

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

California Independent System Operator    ) Docket No. ER05-155-001  
Corporation                                    )

**REQUEST FOR REHEARING OF  
SOUTHERN CALIFORNIA EDISON COMPANY AND  
SAN DIEGO GAS & ELECTRIC COMPANY**

Pursuant to Section 313 of the Federal Power Act (FPA), 16 U.S.C. § 8251 (2000), and Rules 212 and 713 of the Rules and Regulations of the Federal Energy Regulatory Commission (Commission or FERC), 18 C.F.R. §§ 385.212, .713 (2004), Southern California Edison Company (SCE) and San Diego Gas & Electric Company (SDG&E) (collectively, Movants) hereby request rehearing of the December 30, 2004, *Order Accepting and Suspending Filings and Notices of Cancellation, and Establishing Hearing and Settlement Judge Procedures (December 30 Order)* in the above-referenced docket.<sup>1/</sup> Specifically, Movants seek rehearing of the portion of such order approving the exemption from otherwise applicable Must-Offer Charges contained in the Interim COTP Operating Agreement (COTP OA).

**I. SPECIFICATION OF ERROR**

Movants except to the Commission's ruling that the COTP OA is just and reasonable in exempting load or demand from ISO Tariff Must-Offer Charges.

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<sup>1/</sup> *California Indep. Sys. Operator Corp.*, 109 FERC ¶ 61,391 (2004).

Such ruling is not based on substantial evidence, devoid of reasoning, arbitrary and capricious, and discriminatory.

## II. BACKGROUND

Prior to the filing of the COTP OA, there was no question that the loads and demand of COTP Participants were subject to Emissions, Startup, and Minimum Load (Must-Offer Charges) under the ISO Tariff. Under the ISO Tariff, Must-Offer Charges are assessed to Control Area Gross Load and Demand within California outside of the ISO Control Area that is served by exports from the ISO Control Area, regardless of whether the ISO Controlled Grid is used to serve the load or demand. Similarly, the COTP Participants' load and exports could be subject to certain Grid Management Charges (GMC) both under the Commission's orders in Docket No. ER01-313 and the settlement filed in Docket No. ER04-115, regardless of whether the ISO Controlled Grid was used. The COTP OA exempts load and demand from Must-Offer Charges, if such load or demand is not otherwise using the ISO Controlled Grid. In contrast, as the Commission has now clarified, there is no exemption in the COTP OA from the GMC.<sup>2/</sup>

SCE protested the exemption from Must-Offer Charges on grounds of undue discrimination and cost-shifting. SCE also argued that the ISO had submitted no

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<sup>2/</sup> FERC explained that "TANC clarifies that the reference to 'a binding settlement' in section 6.3 refers to the grid management charge settlement that the non-PTO COTP Participants negotiated in Docket No. ER01-313." *December 30 Order* at P 41. Because no settlement exists in Docket No. ER01-313, as that docket was not settled, there obviously is no COTP-related GMC exemption. Even if a settlement had existed in Docket No. ER01-313, it would have been superseded by the 2004 GMC filing, which was settled with no COTP-related exemption, as the ISO has confirmed repeatedly to SCE. If any party tries to claim such a settlement exempting COTP from GMC does exist, and the Commission confirms the existence of such a settlement, SCE will seek rehearing at the appropriate time.

proof that: 1) the resulting impact on rates and charges would be minor or 2) that the exemption had anything to do with the settlement, the settlement negotiations, or the settlement documents filed in related Dockets. SCE explained that:

[t]he fact that the ISO views it as perfectly just and reasonable to charge the CAGL of COTP Participants with load in its control area these charges both now after the COTP OA expires, begs the question as to why should these entities receive any respite from such just and reasonable charges. It is unjust and unreasonable the CAISO to give away dollars of one class of ratepayers, wholly outside of the CAISO Tariff regime, in order to placate another set of ratepayers, even if it is for an abbreviated time period.

SCE Protest at 15 (Nov. 22, 2004).

SDG&E timely protested on similar grounds. SDG&E Protest at 6-8 (November 22, 2004). Neither Movant's concerns were addressed by the *December 30 Order*.

### **III. ARGUMENT**

The totality of the Commission's response to SCE's arguments, as well as similar arguments of SDG&E, as to the facially discriminatory nature of the exemption from Must-Offer Charges is as follows:

43. The creation of an SE is but one piece of the overall package designed to continue service at non-pancaked rates. As such, the Interim COTP Agreement contributes to the continued reliability and scheduling efficiency benefits achieved by the totality of the settlements and agreements filed. Accordingly, we accept the Interim COTP as filed.

*December 30 Order* at P 43.

This brief statement does not meet the standard contained in the Administrative Procedures Act (APA) that an administrative agency's decision is arbitrary and capricious "if the agency has . . . entirely failed to consider an important aspect of the problem, [or has] offered an explanation for its decision that runs counter to the evidence before the agency . . . ."<sup>3/</sup> Here, the Commission has dismissed the numerous pages of argument submitted by SCE and SDG&E without any consideration of the issues raised and without any reliance on evidence. Indeed, the Commission does not even directly mention the Must-Offer Charge exemption in its discussion of the COTP OA.

The limited reasoning for approving the COTP OA is not supported by substantial evidence, as required by law. Although highly deferential, appellate review of rate issues "is not an empty gesture. The Commission must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record, and the path of its reasoning must be clear."<sup>4/</sup> First and foremost, the creation of a Scheduling Entity (SE) and the resulting exemption from Must-Offer Charges has not and cannot be shown to be part "of an overall package designed to continue service at non-pancaked rates." *December 30 Order* at P 43. With the COTP OA in place, a third party using both the COTP and the ISO Controlled Grid certainly would pay pancaked charges for transmission service -- one charge to the COTP Participant and one to the ISO. Nothing

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<sup>3/</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>4</sup> *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999) (internal quotations and citations omitted); *see also Louisiana Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 225 (D.C. Cir. 1999) ("To the extent the Commission made factual determinations in the course of exercising its discretion, we of course ask whether those conclusions are supported by substantial evidence").

in the COTP OA prevents a COTP Participant from charging for use of the COTP under its own tariff.

More importantly, with or without the Must-Offer Charge exemption contained in the COTP OA, load or demand using both the COTP and the ISO Controlled Grid would pay for Must-Offer Charges only once. The exemption certainly is not needed to avoid pancaking of Must-Offer Charges; without the exemption, such charges still would only be paid once to the ISO. Indeed, prior to the existence of the COTP OA, load and demand using either or both the COTP and ISO Controlled Grid only paid the Must-Offer Charge once. If the Commission's basis for allowing the discriminatory treatment is the avoidance of rate pancaking, it must explain what rates that would otherwise be pancaked are not pancaked, due to the existence of the COTP OA.

Second, the notion that the creation of the SE and resulting Must-Offer Charge exemption was part of a package is wholly unsubstantiated. This aspect of the "package" was not negotiated as part of the settlement proceedings in Docket Nos. ER04-688, *et al.* SCE provided un rebutted testimony that the COTP OA was unknown to SCE and was not negotiated as part of any package. Indeed, had SCE known of the COTP OA exemption, there would have been no uncontested settlement at all regarding COTP.

The notion that "continued reliability and scheduling efficiency benefits" offset the cost-shifts to Movants (and others) and mitigate the discrimination resulting from the Must-Offer Charge exemption contained in the COTP OA is not supported by a shred of evidence. *Id.* The Commission points to the "continued reliability and scheduling efficiency benefits achieved;" this statement implies that there has been no

increase in reliability and scheduling efficiency from the *status quo*. *Id.* (emphasis added). Thus, Movants and others will pay more in Must-Offer Charges, without any change in the level of service received. Under the *status quo*, Must-Offer Charges were assessed COTP Participants' load and demand in accordance with the ISO Tariff. Unless there is evidence that the COTP OA provides actual, quantitative improvement in reliability and scheduling efficiency, there is absolutely no evidentiary basis for now exempting the very same loads and demands from Must-Offer Charges.<sup>5/</sup>

The Commission does not in any way even address Movants' undue discrimination claim with regard to the Must-Offer Charge exemption. Movants have agreements with the ISO, such as the Transmission Control Agreement, that contribute to reliability and efficiency and prevent rate pancaking, yet neither Movant has received a Must-Offer Charge exemption. Neither the ISO nor the *December 30 Order* offer an explanation of why entities whose load and demand currently are subject to Must-Offer Charges should now be exempt from such charges simply because an existing set of arrangements was replaced with a new set. Plainly, if it was just and reasonable to assess such entities prior to the COTP OA due to cost causation/benefits received, an exemption cannot be justified absent an explanation as to why such loads and demands no longer cause the costs or receive the benefits. Not only has such evidence not been produced,

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<sup>5/</sup> The evidence actually supports the notion that the COTP OA has made scheduling so much more complex that an additional agreement, with new rates and charges, is required. In effect, the existing Coordinated Operation Agreement has been replaced with two agreements -- the Owners Coordinated Operation Agreement and the COTP OA. And, PG&E, who previously scheduled COTP now is replaced with an entirely new entity -- an SE. There is no evidence of greater efficiency in the new arrangements.

the ISO admits that it does not exist. The ISO only justified the exemption on the grounds of the "minor and interim nature on rates and charges and the importance of this agreement to the overall settlement." ISO Transmittal Letter at 6-7. In other words, the ISO had no other basis for claiming the exemption was reasonable other than that the cost shift was small. Even if the cost shift is small (a "fact" for which the ISO has provided no evidence), that alone cannot make such a shift just and reasonable.

In sum, the Commission has failed to meet the standard of reasoned decisionmaking and its decision to permit the Must-Offer Charge exemption is arbitrary and capricious.

#### IV. CONCLUSION

Wherefore, Movants respectfully requests that the Commission reverse its order and reject the discriminatory aspects of the Interim COTP Operating Agreement for the reasons described herein.

Respectfully submitted,



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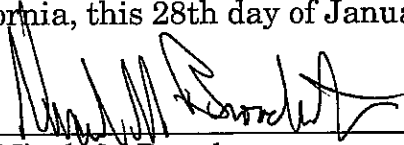
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Rosemead, California, this 28th day of January, 2005.



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Nicole M Broadwater

Project Analyst

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