⁶ *Id.* at 23-24 (citing *West v. AT&T*, 311 U.S. 223, 236-237 (1940)). California Parties also cite *King v. Order of United Commercial Travelers of America*, 333 U.S. 153, 158-159 (1948) for the proposition that “where a state body with statewide authority (like the CPUC) has opined (as has the CPUC), its decisions are binding ‘unless there is persuasive evidence that the highest state court would rule otherwise.’” However, California Parties misconstrue this language. The actual language in the case states that: “federal courts are bound by decisions of a *state’s intermediate appellate courts* unless there is persuasive evidence that the highest state court would rule otherwise.” *Id.* at 158.

⁶⁷ Rehearing Request at 22.

⁶⁸ *Id.* at 24.

⁶⁹ *Erie*, 304 U.S. at 78.

⁷⁰ *Id.* (“And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”); see *West v. AT&T*, 311 U.S. at 236-237 (finding that “a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court” but “it is the duty . . . in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule”); *Comm’r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (“If there be no decision by [the highest state] court then federal authorities must apply what they find to be the state law after giving proper regard to relevant rulings of other courts of the State.”) (internal quotations omitted); *Mason v. Am. Emery Wheel Works*, 241 F.2d 906, 908-10 (1st Cir. 1957) (declining to apply the state law as expressed by the Mississippi Supreme Court on the belief that the court would reconsider and revise its rule when it next confronted the issue in light of a pervasive trend in other jurisdictions); *Straits Financial LLC v. Ten Sleep Cattle Co.*, 900 F.3d 359,

34. Thus, as California Parties acknowledge, to the extent the *Erie* doctrine applies here, it requires only that the Commission “apply state law by interpreting it as it would be interpreted by the state’s highest court.”⁷¹ The Commission has done just that in this proceeding.⁷² Specifically, as demonstrated in the preceding section, we have determined that the California Supreme Court would likely find transfers of *operational* control are outside the scope of section 851, notwithstanding CPUC decisions to the contrary.⁷³ This is all that is required by *Erie*, as recognized by California Parties,⁷⁴ not outright deference to CPUC’s own interpretation of the law.

35. In any event, we continue to find that *Erie* is, in fact, not applicable here. As the U.S. Court of Appeals for the Second Circuit explained in *Maternally Yours v. Your Maternity Shop, Inc.*,⁷⁵ “the Erie doctrine is inapplicable to claims or issues created and governed by federal law.”⁷⁶ Here, the issue of whether to grant the RTO-Participation Incentive is *created and governed* by federal law and the Commission’s action in

369 (7th Cir. 2018) (“[I]f a question of law has not yet been decided by that court, we are to make a prediction of how the Supreme Court of [the state] would rule on it”) (internal quotations omitted)).

⁷¹ Rehearing Request at 16 (citing *West v. AT&T*, 311 U.S. at 236-237); *see also id.* at 23-26.

⁷² *See* Order on Remand, 168 FERC ¶ 61,038 at PP 42-52 (interpreting California law and rejecting California Parties’ interpretation).

⁷³ *See supra* P 24; *see also* Order on Remand, 168 FERC ¶ 61,038 at P 43. Rehearing Request at 25-26 (“even assuming the CPUC’s interpretation of [section] 851 were not binding, to satisfy *Erie*, the Commission would nonetheless be obliged to ascertain how the state’s Supreme Court *would* have ruled, not how it *might* have ruled”).

⁷⁴ Rehearing Request at 24 (citing *West v. AT&T*, 311 U.S. at 236-237 for the proposition that “it is the duty of the [federal government] in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of ‘general law’ and however much the state rule may have departed from prior decisions of the federal courts”).

⁷⁵ 234 F.2d 538 (2d Cir. 1956).

⁷⁶ *Id.* at 540 n.1; *see also Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 174 (1942) (finding the *Erie* doctrine is “inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law”); 19 Wright, Miller, & Cooper, Federal Practice and Procedure, § 4520.

granting the RTO-Participation Incentive carries out Congress's specific directive in FPA section 219(c), a matter within the Commission's exclusive jurisdiction.⁷⁷ While we recognize that there may be instances other than diversity actions in federal court in which *Erie* applies,⁷⁸ the cases on which California Parties rely do not change our determination here. Nor do the Commission cases identified by California Parties that cite *Erie* for the proposition that there is no federal common law of contracts⁷⁹ alter our determination.⁸⁰ In this proceeding, we are acting under federal law as authorized by section 219 of the FPA to determine whether PG&E is entitled to the federal transmission rate incentive. The fact that state law could inform our determination does not make *Erie* applicable or, as argued by California Parties, require the Commission to defer to CPUC's interpretation of state law.⁸¹

⁷⁷ Order on Remand, 168 FERC ¶ 61,038 at P 41.

⁷⁸ Rehearing Request at 20-21 (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003) for the proposition that "*Erie* applies irrespective of whether the source of subject matter jurisdiction is diversity or federal question" and *Maternally Yours*, 234 F.2d at 540 n.1 for the proposition that "the *Erie* doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law"). As noted above, PG&E's claim is created and governed by federal law – section 219 of the FPA and Order No. 679.

⁷⁹ *Id.* at 21 (citing *Pub. Util. Dist. No. 1. of Snohomish Cty., Wash.*, 115 FERC ¶ 61,375, at P 70 (2006) (*Snohomish*); *Town of Massena, N.Y. v. Niagara Mohawk Power Corp.*, 18 FERC ¶ 61,068 at 61,117 (1982) (*Town of Massena*)).

⁸⁰ In *Snohomish*, a contract interpretation case, the Commission only briefly mentioned *Erie* for the proposition that there is no federal common law of contracts. *Snohomish*, 115 FERC ¶ 61,375 at P 70 & n.79. In *Town of Massena*, the Commission cited *Erie* when explaining that New York law provided the rule for deciding the contract interpretation at issue. *Town of Massena*, 18 FERC ¶ 61,068 at 61,117. Here, there is no contract interpretation issue nor an issue regarding whether state law applies. For the same reason, California Parties' reliance on *Pennzoil Co. v. FERC*, is misplaced. Rehearing Request at 23 (citing 645 F.2d 360, 384 (5th Cir. 1981)). In *Pennzoil*, the court found that the Commission, under *Erie*, must take state law into account in interpreting certain contracts. As explained above, the Commission here has considered state law in order to respond to California Parties' argument that PG&E does not qualify for the federal transmission rate incentive authorized by section 219 of the FPA, a claim created and governed by federal law.

⁸¹ See *supra* note 52; see also *Comm'r v. Estate of Bosch*, 387 U.S. at 465 ("when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should a fortiori not be controlling").

36. Finally, we disagree that the statements made at oral argument are binding on the Commission.⁸² As the D.C. Circuit has recognized, the Commission’s “enabling statute provides at least three Commissioners must be present to constitute a quorum” and “[a]ctions of the Commission shall be determined by a majority vote of the members present.”⁸³ Further, the D.C. Circuit has recognized that “an agency’s authority runs to it as ‘an entity apart from its members, and it is its institutional decisions—none other—that bear legal significance.’”⁸⁴ Accordingly, a phrase from oral argument cannot substitute for the Commission acting as a body as it has done here.⁸⁵

C. Commission Policy on RTO/ISO Participation and Transmission Control Agreement

37. On rehearing, California Parties take issue with the Commission’s finding that PG&E’s participation in CAISO is voluntary because the Commission has not mandated participation in transmission organizations.⁸⁶ They state that whether or not the Commission mandates transmission organization participation does not answer the question of whether a utility’s continued participation is involuntary for other reasons, including state or regulatory requirements.⁸⁷ California Parties also argue that the

⁸² California Parties assert the following exchange is binding on the Commission:

Judge Thomas: No. The Commission can’t decide what California law means.

Commission Counsel: Certainly not.

Rehearing Request at 22 (citing *CPUC v. FERC*, No. 16-70481, Oral Argument, 25:55-27:33, Oct. 13, 2017).

⁸³ *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1169 (D.C. Cir. 2016) (citing 42 U.S.C. § 7171(e) (2018)). See also *Fed. Trade Comm’n v. Flotill Prods., Inc.*, 389 U.S. 179, 183 (1967) (discussing the “almost universally accepted common-law rule” that only a “majority of a collective body is empowered to act for the body”).

⁸⁴ *Pub. Serv. Comm’n of N.Y. v. Fed. Power Comm’n*, 543 F.2d 757, 776 (D.C. Cir. 1974).

⁸⁵ In any event, California Parties misstate Commission counsel’s exchange with the court, as nowhere in that exchange did Commission counsel state or suggest that the Commission “had no independent authority to *interpret* state law.” Rehearing Request at 3 & n.8 (emphasis added).

⁸⁶ *Id.* at 32.

⁸⁷ *Id.*

Commission misconstrued the Transmission Control Agreement to exclude state regulatory approvals.⁸⁸

38. We disagree. We find it relevant that, under Commission precedent and policy, PG&E's participation in CAISO is voluntary. As discussed above, section 219 of the FPA and Order No. 679 provide the basis for granting the RTO-Participation Incentive and thus, the Commission's policy is relevant to making this determination. Moreover, in the Order on Remand, the Commission reviewed whether PG&E's continued participation is involuntary for other reasons, including state or regulatory requirements, and determined that it is not.⁸⁹ We affirm that finding here. With regard to section 3.3.3 of the Transmission Control Agreement, which California Parties claim imposes an obligation on PG&E to seek CPUC approval before withdrawing from CAISO, the Commission stated in the Order on Remand that, "[w]hile this provision of the Transmission Control Agreement references 'necessary regulatory approvals,' it notably does not reference any particular necessary approval, such as approval by CPUC."⁹⁰ California Parties have not provided any argument on rehearing to persuade us to modify this finding. They only point back to their prior arguments on the California Transfer Authorization Order and section 1709 of the California Code, which we address above.⁹¹

The Commission orders:

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁸⁸ *Id.* at 33.

⁸⁹ Order on Remand, 168 FERC ¶ 61,038 at P 2.

⁹⁰ *Id.* P 51 n.129.

⁹¹ *See supra* P 20.