
The issue on remand in each consolidated docket is the same: whether Pacific Gas and Electric Company (“PG&E”) is entitled to receive the 50 basis point return-on-equity (“ROE”) transmission rate incentive for its membership in the California Independent System Operator Corporation (“CAISO”). The answer to that question is yes.

In this initial brief, the Joint Utilities respond to the four questions set out in paragraph 25 of the Remand Order and provides additional considerations supporting the Commission’s grant to PG&E of the 50 basis point ROE incentive adder that are based upon the benefits that flow from PG&E’s CAISO membership.

1 164 FERC ¶ 61,121 (2018) (‘Remand Order’).
I. RESPONSE TO QUESTIONS

A. Does California Require PG&E to Participate in CAISO?

No. PG&E’s participation in the CAISO is governed by the Transmission Control Agreement (“TCA”). The TCA is a filed rate subject to the exclusive jurisdiction of this Commission and explicitly allows PG&E to withdraw from the CAISO. California lacks jurisdiction to alter the terms of the TCA.

Moreover, the California Public Utilities Commission’s (“CPUC’s”) assertion that California Public Utilities Code Section 851 (“PU Code Section 851”) requires PG&E to participate in the CAISO is incorrect because PU Code Section 851 does not require PG&E to receive CPUC approval to reacquire operational control of assets from the CAISO. Finally, even assuming PU Code Section 851 applies and provides the CPUC with authority to review reacquisition of operational control of assets, conditioning withdrawal on obtaining such regulatory approval does not establish that withdrawal is involuntary.

1. PG&E Participates in the CAISO Pursuant to the TCA, Which Governs Operational Control by CAISO and Is Subject to the Exclusive Jurisdiction of This Commission

   a. Historical Background of the IOUs’ Membership Supports Voluntary Participation

   In 1995, the CPUC requested the California investor-owned utilities (“IOUs”) “to develop a detailed proposal for submission to the Federal Energy Regulatory Commission (“FERC”) to establish the independent system operator (“ISO”) and its protocols and transfer operational control of the utilities’ transmission facilities to the ISO.”2 The IOUs actively

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participated in the formation of the CAISO, including the submission of various tariffs, rules and protocols for this Commission’s consideration and adoption.

Once this Commission, under its jurisdiction, established the appropriate rules and protocols for CAISO membership in the TCA, the IOUs voluntarily transferred operational control of their transmission assets to the CAISO. The TCA, which is the controlling agreement and rate schedule between the CAISO and its Participating Transmission Owners (“Participating TOs”), states:

3.3.1 Notice. Subject to Section 3.3.3, any Participating TO may withdraw from this Agreement on two years’ prior written notice to the other Parties.

3.3.3 Conditions of Withdrawal. Any withdrawal from this Agreement pursuant to Section 3.3.1 or Section 3.3.2 shall be contingent upon the withdrawing party obtaining any necessary regulatory approvals for such withdrawal. The withdrawing Participating TO shall make a good faith effort to ensure that its withdrawal does not unduly impair the CAISO’s ability to meet its Operational Control responsibilities as to the facilities remaining within the CAISO Controlled Grid.3

Therefore, the TCA since its inception has always explicitly allowed a Participating TO to withdraw from the CAISO.4

b. This Commission Has Exclusive Jurisdiction Regarding Changes in CAISO Operational Control Through the Commission Approved TCA

The issues of CAISO operational control and CAISO membership, which is entirely dependent on operational control, are solely within this Commission’s jurisdiction, whether

3 TCA § 3.3.

4 As discussed infra, agreements regarding ISO/RTO membership are subject to FERC jurisdiction and they control entities’ right to join or withdraw from an ISO/RTO. E.g., Louisville Gas & Elec. Co., 114 FERC ¶ 61,282 at P 65 (2006).
applying the law of field or conflict preemption.\(^5\) Field preemption applies where “Congress evidences an intent to occupy a given field.”\(^6\) Here, the Federal Power Act delegates to this Commission the exclusive jurisdiction to regulate the transmission and sale at wholesale of electric energy in interstate commerce, and this “exclusive jurisdiction extends over all facilities for such transmission or sale of electric energy.”\(^7\) Thus, this Commission has exclusive jurisdiction concerning whether PG&E’s facilities can be removed from CAISO operational control or whether PG&E can withdraw entirely from CAISO.

Conflict preemption applies when compliance with both state and federal law is impossible\(^8\) or when state law stands as “an obstacle to accomplishment and execution of the full purposes and objectives of Congress.”\(^9\) Here, allowing the CPUC to overrule the Commission as to whether PG&E’s facilities can be removed from CAISO operational control or whether PG&E can withdraw entirely from CAISO.

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6 *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 849–50 (9th Cir.), opinion amended on denial of reh'g, 387 F.3d 966 (9th Cir. 2004).

7 *Id.* (quoting *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1056 (9th Cir.2001)).

8 *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (finding conflict preemption where “compliance with both federal and state regulations is a physical impossibility.”).

can withdraw entirely from CAISO, as long as PG&E fully abides by the terms of the TCA, would result in a situation where the state law would serve as an obstacle.10

Even assuming the CPUC is right and California law did require PG&E to seek CPUC approval to divest of CAISO operational control (which it clearly does not as discussed below), the CPUC’s interpretation of this state law would be preempted. For example, the CAISO takes or disclaims operational control based upon the terms of the TCA,11 including the “Seven Factor Test” from the Commission’s Order No. 888.12 The CPUC cannot compel CAISO to take operational control of facilities that do not meet the terms and conditions this Commission adopted in accepting the TCA as just and reasonable. Nor can the CPUC order PG&E not to

10 The CPUC has suggested it has the authority to regulate the relationship between the CAISO and the IOUs regarding the CAISO’s operational responsibility over FERC-jurisdictional assets. See CPUC Opening Brief at 5-6 (filed in CPUC v. FERC, 2016 WL 4051174 (9th Cir.)). Taken to its logical extent, these arguments would enable the CPUC to issue an order prohibiting utilities from filing with FERC changes to their FERC-jurisdictional rates and tariffs that the CPUC opposed or ordering utilities as to the nature of FERC filings they must make. Clearly, such a regime is not consistent with FERC jurisdiction and the FPA. See e.g. Western Massachusetts Electric Company, 23 FERC ¶ 61,025, 61,757 (1983), reh’g denied, 23 FERC ¶ 61,345 (1983), aff’d Massachusetts v. FERC, 729 F.2d 886, 888 (1st Cir. 1984) (holding that the net effect of accepting the state’s argument is to allow a state to do what FERC itself cannot, namely, to change an interstate rate practice that FERC has not found unreasonable).

11 Amended and Restated TCA Section 4.1.1 (“[E]ach Participating TO shall place under the CAISO’s Operational Control the transmission lines and associated facilities forming part of the transmission network that it owns or to which it has Entitlements) (available at https://www.caiso.com/Documents/TransmissionControlAgreement.pdf).

transfer to the CAISO transmission facilities that meet the requisite requirements of integrated
transmission as set by this Commission and subject to the TCA.¹³

A failure to apply the doctrine of preemption in this case would be particularly
troublesome, as it could result in a patchwork of conflicting treatment of transmission owners
that are subject to state laws requiring ISO membership (i.e., some states may compel
membership but not oppose the adder). Also, a ruling in favor of the CPUC could spur other
states to adopt new laws requiring ISO membership, striking a serious blow to needed
transmission investment by potentially reducing both returns on equity and the certainty of
returns on equity. Such action could also deter future expansion of market participation
throughout the country. Any such outcome would run antipodal to the intent of both the
Commission and Congress. Similarly, tariff provisions that require ISO membership to include
facilities’ costs in ISO rates could become the subject of litigation over compelled membership
and adders. The Commission should clearly reiterate its incentive policies in support of market
participation which result in numerous benefits to customers by restating its policy on voluntary
ISO membership entitles all transmission owners with a stated base return on equity to a 50-basis
point adder.

¹³ The PUC cannot give itself power that it does not otherwise have and cannot, by fiat, abolish
the application of federal regulations. CALIFORNIA GOVERNMENT CODE §11342.1 (a regulation
“to be effective, shall be within the scope of [the] authority conferred” by the statute that it
implements).
2. No California Law Prevents Withdrawal of Participation from CAISO, Thus PG&E’s Participation Is Voluntary

The CPUC argues PG&E cannot voluntarily withdraw from the CAISO because “it is the CPUC, not PG&E that determines whether or not PG&E will remain a member of the CAISO.” Specifically, the CPUC asserts that PU Code Section 851 requires PG&E to receive regulatory approval from the CPUC to reacquire operational control of assets from the CAISO prior to withdrawing. The CPUC’s interpretation of PU Code Section 851, and its conclusions about the impact on PG&E’s participation in the CAISO, are incorrect. PU Code Section 851 does not apply to reacquisition of operational control of assets.

The CPUC cites dicta in CPUC Decision 98-01-053 to support its claim that PU Code Section 851 requires PG&E to obtain CPUC approval to take operational control of its facilities back from the CAISO. PU Code Section 851 unambiguously provides that a public utility “shall not sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any...”

14 Notice of Intervention, Protest and Request for Maximum Suspension, Motion for Summary Disposition, and Request for Hearing of the California Public Utilities Commission at 15, Dkt. No. ER16-2320 (Aug. 19, 2016). See also CPUC Opening Brief at 5-6 (filed in CPUC v. FERC, 2016 WL 4051174 (9th Cir.)).


16 CPUC Opening Brief at 5-6, 11 (filed in CPUC v. FERC, 2016 WL 4051174 (9th Cir.)) (“[W]e note that any future transfer of operational control of the transmission facilities from the ISO will, itself, be subject to review under PU Code Section 851, whether it is to the joint applicants or to some other party”) (citing CPUC Decision 98-01-053).
part of its [assets] without first [receiving] an order from the [CPUC] authorizing it to do so.”

The plain meaning of the statute demonstrates that it addresses disposal and encumbrance of assets. PU Code Section 851 on its face does not address the reacquisition of operational control over property. A decision by PG&E to retake operational control from the CAISO to itself does not encumber or dispose of an asset. The CPUC cannot add to a statute something which is not there. Thus, PU Code Section 851 only applies when a utility is encumbering or disposing of an asset, and does not address reacquisition of control.

17 CAL. PUB. UTIL. CODE § 851 (“A public utility, other than a common carrier by railroad subject to Part A of the Interstate Commerce Act (49 U.S.C. Sec. 10101 et seq.), shall not sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, or by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having either secured an order from the commission authorizing it to do so for qualified transactions valued above five million dollars ($5,000,000) . . .”).

18 It also does not address transfer of operational control from a public utility to another party.

19 See, e.g., California Cosmetology Coalition v. Riley, 110 F.3d 1454, 1460 (9th Cir. 1997) (“A regulation may not serve to amend a statute nor add to the statute ‘something which is not there’”) (citations omitted); Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004) (“It is well established that ‘when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.’”) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S.Ct. 1942, 1947, 147 L.Ed.2d 1 (2000)).

20 SCE notes that the CPUC has implicitly acknowledged that IOUs do not need its permission under PU Code Section 851 to remove facilities from CAISO control. Since the CAISO was formed, SCE has transferred numerous transmission facilities out of the CAISO’s operational control, as they were no longer integrated. See, e.g., Dkt. Nos. ER13-1848; EL14-14; ER14-783; ER14-983; ER14-986, ER14-987, ER14-989; ER14-997; ER14-1000; ER14-1001. SCE did not seek CPUC permission under PU Code Section 851, or any other state code section, to do so, and the CPUC has never objected to SCE’s actions. To SCE’s knowledge, the CPUC did not even intervene in any of the listed proceedings at FERC, despite being served with the filings in all of the ER dockets which clearly indicated that facilities had been removed from CAISO control because they no longer were integrated, network transmission facilities. As required by the
3. Even if California Law Required PG&E to Receive CPUC Approval to Reacquire Operational Control, PG&E’s Participation in the CAISO Is Voluntary

Even assuming arguendo that PU Code Section 851 requires PG&E to seek CPUC approval to reacquire operational control of assets from the CAISO, this does not undermine PG&E’s voluntary participation in the CAISO. Rather, it simply means that if PG&E elects to withdraw from the CAISO, then the withdrawal is conditioned on obtaining regulatory approval from the CPUC, in addition to this Commission. Conditioning withdrawal on obtaining regulatory approval does not establish that withdrawal is not voluntary.

The Commission has indicated that it has a policy of voluntary ISO participation.\(^{21}\)

The Commission has also confirmed that withdrawal from an ISO requires its review and approval under the requisite agreements or tariffs.\(^{22}\) To claim that the Commission’s regulatory approval eliminates voluntary participation conflicts with, and indeed defeats, its voluntary ISO TCA, the CAISO issued a public Market Notice of its actions removing SCE facilities from its control. ISO Intention to Release Transmission Lines and Associated Facilities from Operational Control (last visited at https://www.caiso.com/Documents/ISO_Intention-ReleaseTransmissionLines-AssociatedFacilities-OperationalControlSep13_2013.htm).

\(^{21}\) Order No. 679 at P 331 (“The basis for the incentive is a recognition of the benefits that flow from membership in such organizations and the fact that continuing membership is generally voluntary.”). See also Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at 831 (1999), order on reh’g, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), aff’d sub nom. Pub. Util. Dist. No. 1 v. FERC, 272 F.3d 607 (D.C. Cir. 2001). As discussed supra, this fact calls into serious question whether a state or state commission could adopt a law or regulation that does not permit withdrawal under any circumstances.

\(^{22}\) Louisville Gas & Elec. Co., 114 FERC ¶ 61,282 at P 27 (2006) (among other things, the Applicants’ proposal to withdraw from the Midwest ISO must comply with the withdrawal provisions in the Commission-approved TO Agreement).
participation policy and renders the incentive adder an illusory incentive.\textsuperscript{23} To avoid this nonsensical result, it is reasonable to conclude that making an ISO participant’s voluntary election to withdraw contingent upon meeting certain FERC regulatory requirements does not negate its choice to withdraw. Similarly, concluding that PG&E must meet certain CPUC regulatory requirements for withdrawal does not negate its voluntary election to withdraw.

\textbf{B. Is This Commission Required to Defer to CPUC’s Interpretation of the Relevant California Law(s) in This Case That CPUC Is Charged with Administering When That Interpretation Is Presented in a Pleading Before This Commission?}

The Joint Utilities have not identified any case law addressing whether or to what extent a federal agency should defer to a state agency’s interpretation of state statutes that the agency is charged with administering. Federal courts do not defer to an agency’s interpretation, as presented in a pleading, where the position is plainly erroneous or a convenient litigation position.\textsuperscript{24} The Supreme Court has explained:

\begin{quote}
Although \textit{Auer} ordinarily calls for deference to an agency’s interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief, this general rule does not apply in all cases. Deference is undoubtedly inappropriate, for example, when the agency’s interpretation is plainly erroneous or inconsistent with the regulation. And deference is likewise unwarranted when there is reason to suspect that the agency’s
\end{quote}

\begin{footnotesize}
\textsuperscript{23} Notably, the CPUC has not argued that PG&E’s voluntary participation in the CAISO is defeated because the TCA requires PG&E to obtain this Commission’s approval prior to withdrawal.

\textsuperscript{24} \textit{Bowen v. Georgetown University Hospital}, 488 U.S. 204, 212 (1988) (“deference to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate.”); \textit{Christopher v. Smithkline Beecham Corp.}, 132 S.Ct. 2156, 2167 (2012) (reasoning that agency interpretation did not “reflect the agency's fair and considered judgment on the matter in question” because agency only advanced its reading during litigation and regulated party did not have notice of agency’s position prior to suit); \textit{Idaho Dept. of Health and Welfare v. U.S. Dept. of Energy}, 959 F.2d 149, 153 (“We grant no deference to an interpretation put forth merely as a litigation position.”).
\end{footnotesize}
interpretation does not reflect the agency’s fair and considered judgment on the matter in question. This might occur when the agency’s interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a convenient litigating position, or a post hoc rationalization advanced by an agency seeking to defend past agency action against attack.25

The CPUC’s interpretation of PU Code Section 851 as presented in pleadings before this Commission is plainly erroneous because as discussed above, PU Code Section 851 on its face does not address the *reacquisition* of operational control over property. Thus, the CPUC’s interpretation is plainly erroneous and not entitled to deference.26

In addition, the Joint Utilities note that the CPUC’s pleadings go beyond interpretation of PU Code Section 851 or any California law to conclude that PG&E’s participation in the CAISO is not voluntary because “the CPUC has consistently interpreted California law to require that PG&E seek CPUC authorization before departing the CAISO.”27 However, any analysis concerning the impact of a state regulatory approval requirement involving a state agency on eligibility for an incentive adder is necessarily dependent upon analysis of the law of federal preemption discussed above, not merely California law, and no deference should be afforded the CPUC as to its interpretation of federal law.

Finally, the CPUC has not addressed the issue as to why a requirement of state regulatory approval makes a withdrawal involuntary, given that the state commission cannot act in an

25 *Christopher v SmithKline Beecham Corp.*, 567 US at 154 (citations and quotations omitted).

26 The interpretation likewise conflicts with the CPUC’s failure to require SCE to seek PU Code Section 851 approval to remove facilities from CAISO operational control despite repeated notices that SCE was doing so.

27 Joint Answer to Motion of Pacific Gas and Electric Company to Establish Procedures on Remand at 4, Dkt. No. ER14-2529 (March 13, 2018).
arbitrary manner. As discussed in response to Question B, Section A(3) above, this Commission has recognized that the requirement for its regulatory approval does not make an ISO departure involuntary.

C. If the Commission Is Required to Defer to the CPUC’s Interpretation of the Relevant California Law(s) As Presented in Its Pleadings Before This Commission in This Case, What Is the Standard for Such Deference That This Commission Must Apply?

As explained in response to Question (B) above, the Commission is not required to defer to the CPUC’s interpretation of the relevant California laws as presented in its pleadings and the legal issues raised are not limited to California law in any event. While a court may be deferential to a state agency’s interpretation of state law, deference is not appropriate where a state agency’s interpretation is not a reasoned and consistent view of a statute or regulation.28

The CPUC cites to its CPUC Decision 98-01-053 to demonstrate the conclusion that PU Code Section 851 applies to reacquisition of operational control over property by a utility. In CPUC Decision 98-01-053, the Commission states in dicta that “any future transfer of operational control of the transmission facilities from the ISO will, itself, be subject to review under PU Code Section 851.” However, this conclusory statement is not identified as a conclusion of law and it is not supported by any explanation or analysis regarding how this conclusion fits within the scope of the plain language of the statute. In fact, it is undermined by the Decision’s Conclusion of Law No. 1: “The proposed transfer [from a utility to the CAISO]

28 Idaho Dept. of Health and Welfare v. U.S. Dept. of Energy, 959 F.2d 149, 152 (9th Cir. 1992) (“We recognize that by ruling as we do today, we contradict Idaho’s interpretation of its own regulations. This court ordinarily grants substantial deference to such interpretations. If an agency’s interpretation is a reasoned and consistent view of its regulations, we will not substitute our own interpretation for that of the agency’s. Because we find that Idaho’s proffered interpretations are neither, we grant no deference here.”) (internal citations omitted).
falls under the prohibition against ‘otherwise disposing of’ utility property that is useful or necessary without the Commission’s prior approval set forth in PU Code Section 851.”29

Since the CPUC’s legal conclusion is that transfer of operational control falls within the scope of PU Code Section 851 because it constitutes “otherwise disposing of” an asset, it is not logical to extend this conclusion to instances where there is no disposal, such as reacquisition of operational control over property. Accordingly, the CPUC’s interpretation that PU Code Section 851 applies to reacquisition of operational control over property is not a reasoned and consistent view of a statute the CPUC is charged with administering, and should not be accorded deference.

There is an additional reason not to afford the CPUC deference as to a position that derives from dicta in CPUC Decision 98-01-053 regarding how to interpret the “dispose of” wording in PU Code Section 851. The CPUC’s original interpretation that the term “dispose of” encompasses giving ISO operational control was issued at a time when this Commission and others incorrectly interpreted a similar federal statute as encompassing ISO operational control. At the time of the creation of the CAISO, the Commission and IOUs assumed the transfer of operational control to the CAISO required Commission approval under Section 203 of the Federal Power Act (“FPA”) and the IOUs filed Section 203 applications in Docket No. EC96-19 accordingly. Likewise the IOUs and CPUC assumed that PU Code Section 851 applied to such transfers of operational control to the CAISO and the IOUs sought CPUC approval for the transfer. After appellate litigation involving another ISO, the D.C. Circuit examined FPA Section 203, finding that the expression “otherwise dispose of” requires interpretation by looking at the words surrounding it under the principle noscitur a sociis and concluded that the term did

29 CPUC Decision 98-01-053, Conclusion of Law 1, 1998 WL 242747 at *9 (emphasis added).
not include turning over facilities to ISO operational control. Although PU Code Section 851 is somewhat broader than FPA Section 203, in that it includes the concepts of mortgages and encumbrances, those additional concepts should not cause a court or agency interpreting the statute to reach a differing conclusion. Rather, PU Code Section 851, like FPA Section 203, contemplates changes in ownership or proprietary interests; encumber and mortgage also refer to proprietary-like interests. Had a California court or even the CPUC been asked to consider the meaning of PU Code Section 851 after Atlantic City was issued, it may have interpreted it in the same manner as the Court of Appeals for the D.C. Circuit. The Joint Utilities have found no evidence that PU Code Section 851 was ever interpreted in light of Atlantic City and thus its 1998 interpretation is stale.

D. If PG&E Were to Seek CPUC Approval to Withdraw from CAISO and Thus Assume Operational Control of Its Transmission Facilities or Join Another RTO/ISO, What Standard Would CPUC Apply Under the California Public Utility Code in Considering This Matter?

As explained above, PG&E is not required to seek CPUC approval to withdraw from the CAISO. However, for purposes of providing a response to this question, the Joint Utilities assume arguendo, based upon previous legal arguments made by the CPUC, that PG&E “cannot leave the CAISO without CPUC authorization” and that authorization of withdrawal is

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30 Atlantic City Elec. Co. v. FERC, 295 F.3d 1, 12–13 (D.C. Cir. 2002) (Atlantic City).

31 An encumbrance is defined by Black’s Law Dictionary 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.”

32 A mortgage holder can take ownership of property in the event of a failure to pay.
dependent upon the CPUC’s “statutory obligation to review” transfers of operational control pursuant to PU Code Section 851.\(^{33}\)

The CPUC has explained that the standard of review for approval under PU Code Section 851 is “whether it is adverse to the public interest, which includes ratepayer interest.”\(^{34}\) Unless the request is adverse, transfer authorization will be granted. In addition, the CPUC must “ensure that facilities needed to maintain the reliability of the electric supply remain available and operational.”\(^{35}\)

Contrary to the CPUC’s assertions, the CPUC is not “determin[ing] whether or not PG&E will remain a member of the CAISO.”\(^{36}\) CPUC is not free to decide by fiat whether PG&E remains a member of the CAISO. Rather, the CPUC would be charged with determining whether the facts presented by PG&E meet the requirements of PU Code Section 851 based upon an established standard of review. And, any CPUC decision will be subject to appropriate judicial review\(^{37}\) and could be overturned by a court.


\(^{34}\) Decision Granting Approval of Lease of Transfer Capability Rights From San Diego Gas & Electric Company to Citizens Energy Corporation, D.11-05-048, Conclusion of Law 1, 2011 WL 2246056 (May 26, 2011). See also Re Universal Marine Corporation, D. 84-04-102, 1984 Cal. PUC LEXIS 962, *3, 14 CPUC 2d 644 (“[W]e have long held that the relevant inquiry in an application for transfer is whether the transfer will be adverse to the public interest”).

\(^{35}\) CAL. PUB. UTIL. CODE § 362.


\(^{37}\) CAL. PUB. UTIL. CODE § 1757.
II. THIS COMMISSION SHOULD NOT LIMIT ITS EVALUATION REGARDING APPLICABILITY OF AN INCENTIVE ADDER SOLELY TO WHETHER PARTICIPATION IS VOLUNTARY

As the Remand Order notes, the Ninth Circuit concluded that “[t]o satisfy Order 679’s case-by-case analysis requirement and to avoid creating a generic adder, FERC needed to inquire into PG&E’s specific circumstances.” However, the Commission should not limit its “specific circumstances” analysis solely to “whether [PG&E] could unilaterally leave [CAISO] and thus whether an incentive adder could induce it to remain in [CAISO].” The Ninth Circuit did not require such a narrow analysis; it explained that it concluded the orders on review were arbitrary and capricious, and remanded, because “the adders were granted summarily without any case-specific inquiry in the circumstances of PG&E’s membership.”

In addition, Order No. 679 acknowledges that the incentive is a recognition that membership is generally voluntary, and does not state that membership must be voluntary. Order No. 679, in fact, explicitly rejected proposals to prohibit the incentive adder where a transmission owner is ordered to join an ISO by statute. And, there is no reasonable policy-distinction between a requirement to join an ISO and a requirement to continue to remain in an ISO. Thus, the Commission should evaluate

38 CPUC v. FERC, 879 F.3d at 979 (emphasis added).
39 Order No. 679 at P 331 (“The basis for the incentive is a recognition of the benefits that flow from membership in such organizations and the fact continuing membership is generally voluntary.”).
40 Order No. 679 at P 316; Order No. 679-A at P 83.
41 The Ninth Circuit identified the distinction between an order to joint and an order to continue participation, but concluded that Order No. 679 did not address the impact of a continued participation requirement because no party to the Order No. 679 proceedings raised the issue. See CPUC v. FERC, 879 F.3d at 975.
PG&E’s membership pursuant to Order No. 679 based upon a case-specific analysis that considers all of PG&E’s relevant circumstances.

PG&E participation in the CAISO has, in fact, resulted in tangible “benefits that flow from membership,”42 consistent with the policy expectations outlined by this Commission. For example, CAISO, though its FERC-jurisdictional tariffs, has implemented numerous policies and practices that benefit the CAISO grid and its customers. Significantly, the CAISO has led the nation in implementing Order 1000, which allows for competitive transmission in the CAISO footprint, increasing competition and reducing costs. Further, the CAISO plans the transmission system to meet reliability standards and resiliency goals and manages market issues. Also, the most recent western Energy Imbalance Markets (“EIM”) quarterly report, dated July 31, 2018, indicates significant benefits flowing to CAISO members regarding cost savings.43 The CAISO makes optimal use of all available transmission, provides market participants with tools to protect against transmission congestion, produces a least-cost dispatch of resources based on market bids and reliability requirements, continuously monitors market and grid conditions and implements market power mitigation when appropriate, provides for comprehensive market monitoring and much more. The benefits of continued CAISO membership are too numerous to detail but it is clear that continued membership in the CAISO should be incentivized through the application of the 50 basis point ROE incentive.

42 Order 679 P 331.

III. CONCLUSION

For the reasons stated above, the Joint Utilities respectfully request that the Commission affirm that PG&E is entitled to continue to receive the 50 basis point ROE incentive.

Respectfully submitted,

/s/ Matthew W. Dwyer
Matthew W. Dwyer
Rebecca Furman
Attorneys for Southern California Edison Company
P.O. Box 800
Rosemead, CA 91770
Tel. (626) 302-6521
Facsimile: (626) 302-1910
E-mail: matthew.dwyer@sce.com

/s/ Jonathan J. Newlander
Jonathan J. Newlander
Attorney for San Diego Gas & Electric Company
8330 Century Park Court CP32D
San Diego, CA 92123
Tel. (858) 654-1652
Facsimile: (619) 699-5027
E-mail: jnewlander@semprautilities.com
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing INITIAL BRIEF OF SOUTHERN CALIFORNIA EDISON COMPANY AND SAN DIEGO GAS AND ELECTRIC COMPANY IN RESPONSE TO THE COMMISSION'S AUGUST 20, 2018 ORDER ON REMAND, GRANTING MOTION, CONSOLIDATING PROCEEDINGS AND ESTABLISHING BRIEFING SCHEDULE upon each person designated on the official service lists compiled by the Secretary in this proceeding.

Dated at Rosemead, California, this 19th day of September, 2018.

/s/ Jorge Martinez
Jorge Martinez, Legal Administrative Assistant

SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770