

168 FERC ¶ 61,038
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Pacific Gas and Electric Company

Docket Nos. ER14-2529-005
ER15-2294-004
ER16-2320-004
(consolidated)

ORDER ON REMAND

(Issued July 18, 2019)

1. In a series of Commission orders at issue here,¹ the Commission summarily granted, pursuant to section 219 of the Federal Power Act (FPA)² and Order No. 679,³ Pacific Gas and Electric Company's (PG&E) requests for a 50 basis point return-on-equity (ROE) adder to its transmission rates (RTO-Participation Incentive) for its continuing membership in the California Independent System Operator Corporation (CAISO). In granting the requests, the Commission rejected the California Public Utilities Commission's (CPUC) argument that PG&E was not eligible for the incentive because California law required PG&E to participate in CAISO. On appeal, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) remanded the underlying

¹ 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; *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 (9th Cir. 2018); *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).

² 16 U.S.C. § 824s (2012).

³ *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).

proceedings 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].”⁴ On August 20, 2018, the Commission issued an initial order on remand establishing briefing procedures regarding those issues.⁵

2. Having reviewed the record, including the additional briefing provided by parties to this proceeding, we here find 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. We therefore reaffirm the Commission’s prior grant of PG&E’s request for the RTO-Participation Incentive.

I. Procedural History

A. PG&E’s Rate Cases

3. Following the issuance of Order No. 679 in 2007, PG&E began requesting the RTO-Participation Incentive for its ongoing participation in CAISO as part of its near-annual transmission owner tariff filing. The Commission routinely granted this request based on the summary finding that utilities remaining in a regional transmission organization (RTO) or independent system operator (ISO) (together, RTO/ISO) are presumed eligible for the RTO-Participation Incentive, while setting other issues, such as PG&E’s base ROE, for hearing and settlement judge procedures.⁶ These proceedings typically settled without controversy. However, starting in 2014 with PG&E’s sixteenth transmission owner tariff filing (TO16), CPUC challenged the Commission’s decisions granting PG&E the RTO-Participation Incentive.

4. CPUC’s arguments in these filings can be summarized as generally falling within two main categories. First, CPUC argued that PG&E’s participation in CAISO is not voluntary because California law⁷ required PG&E to turn over operational control of its transmission system to CAISO in March 1998. CPUC thus asserted that, because PG&E’s participation is legally mandated under California law, the RTO-Participation

⁴ *CPUC v. FERC*, 879 F.3d 966.

⁵ *Pac. Gas & Elec. Co.*, 164 FERC ¶ 61,121 (2018) (Order on Remand).

⁶ *See, e.g.*, TO18 Order, 156 FERC ¶ 61,238 at PP 33-34.

⁷ *See* CPUC, Decision No. 95-12-063, 64 CPUC 2d 1, 31, 1995 WL 792086 (Dec. 20, 1995) (California Restructuring Order); CPUC, Decision No. 98-01-053, 78 CPUC 2d 307, 1998 WL 242747 (Jan. 21, 1998) (California Transfer Authorization Order). *See also* Cal. Pub. Util. Code §§ 330m, 365, 851 (2018).

Incentive does not induce PG&E to remain a participating transmission owner in CAISO, and the Commission should not continue to grant the RTO-Participation Incentive. Second, CPUC argued that the Commission has created a generic adder in contradiction to the Commission's established policy of granting the RTO-Participation Incentive "when justified" and after performing a "case-by-case" analysis, as enunciated in Order No. 679.⁸

5. The Commission granted PG&E's requests over these protests, reasoning that, regardless of California's state law requirements, the Commission has authority to grant the RTO-Participation Incentive to utilities that voluntarily join or continue their membership in RTOs/ISOs, and that nothing in Order No. 679 requires the Commission to discontinue such adders in the face of arguments such as those raised by CPUC.⁹ The Commission also rejected arguments that it had created a generic ROE adder, stating that utilities that can demonstrate they have joined an RTO/ISO and their membership is ongoing will be presumed to be eligible for the incentive.¹⁰ Subsequently, the Commission denied CPUC's requests for rehearing on this issue.

B. CPUC v. FERC

6. On appeal, the Ninth Circuit found that the Commission "did not reasonably interpret Order [No.] 679 as justifying summary grants of adders for remaining in a transmission organization."¹¹ After concluding that the Commission's interpretation of Order No. 679 was not owed deference, because it was plainly erroneous and inconsistent with the regulation, 18 C.F.R. § 35.35(e),¹² or, alternatively, because it did not reflect "the fair and considered judgment on the matter in question[,]"¹³ the Ninth Circuit

⁸ See Order No. 679, 116 FERC ¶ 61,057 at P 326; Order No. 679-A, 117 FERC ¶ 61,345 at P 79.

⁹ TO16 Rehearing Order, 154 FERC ¶ 61,119 at P 10; TO17 Order, 152 FERC ¶ 61,252 at P 24; TO17 Rehearing Order, 154 FERC ¶ 61,118 at P 9.

¹⁰ TO16 Rehearing Order, 154 FERC ¶ 61,119 at P 11; TO17 Order, 152 FERC ¶ 61,252 at P 25; TO17 Rehearing Order, 154 FERC ¶ 61,118 at P 11.

¹¹ *CPUC v. FERC*, 879 F.3d at 973-77.

¹² *Id.* at 974-75.

¹³ *Id.* at 975-76.

employed traditional tools of interpretation to conclude that “[c]hallenges such as that mounted by CPUC are not precluded and must be answered by [the Commission].”¹⁴

7. Having concluded that the Commission’s interpretation of Order No. 679 was not controlling, the Ninth Circuit then found that the Commission’s determinations in the TO16 and TO17 Orders were arbitrary and capricious for failing to provide a reasoned explanation for granting the RTO-Participation Incentive in light of the Commission’s policy that incentives should only be awarded to induce future behavior.¹⁵ The court rejected the Commission’s arguments that Order No. 679 superseded Commission policy relating to incentives generally, stating that, while certain cases were explicitly overruled,¹⁶ Order No. 679 “did not overrule [the Commission’s] policy of awarding incentives to induce future voluntary conduct.”¹⁷ The Ninth Circuit concluded that the Commission’s departure from this policy in the TO16 and TO17 Orders was arbitrary and capricious, because the Commission never acknowledged the policy, nor provided an explanation for its departure from the policy; instead, it merely asserted the authority to grant the incentive.

8. The Ninth Circuit also found that the Commission acted arbitrarily and capriciously by creating what the court viewed as a generic ROE adder in contravention of Order No. 679’s requirement to perform a case-by-case review into whether a utility is eligible for, or entitled to, the RTO-Participation Incentive.¹⁸ The court stated that “to avoid creating a generic adder, [the Commission] needed 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].”¹⁹ The court noted that the amount of the RTO-Participation Incentive (e.g., 50 basis points) did not make it generic, but

¹⁴ *Id.* at 977.

¹⁵ *Id.*

¹⁶ *See* Order No. 679-A, 117 FERC ¶ 61,345 at n.142 (reversing the policy adopted in *S. Cal. Edison Co.*, 114 FERC ¶ 61,018, at P 15 (2006), where the Commission rejected Southern California Edison Company’s (SoCal Edison) request for an RTO-Participation Incentive prior to Order No. 679 because SoCal Edison was already a member of CAISO and “need[ed] no inducement”).

¹⁷ *CPUC v. FERC*, 879 F.3d at 978.

¹⁸ *Id.*

¹⁹ *Id.* at 979.

rather the summary acceptance of the incentive without any case-specific inquiry into the circumstances of PG&E's membership made it generic.²⁰

C. Remand Proceedings

9. On remand, the Commission established a briefing schedule and requested that interested parties answer the following questions:

(a) Does California law require PG&E to participate in CAISO?

(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?

(c) If the Commission is required to defer to 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?

(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?²¹

PG&E, California Parties,²² and Joint Utilities²³ timely filed initial briefs on September 19, 2018 and reply briefs on October 10, 2018. Their positions are summarized below.

²⁰ *Id.*

²¹ Order on Remand, 164 FERC ¶ 61,121 at P 25.

²² California Parties include CPUC, the Sacramento Municipal Utility District, and the Transmission Agency of Northern California.

²³ Joint Utilities include SoCal Edison and San Diego Gas and Electric Company (SDG&E).

1. Does California law require PG&E to participate in CAISO?

a. Initial Briefs

10. California Parties argue that California law requires PG&E to participate in CAISO.²⁴ California Parties assert that the *Erie* doctrine²⁵ requires this Commission to apply California law.²⁶ According to California Parties, the *Erie* doctrine does not distinguish between state law as enunciated by the state legislature in a statute or state law enunciated by its highest court; both, they assert, are binding on the federal courts. California Parties assert that when a state's highest court has not spoken directly to the question at issue, federal courts must "ascertain from all available data what the state law is and apply it rather than to prescribe a different rule"²⁷ California Parties thus argue that, where an intermediate appellate court has offered its interpretation, that court's interpretation is binding on federal courts "unless there is persuasive evidence that the highest state court would rule otherwise."²⁸ California Parties then assert that even rulings of a state court of original jurisdiction may bind federal courts where the court has state-wide jurisdiction and its standing is similar to that of an intermediate level court.²⁹

11. California Parties state that the California Supreme Court has ruled that section 1709 of the California Public Utilities Code (California Code) makes final CPUC determinations "conclusive in all collateral actions and proceedings."³⁰ Thus, California Parties assert that, under *Erie*, such determinations are final and binding on the Commission, and the Commission may not offer its own interpretation of California law. Alternatively, California Parties argue that the Commission is bound by CPUC's interpretation of California law because California Supreme Court precedent holds that

²⁴ California Parties Initial Brief at 19.

²⁵ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (*Erie*).

²⁶ California Parties Initial Brief at 16-17.

²⁷ *Id.* at 5-6 (quoting *West v. Am. T. & T. Co.*, 311 U.S. 223 (1940) (*West*) (internal quotations omitted)).

²⁸ *Id.* at 6 (quoting *King v. Order of United Commercial Travelers of Am.*, 333 U.S. 153, 158 (1948) (*King*) (internal quotations omitted)).

²⁹ *Id.* (citing *King*, 333 U.S. at 159).

³⁰ *Id.* at 7 (quoting *People v. W. Air Lines, Inc.*, 42 Cal. 2d 621, 630 (1954) (internal quotations omitted)).

CPUC interpretations of the California law that it administers are to be upheld unless they lack “a reasonable relation to statutory purposes and language.”³¹

12. California Parties characterize CPUC as having broad authority over the utilities it regulates, and state that, if PG&E wanted to challenge the California Restructuring and California Transfer Authorization Orders, it should have done so in a timely fashion pursuant to the judicial review provisions of the California Code.³² California Parties assert that any Commission determination now contrary to the California Restructuring and California Transfer Authorization Orders would be an impermissible collateral attack against those laws.³³

13. In support of their position, California Parties point to the California Restructuring Order, where CPUC ordered California’s three investor-owned utilities to submit to this Commission a proposal to establish an ISO and to transfer control of their transmission facilities to that ISO.³⁴ California Parties note that the California Restructuring Order explicitly required the investor-owned utilities to seek CPUC approval to transfer operational control of their transmission facilities to an ISO pursuant to section 851 of the California Code. In the California Transfer Authorization Order, California Parties state that CPUC granted the transfer of operational control of transmission facilities to CAISO under section 851 of the California Code, and further provided that any future transfers of operational control, such as from CAISO back to the three investor-owned utilities, would require CPUC authorization pursuant to section 851 of the California Code.³⁵

14. Thus, California Parties’ essential argument is this: PG&E is required to participate in CAISO because the California Restructuring and California Transfer Authorization Orders required the investor-owned utilities to obtain CPUC approval prior to making future transfers of operational control of transmission facilities (e.g., from CAISO back to the three California investor-owned utilities) under section 851 of

³¹ *Id.* (quoting *Greyhound Lines, Inc. v. Pub. Utils. Comm’n of Cal.*, 68 Cal. 2d 406, 410-11 (1968) (*Greyhound Lines*); *S. Cal. Edison Co. v. Peevey*, 31 Cal. 4th 781, 796 (2003) (*Peevey*) (internal quotations omitted)).

³² *Id.* at 8-12.

³³ *Id.* at 11-12.

³⁴ *Id.* at 12 (citing California Restructuring Order, 1995 WL 792086 at *99).

³⁵ *Id.* at 14-15 (citing California Transfer Authorization Order, 1998 WL 242747 at *7).

the California Code.³⁶ Therefore, PG&E is not entitled to the RTO-Participation Incentive because its membership is not voluntary and any withdrawal from CAISO requires CPUC authorization.³⁷

15. PG&E and Joint Utilities assert that California law does not require PG&E's participation in CAISO. They argue that PG&E's participation is voluntary and that CPUC could have compelled neither the formation of CAISO nor the transfer of operational control of Commission-jurisdictional transmission facilities to CAISO.³⁸ PG&E and Joint Utilities assert that these actions (i.e., creating CAISO and approving the transfer of operational control) are within the exclusive jurisdiction of this Commission.³⁹ PG&E supports its position with an analysis of California law beginning with the California Restructuring and California Transfer Authorization Orders and moving through relevant sections of the California Code.⁴⁰ Joint Utilities for the most part agree with PG&E's positions, adding that SoCal Edison has withdrawn several transmission facilities from CAISO's operational control and submitted filings only to this Commission, not CPUC, to do so.⁴¹ Joint Utilities state that CPUC did not object to SoCal Edison's actions despite being served with the withdrawal filings. Lastly, even assuming California law requires PG&E to seek CPUC approval to reacquire operational control of its transmission facilities, Joint Utilities argue that the decision to seek such approval remains with PG&E, and therefore its participation in CAISO is voluntary.⁴²

b. Reply Briefs

16. California Parties state that the California Transfer Authorization Order specifically: (1) stated that the investor-owned utilities would be required to obtain approval from CPUC under section 851 of the California Code when transferring

³⁶ *Id.* at 16.

³⁷ *Id.* at 16-19.

³⁸ PG&E Initial Brief at 2-3; Joint Utilities Initial Brief at 2-10.

³⁹ PG&E Initial Brief at 3; Joint Utilities Initial Brief at 2-6.

⁴⁰ PG&E Initial Brief at 4-8.

⁴¹ Joint Utilities Initial Brief at 8, n.20.

⁴² *Id.* at 9-10.

their assets away from CAISO;⁴³ (2) explained why the utilities' objections to this determination had no merit;⁴⁴ and (3) relied on section 3.3.3 of the Transmission Control Agreement between the utilities and CAISO to confirm that requiring section 851 approval would be permissible under the Transmission Control Agreement.⁴⁵ California Parties also note that SoCal Edison later petitioned CPUC to change its interpretation of section 851 of the California Code so that SoCal Edison could transfer its assets away from CAISO without CPUC approval, a request that CPUC denied.⁴⁶

17. Even treating the California Transfer Authorization Order's statements as dicta, California Parties argue that the *Erie* doctrine requires the order's consideration.⁴⁷ California Parties argue that "[t]he obligation to accept local law extends not merely to definitive decisions, but to considered dicta as well."⁴⁸ Additionally, California Parties respond to PG&E's and Joint Utilities' arguments that this Commission has exclusive jurisdiction over a utility's withdrawal from a transmission organization, arguing that the Commission has declined in the past to preempt state regulation of the transfer of control of transmission assets to or from a transmission organization.⁴⁹ Lastly, California Parties argue that, while Joint Utilities are correct that CPUC has not actively pursued enforcement actions against the utilities for their failure to seek section 851 authorization prior to transferring operational control of transmission assets, CPUC still retains such enforcement authority and has exercised its discretion not to pursue enforcement.⁵⁰

⁴³ *Id.* at 9 (citing California Transfer Authorization Order, 1998 WL 242747 at *7).

⁴⁴ *Id.* (citing California Transfer Authorization Order, 1998 WL 242747 at *10, n.2).

⁴⁵ *Id.* (citing California Transfer Authorization Order, 1998 WL 242747 at *7).

⁴⁶ *Id.* at 5 (citing CPUC, Decision No. 99-10-066, 3 CPUC 3d 198, 1999 WL 33588617 (Oct. 21, 1999)).

⁴⁷ *Id.* at 10 (citing *Doucet v. Middleton*, 328 F. 2d 97, 101-02 (5th Cir. 1964); *Hawks v. Hamill*, 288 U.S. 52, 59, 60 (1933); *N.Y. Life Ins. Co. v. Schlatter*, 203 F.2d 184, 187 (5th Cir. 1953); *Jackson v. Johns-Manville Sales Corp.*, 781 F. 2d 394, 397 (5th Cir. 1986); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202 (1956)).

⁴⁸ *Id.* at 9.

⁴⁹ *Id.* at 11-12 (citing *S. Cal. Edison Co.*, 89 FERC ¶ 61,009 (1999)).

⁵⁰ *Id.* at 17-18.

18. PG&E argues that California Parties misrepresent California law.⁵¹ First, PG&E argues that no California law requires PG&E to remain a member of CAISO indefinitely. Second, PG&E asserts that CPUC is incapable of compelling both the formation of CAISO and the transfer of operational control of Commission-jurisdictional transmission facilities from PG&E to CAISO, as both actions are within the exclusive jurisdiction of this Commission.⁵²

19. Joint Utilities agree with PG&E and argue that California Parties fail to demonstrate that California law requires PG&E to participate in CAISO.⁵³ Joint Utilities also argue that transfers of operational control of Commission-jurisdictional transmission facilities is solely within this Commission's jurisdiction.⁵⁴ Joint Utilities further note that no CPUC decision addresses the reacquisition of operational control of transmission facilities.⁵⁵ Even assuming that CPUC had authority to review the reacquisition of operational control of transmission facilities, Joint Utilities state that such review does not amount to state-mandated participation in CAISO. Rather, Joint Utilities assert that PG&E may still withdraw from CAISO at any time provided it meets the relevant regulatory requirements.⁵⁶

2. **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?**

a. **Initial Briefs**

20. California Parties state that the Commission is required to defer to CPUC's interpretation of California law in this case and argue that the *Erie* doctrine requires the Commission to apply California law here, including California Supreme Court precedent regarding the relevant California law.⁵⁷ California Parties state that the statutory law and

⁵¹ PG&E Reply Brief at 3.

⁵² *Id.* at 4.

⁵³ Joint Utilities Reply Brief at 3-4.

⁵⁴ *Id.* at 4-7.

⁵⁵ *Id.* at 7-11.

⁵⁶ *Id.* at 12.

⁵⁷ California Parties Initial Brief at 19.

California Supreme Court precedent make the California Restructuring and California Transfer Authorization Orders interpreting CPUC's authority under section 851 of the California Code final and binding in all collateral proceedings, including on this Commission.⁵⁸ Additionally, California Parties state that, even if those decisions had not become binding on this Commission, California law nonetheless provides that CPUC's interpretations of the California Code are to be upheld unless they lack "a reasonable relation to statutory purposes and language."⁵⁹

21. PG&E disagrees that the Commission should defer to CPUC on the matter at hand, primarily arguing that most of the arguments in CPUC's pleadings are not found in any actual CPUC decisions, but are instead litigation positions that are not entitled to deference.⁶⁰ PG&E reiterates that no interpretation of section 851 of the California Code supports the California Parties' assertion that PG&E is required to submit a filing to CPUC before taking back operational control of its transmission facilities from CAISO. According to PG&E, it is not aware of any case law that discusses whether, or to what extent, a federal agency should defer to state agencies when interpreting state statutes.⁶¹ PG&E also asserts that arguments advanced by CPUC in its pleadings to the Commission are inconsistent, in that, prior to TO16, CPUC did not assert that the California Restructuring and California Transfer Authorization Orders required PG&E to remain in CAISO despite PG&E's repeated requests for the RTO-Participation Incentive. Moreover, PG&E points out that if the California Restructuring and California Transfer Authorization Orders truly compelled utilities to remain in CAISO, CPUC's counsel should also have opposed the 50 basis point ROE incentive adder in rate cases submitted by SoCal Edison and SDG&E, which is not the case.⁶²

22. Similarly, Joint Utilities argue that they 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 state agency is charged with administering. Joint Utilities maintain that CPUC has not addressed the issue as to why a requirement of state

⁵⁸ *Id.* at 6-8. *See also supra* § I.C.1.a.

⁵⁹ California Parties Initial Brief at 19 (citing *Greyhound Lines*, 68 Cal. 2d at 410-11; *Peevey*, 31 Cal. 4th at 796).

⁶⁰ PG&E Initial Brief at 9 (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)).

⁶¹ *Id.* at 12.

⁶² *Id.* at 10-11.

regulatory approval makes a withdrawal involuntary, given that the state commission cannot act in an arbitrary manner.⁶³

b. Reply Briefs

23. California Parties state that PG&E and Joint Utilities claim to not be aware of case law addressing whether federal agencies should defer to a state agency's interpretation of state statutes that the state agency is charged with administering. California Parties, however, argue that the utilities have failed to consider *Erie* and its progeny.⁶⁴

24. PG&E responds by arguing that the *Erie* doctrine stands for the proposition that “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.”⁶⁵ PG&E notes that there is no California Supreme Court decision interpreting section 851 of the California Code with respect to the issue presented here, and the plain language of the statute cannot support the position being advanced here. PG&E states that under *West* and *King*, federal courts must “ascertain from all the available data what the state law is and apply it,”⁶⁶ and “where a state's intermediate appellate court has offered its interpretation, that interpretation is binding on the federal government ‘unless there is persuasive evidence that the highest state court would rule otherwise.’”⁶⁷ PG&E states that no appellate courts have spoken to the issues presented here, i.e., whether the California Code gives CPUC jurisdiction over the transfer of operational control of transmission facilities between PG&E and CAISO. Moreover, PG&E argues that there is persuasive evidence—namely, the plain language of the statute—that the California Supreme Court would rule against CPUC.

25. Joint Utilities also argue that the *Erie* doctrine is inapplicable here because the matter is governed by acts of Congress and involves issues relating to the operational control of transmission facilities, which are within this Commission's exclusive jurisdiction.⁶⁸ Joint Utilities argue that section 851 of the California Code is preempted

⁶³ Joint Utilities Initial Brief at 11.

⁶⁴ California Parties Reply Brief at 3.

⁶⁵ PG&E Reply Brief at 6 (quoting *Erie*, 304 U.S. at 78) (internal quotation marks omitted).

⁶⁶ *West*, 311 U.S. at 236-37.

⁶⁷ *King*, 333 U.S. at 158.

⁶⁸ Joint Utilities Reply Brief at 3-4.

by the FPA under either field or conflict preemption.⁶⁹ Joint Utilities assert that the FPA delegates to this Commission the exclusive jurisdiction to regulate the transmission and the sale at wholesale of electric energy in interstate commerce and this extends over all facilities used for such activities.⁷⁰ Thus, Joint Utilities argue that this Commission has exclusive jurisdiction concerning whether PG&E's facilities can be removed from CAISO's operational control. Furthermore, under conflict preemption, Joint Utilities assert that allowing CPUC to prevent PG&E's exit from CAISO would serve as "an obstacle to accomplishment and execution of the full purposes and objectives of Congress" were this Commission to grant a request from PG&E to leave CAISO.⁷¹ Lastly, even assuming that *Erie* applies, Joint Utilities argue that there is no final CPUC decision relating to the "reacquisition of operational control over property."⁷²

3. If the Commission is required to defer to 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?

a. Initial Briefs

26. California Parties argue that the standard to apply when deferring to CPUC is the same as that which a California court would apply.⁷³ According to CPUC, California

⁶⁹ Simply stated, field preemption is a form of implied preemption where Congress does not expressly declare that all state laws are preempted, but legislates in such a manner as to comprehensively occupy the entire field. Conflict preemption is another form of implied preemption, but it arises when it is impossible for someone or some entity to comply with both state and federal laws, or when the objectives of federal law would be thwarted by the state (i.e., when giving effect to state law would create a conflict with federal law). *See, e.g., Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016) (describing field and conflict preemption).

⁷⁰ Joint Utilities Reply Brief at 4-7.

⁷¹ *Id.* at 4-5.

⁷² *Id.* at 7-11.

⁷³ *See* California Parties Initial Brief at 20 (cross-referencing sections II.A and II.B of its brief, which rely, in part, on *Greyhound Lines*, 68 Cal. 2d at 410-11; *Peevey*, 31 Cal. 4th at 796).

courts would uphold CPUC's interpretations of the California Code unless they lack "a reasonable relation to statutory purposes and language."⁷⁴

27. PG&E does not believe that the Commission is required to defer to CPUC staff's interpretation of California law. Additionally, PG&E argues that California courts would accord interpretations contained in CPUC decisions little or no deference,⁷⁵ and there is no reason for this Commission to extend greater deference to CPUC decisions than they would receive before a California court.⁷⁶

28. Joint Utilities assert that the Commission is not required to defer to CPUC's interpretation of the relevant California laws, stating that deference is not appropriate where a state agency's interpretation is not a "reasoned and consistent view of a statute or regulation."⁷⁷ Joint Utilities focus on the term "otherwise dispose of" in section 851 of the California Code, arguing that it is not logical to extend this conclusion to instances where there is no disposal (such as reacquisition of operational control over transmission facilities).⁷⁸

b. Reply Briefs

29. PG&E replies to California Parties' initial brief by asserting that California courts do not afford CPUC decisions the kind of deference that California Parties would have the Commission afford them.⁷⁹ PG&E also states that when interpreting statutes, in particular, the agency's interpretation is "tak[en] into account," but such interpretations "are not binding or necessarily even authoritative."⁸⁰ PG&E also states that in a 2000

⁷⁴ *Id.* at 7-8 (citing *Greyhound Lines*, 68 Cal. 2d at 410-11; *Peevey*, 31 Cal. 4th at 796).

⁷⁵ PG&E Initial Brief at 13 (citing *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 7 (1998) (*Yamaha Corp.*)).

⁷⁶ *Id.* at 12-13 (citing *Yamaha Corp.*, 19 Cal. 4th at 7).

⁷⁷ Joint Utilities Initial Brief at 12 (citing *Idaho Dep't of Health & Welfare v. U.S. Dep't of Energy*, 959 F.2d 149, 152 (9th Cir. 1992)).

⁷⁸ *Id.* at 12-13.

⁷⁹ PG&E Reply Brief at 10.

⁸⁰ *Id.* (quoting *PG&E Corp. v. Pub. Utils. Comm'n*, 118 Cal. App. 4th 1174, 1195 (2004); *S. Cal. Edison Co. v. Pub. Utils. Comm'n*, 85 Cal. App. 4th 1086, 1096 (2000)).

revision to section 1757 of the California Code, which relates to the scope of judicial review, the California legislature stated that:

It is further the intent of the Legislature to conform judicial review of the [CPUC] decisions that pertain to utility service providers with competitive markets to be consistent with judicial review of the other state agencies. . . . Further, it is the intent of the Legislature that decisions of the [CPUC] pertaining to the energy, transportation, and communications industries be subject to review on grounds similar to those of other state agencies.⁸¹

4. 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?

a. Initial Briefs

30. California Parties decline to identify an applicable standard.⁸² California Parties state that any standard applied by CPUC would take into account the controlling law, including relevant laws of California, the public interest standard, and the specific circumstances at that point in time. In any event, California Parties argue that the question is irrelevant, since the decision of whether PG&E may leave CAISO is CPUC's decision to make, regardless of any standard CPUC might apply.⁸³

31. PG&E responds that it does not believe any reading of section 851 of the California Code (or any other provision of the California Code) would require PG&E to seek CPUC approval to take back operational control of transmission facilities from CAISO. PG&E maintains that it could not guess what standard CPUC might apply in the case of a withdrawal because PG&E believes that CPUC's position before the Commission has changed over time: first, PG&E states, CPUC did not make an issue of the RTO-Participation Incentive for many years, but began so doing in TO16 (asserting that PG&E's participation in CAISO was not voluntary); then, according to PG&E, CPUC changed its position in recent times to simultaneously argue that section 851 of the

⁸¹ *Id.* at 10-11 (quoting 2000 Cal. Stat. (Ch. 953) at 7023-7024).

⁸² *See* California Parties Initial Brief at 20 (stating that this question asks CPUC to “engage in speculation and prejudge an issue”).

⁸³ *Id.*

California Code requires CPUC permission for PG&E to leave CAISO, but also that CPUC cannot authorize PG&E's withdrawal from CAISO without a change in law. The dichotomy between these two seemingly conflicting ideas, PG&E asserts, indicates that it is reasonable to conclude that CPUC might not apply a specific standard in considering the matter.⁸⁴

32. Joint Utilities reiterate that PG&E is not required to seek CPUC approval to withdraw from CAISO, but for the purposes of providing an answer to the Commission's question, they state that the standard of review under section 851 of the California Code is "whether [the transfer] is adverse to the public interest, includ[ing] the ratepayer interest."⁸⁵

b. Reply Briefs

33. PG&E responds to California Parties' refusal to respond to this question by stating that CPUC is taking contradictory positions, because it has argued in other proceedings that CPUC lacks the authority to decide whether PG&E may leave CAISO without a change in the law.⁸⁶ PG&E further argues that only this Commission would need to approve its withdrawal application as the Transmission Control Agreement is Commission-jurisdictional and CAISO is Commission-jurisdictional.⁸⁷ PG&E argues that California Parties are essentially arguing that CPUC can interfere with this Commission's jurisdiction to administer rate schedules, and such an argument must be rejected.⁸⁸

5. Other Arguments

a. Initial Briefs

34. In addition to answering the questions posed above, California Parties argue that the Commission misconstrues the scope of the remand ordered by the Ninth Circuit.⁸⁹ California Parties argue that the Ninth Circuit's directive to "inquire into PG&E's specific circumstances, i.e., whether it could unilaterally leave [CAISO] and thus whether

⁸⁴ PG&E Initial Brief at 14-15.

⁸⁵ Joint Utilities Initial Brief at 14-15.

⁸⁶ PG&E Reply Brief at 14.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ California Parties Initial Brief at 2.

an incentive adder could induce it to remain in [CAISO]”⁹⁰ is nothing more than a description of the Commission’s error and does not give the Commission specific instructions to look behind CPUC’s interpretation of California law.⁹¹ California Parties read the Ninth Circuit’s opinion as holding that the Commission needs to explain why CPUC’s showing that PG&E was not a voluntary member of CAISO did not rebut Order No. 679’s rebuttable presumption that membership in an RTO/ISO qualified a utility for an ROE adder.⁹² California Parties thus argue that the only outcome consistent with the Ninth Circuit’s opinion would be to deny PG&E’s request for the RTO-Participation Incentive.⁹³

35. PG&E argues that the Commission should clarify its interpretation of Order No. 679 to make clear that ongoing participation in an RTO/ISO qualifies the participating utility for the 50 basis point ROE adder.⁹⁴ PG&E states that if all that is required to defeat the Commission’s incentive policies is for a state regulatory agency’s counsel to assert, in pleadings before this Commission, that a state law requires continuing participation in an RTO/ISO, then state regulatory counsel can quickly and easily subvert the Commission’s policies. At a minimum, PG&E states that the Commission should rule that the mere assertion by counsel of some state law requirement in a pleading does not suffice to override Order No. 679.⁹⁵ Alternatively, PG&E claims that the Commission could resolve the issue before it on remand by stating clearly that it is the Commission’s interpretation of its Order No. 679 that continuing participation in an RTO/ISO entitles a utility to the 50 basis point ROE adder even in the face of assertions that the continued participation is required by state law. PG&E distinguishes between legislative rules and interpretative rules, and argues that only the former require notice and comment periods.⁹⁶

36. Lastly, Joint Utilities argue that the Commission should not limit its evaluation regarding the applicability of an incentive adder solely to whether participation is

⁹⁰ *CPUC v. FERC*, 879 F.3d at 979.

⁹¹ California Parties Initial Brief at 2, 3.

⁹² *Id.* at 3.

⁹³ *Id.* at 3-4.

⁹⁴ PG&E Initial Brief at 16-19.

⁹⁵ *Id.* at 16.

⁹⁶ *Id.* at 17-19.

voluntary.⁹⁷ Instead, Joint Utilities urge the Commission to analyze all of PG&E's relevant circumstances, including the many benefits to consumers of CAISO membership.⁹⁸

b. Reply Briefs

37. Replying to PG&E and Joint Utilities, California Parties first argue that PG&E is incorrect in maintaining that even those utilities that are required by state law to participate in an RTO/ISO are eligible for the RTO-Participation Incentive.⁹⁹ California Parties argue that state-mandated participation in RTOs/ISOs would further the Commission's broader policy interests in promoting RTO/ISO participation, not undermine them.¹⁰⁰ California Parties also argue that the Commission cannot change its interpretation of Order No. 679 retroactively to permit the grants of membership incentives even when continued membership is not voluntary.¹⁰¹

38. Both PG&E and Joint Utilities disagree with the assertion that the Commission misconstrued the scope of this proceeding. Joint Utilities argue that California Parties incorrectly assert that the Ninth Circuit held that California law prevents PG&E's departure from CAISO without CPUC authorization. They contend that the Ninth Circuit explicitly did not reach this issue, and that the Commission has not misconstrued the scope of the issues on remand.¹⁰² Joint Utilities quote the Ninth Circuit's statement that to "satisfy Order [No.] 679's case-by-case analysis requirement and to avoid creating a generic adder, FERC needed to inquire into PG&E's specific circumstances, i.e., whether it could unilaterally leave the [CAISO] and thus whether an incentive adder could induce it to remain in the [CAISO]."¹⁰³ Accordingly, Joint Utilities assert that the Commission must properly examine PG&E's specific circumstances, including whether state law requires PG&E's participation in CAISO, to determine whether PG&E is entitled to the 50 basis point adder.

⁹⁷ Joint Utilities Initial Brief at 16-17.

⁹⁸ *Id.* at 17.

⁹⁹ California Parties Reply Brief at 13-14.

¹⁰⁰ *Id.* at 14-15.

¹⁰¹ *Id.* at 16-17.

¹⁰² Joint Utilities Reply Brief at 2.

¹⁰³ *Id.* at 3 (quoting *CPUC v. FERC*, 879 F.3d at 979).

39. PG&E reiterates this point, stating that nowhere in *CPUC v. FERC* is there any substantive discussion of California law, nor does it make any decision or holding concerning California law.¹⁰⁴ PG&E also argues that the California Parties misconstrue the scope of the issues on remand by asserting that the Ninth Circuit expressly acknowledged that state law prevented PG&E's departure from CAISO without CPUC authorization. PG&E rather argues that the only reasonable interpretation of the scope of the issues on remand is the scope contained in the Order on Remand.¹⁰⁵

II. Discussion

A. Scope of Remand

40. As a preliminary matter, we disagree with California Parties' arguments relating to the scope of the remand. California Parties erroneously assume that the Ninth Circuit found that California law mandates PG&E's ongoing participation in CAISO. While acknowledging that the Commission and PG&E argued that PG&E's participation in CAISO is voluntary, the court did not address those arguments because they were not discussed in the underlying Commission orders.¹⁰⁶ Moreover, in remanding the proceeding to the Commission, the court made no findings regarding state law, and concluded its opinion by stating "[w]e need not, and do not, reach any other issue urged by the parties."¹⁰⁷ The Ninth Circuit remanded the proceeding to the Commission for further proceedings consistent with its opinion, expressly finding: "To satisfy Order [No.] 679's case-by-case analysis requirement and to avoid creating a generic adder, FERC needed to inquire into PG&E's specific circumstances, i.e., whether it could unilaterally leave the [CAISO] and thus whether an incentive adder could induce it to remain in the [CAISO]."¹⁰⁸ The merits of CPUC's arguments regarding state law bear upon the issue framed by the Ninth Circuit, and thus we must address them on remand.

B. The Erie Doctrine and Deference

41. We disagree with the California Parties that the *Erie* doctrine applies here because, as a creature of federal statute created by Congress, this Commission's subject matter jurisdiction over proceedings before it arises solely under the acts that the Commission is

¹⁰⁴ PG&E Reply Brief at 2.

¹⁰⁵ *Id.* at 2-3.

¹⁰⁶ *CPUC v. FERC*, 879 F.3d at n.5.

¹⁰⁷ *Id.* at 980.

¹⁰⁸ *Id.* at 979.

required to administer (as a federal question under, for example, the FPA).¹⁰⁹ Specifically, the issue here involves the transmission and sale at wholesale of electric energy in interstate commerce, over which the FPA provides exclusive jurisdiction to this Commission. *Erie* applies to those cases where a federal *court's* subject matter jurisdiction is based on diversity jurisdiction.¹¹⁰ California Parties cite no cases involving this Commission or other federal agencies to support their position that *Erie* is relevant to the circumstances here.¹¹¹

C. Inquiry into PG&E's Specific Circumstances

42. We next turn to the substantive question presented to us by the Ninth Circuit: “To satisfy Order [No.] 679’s case-by-case analysis requirement and to avoid creating a generic adder, FERC needed to inquire into PG&E’s specific circumstances, i.e., whether it could unilaterally leave the [CAISO] and thus whether an incentive adder could induce it to remain in the [CAISO].”¹¹² As discussed below, we conclude that the relevant provisions of the California Code do not mandate PG&E’s participation in CAISO, or prohibit PG&E from unilaterally withdrawing from CAISO, and that California Parties’ interpretation of the California Transfer Authorization Order is inconsistent with the express language of the California Code.

43. California Parties point to no provision in the California Code that mandates RTO/ISO membership, and our survey of the provisions of the California Code identified on the record here reveals none. 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

¹⁰⁹ 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”).

¹¹⁰ A federal court is said to have “diversity jurisdiction” when its subject matter jurisdiction over a controversy arises not from federal law but from the diversity of citizenship among the parties (i.e., the parties are from different states), and the remedy sought is for a sum of money sufficient to trigger federal jurisdiction (currently \$75,000). Because federal law is not implicated, the substantive law of the state is applied. See, e.g., 13D Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc.* ch. 2-3 (3d ed. Nov. 2018).

¹¹¹ We note that California Parties also do not cite to any principles of administrative law that require a federal agency to defer to a state agency.

¹¹² *CPUC v. FERC*, 879 F.3d at 979.

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 that results in an equitable return on capital investment in transmission facilities for all Independent System Operator participants.¹¹³

44. 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.¹¹⁴

45. The language of these statutory provisions does not mandate participation in CAISO. Rather, as the language highlighted above suggests, these provisions speak in terms of encouragement and facilitation of participation. We cannot reasonably read these provisions as mandating participation in CAISO. 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.

¹¹³ Cal. Pub. Util. Code § 330(m) (emphasis added).

¹¹⁴ *Id.* § 365 (emphasis added).

46. In the absence of any section of the California Code directly addressing RTO/ISO membership that supports their position, California Parties rely largely upon the California Transfer Authorization Order and, in particular, the following language:

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.¹¹⁵

47. According to the California Parties, the California Transfer Authorization Order interprets section 851 of the California Code as requiring PG&E to seek CPUC approval before withdrawing from CAISO.¹¹⁶ However, we find that any such interpretation of the California Transfer Authorization Order is 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.¹¹⁷

¹¹⁵ 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.

¹¹⁶ *See* California Parties Initial Brief at 8-17; 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).

¹¹⁷ Cal. Pub. Util. Code § 851.

48. California Parties rely on the language “or otherwise dispose of” to assert that CPUC must approve transfers of operational control of PG&E’s transmission facilities.¹¹⁸ However, the language of section 851 does not explicitly give CPUC jurisdiction over transfers of *operational* control, and we believe that, when interpreting the language “or otherwise dispose of,” the California Supreme Court may, while applying traditional canons of statutory construction,¹¹⁹ determine that transfers of *operational* control are outside the scope of section 851. Specifically, the language in that provision relating to “[sales], lease[s], assign[ments], [and] mortgage[s]” refers to exchanges of proprietary rights, and we thus find that 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. If the legislature had intended that section 851 govern transfers of operational control, we conclude that it would have been more reasonable to spell that out expressly, rather than include it as part of what is essentially a catch-all phrase that immediately follows language that governs transfers of proprietary rights.

49. Our reading of section 851 of the California Code is also informed by the United States Court of Appeals for the District of Columbia Circuit’s (D.C. Circuit) decision in *Atlantic City Electric Company v. FERC*.¹²⁰ There, the D.C. Circuit interpreted FPA section 203,¹²¹ which assigns to this Commission authority analogous to the authority that

¹¹⁸ California Transfer Authorization Order, 1998 WL 242747, at *4.

¹¹⁹ 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 (11th ed. 2019) Const. Law § 136.

¹²⁰ 295 F.3d 1 (D.C. Cir. 2002) (*Atlantic City*).

¹²¹ 16 U.S.C. § 824b (2012). For comparison’s sake, at the time *Atlantic City* was decided FPA section 203 provided:

“No public utility shall *sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission*, or any part thereof of a value in excess of \$50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any

section 851 of the California Code assigns to CPUC. The D.C. Circuit concluded that FPA section 203 does not confer jurisdiction upon this Commission over the transfer of operational control of transmission facilities necessary to join or withdraw from an RTO/ISO.¹²² In the underlying orders under review, the Commission found that the proposal by certain public utilities to transfer operational responsibilities over their transmission facilities to PJM Interconnection, L.L.C. involved a disposition of jurisdictional facilities within the meaning of section 203 and, therefore, required Commission authorization. The Commission also prohibited the withdrawal of those public utilities from PJM without Commission preapproval. The D.C. Circuit disagreed with the Commission's interpretation of section 203, finding that "[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."¹²³ 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.¹²⁴ Instead, the court noted that the Commission's authority over transfers of operational control stemmed from its authority under FPA section 205.¹²⁵

50. As California courts have applied *noscitur a sociis* in other contexts,¹²⁶ and given the D.C. Circuit's interpretation of the analogous FPA section 203, we are not persuaded by the argument that section 851 of the California Code requires CPUC to approve transfers of *operational* control of transmission facilities. Nor have California Parties cited any California court opinions interpreting section 851 to support their position. Accordingly, we find that section 851 of the California Code does not support California Parties' position. California Parties fail to point to any other section of the California Code that requires PG&E to seek CPUC's approval before withdrawing from CAISO.

security of any other public utility, without first having secured an order of the Commission authorizing it to do so."

Atlantic City, 295 F.3d at 5 (quoting 16 U.S.C. § 824b(a) (2000)).

¹²² *Id.* at 11-13.

¹²³ *Id.* at 11.

¹²⁴ *Id.* at 12.

¹²⁵ *Id.*

¹²⁶ *See supra* n.119.

51. Further, under Commission precedent and policy, PG&E's participation in CAISO is voluntary. In Order No. 2000,¹²⁷ the Commission determined that the most appropriate approach for facilitating the creation and efficient expansion of RTOs/ISOs was to make membership in the organizations voluntary for public utilities.¹²⁸ This longstanding policy of voluntary RTO/ISO formation and membership remains unchanged, and is reflected in CAISO's currently-effective Transmission Control Agreement—a Commission-jurisdictional agreement on file with the Commission—which allows PG&E to withdraw from CAISO by providing two-years' written notice to other CAISO members and receiving the necessary regulatory approvals.¹²⁹

52. As the Commission explained in Order No. 679, the basis for the RTO-Participation Incentive is a recognition of the benefits that flow from RTO/ISO membership and the fact continuing membership is generally voluntary.¹³⁰ 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, we find that PG&E could unilaterally leave CAISO without obtaining CPUC authorization. Consequently, we find that the RTO-Participation Incentive induces PG&E to remain a participating

¹²⁷ See *Regional Transmission Organizations*, Order No. 2000, 89 FERC ¶ 61,285 (1999), *order on reh'g*, Order No. 2000-A, 90 FERC ¶ 61,201 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

¹²⁸ See Order No. 2000, 89 FERC ¶ 61,285 at 31,033 (“we continue to believe . . . that at this time we should pursue a voluntary approach to participation in RTOs”). See also Order No. 679, 116 FERC ¶ 61,057 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.”).

¹²⁹ CAISO, Amended and Restated Transmission Control Agreement, §§ 3.3.1, 3.3.3. While 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.

¹³⁰ See Order No. 679, 116 FERC ¶ 61,057 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.”); 16 U.S.C. § 824s(c) (requiring the Commission to create an incentive to encourage utilities to join Transmission Organizations, as defined in FPA section 3(29), 16 U.S.C. § 796(29) (2012)).

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member of CAISO and is consistent with the directives of FPA section 219.¹³¹ Accordingly, we reaffirm the continuation of PG&E's 50 basis point ROE adder.¹³²

The Commission orders:

(A) We hereby find that PG&E is a voluntary member of CAISO and is therefore eligible for and entitled to the RTO-Participation Incentive, as discussed in the body of this order.

(B) We hereby reaffirm the continuation of PG&E's 50 basis point ROE adder, as discussed in the body of this order.

By the Commission. Commissioner Glick is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

¹³¹ 16 U.S.C. § 824s(c).

¹³² In reaching this conclusion, the Commission is not addressing the preemption arguments raised by certain parties, but may address that issue in the future, if warranted.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company

Docket Nos. ER14-2529-005
ER15-2294-004
ER16-2320-004
(consolidated)

(Issued July 18, 2019)

GLICK, Commissioner, *concurring*:

1. I join today's order because the California Parties¹ have not demonstrated that Pacific Gas and Electric Company (PG&E) is required by California law or regulation to remain a member of the California Independent System Operator (CAISO). I previously dissented from a Commission order granting an RTO-Participation Incentive to Southern California Edison (SoCal Edison)²—another of California's investor-owned utilities that is, as relevant here, in the same shoes as PG&E. In that order, the Commission took the position that the voluntary nature of SoCal Edison's membership in CAISO was irrelevant to whether an RTO-Participation Incentive was just and reasonable; all that mattered was that SoCal Edison remained a CAISO member.³ I dissented from that order because, assuming that the California Public Utility Commission was correct in arguing that SoCal Edison was required to remain in CAISO—an argument that the Commission at that point did not dispute⁴—there was nothing for the RTO-Participation Incentive to

¹ The California Parties are the California Public Utilities Commission, the Sacramento Municipal Utility District, and the Transmission Agency of Northern California.

² *S. California Edison Co.*, 161 FERC ¶ 61,309 (2017) (Glick, Comm'r, dissenting) (SoCal Edison Order).

³ *Id.* P 25; *see also California Pub. Utilities Comm'n v. FERC*, 879 F.3d 966, 974 (9th Cir. 2018) (*CPUC v. FERC*) (explaining that, under the Commission's interpretation in place at the time, a transmission owner's "ongoing membership itself is the sole criterion for receipt of an incentive adder").

⁴ SoCal Edison Order, 161 FERC ¶ 61,309 at P 25 & n.49.

incentivize.⁵ I concluded that awarding a 50-basis-point ROE adder under those circumstances was unjust and unreasonable and not the product of reasoned decisionmaking.

2. While rehearing was pending in that proceeding, the U.S. Court of Appeals for the Ninth Circuit issued its decision in this PG&E proceeding. The court held that the Commission was arbitrary and capricious in awarding PG&E an RTO participation adder.⁶ The court explained that the Commission has “a longstanding policy that incentives should only be awarded to induce future behavior”⁷ and that awarding an RTO-Participation Incentive to a utility that is required to remain in an RTO conflicted with that policy.⁸ In addition, the Court held that by granting PG&E an RTO-Participation Incentive without addressing the California Public Utility Commission’s arguments that there was nothing to incentivize, the Commission had created a “generic incentive” in violation of its own clearly articulated policy.⁹ The court remanded the proceeding to the Commission to address those issues and to engage in a case-specific review of PG&E’s application for an RTO-Participation Incentive.

3. Today’s order responds to the court’s remand by finding that PG&E’s membership in CAISO is voluntary and not required by California law or regulation. I agree with the outcome for the reasons stated in the Commission’s order.¹⁰ As a result of that finding, Commission precedent provides that PG&E is presumptively eligible for an RTO-Participation Incentive.¹¹ Because the California Parties opposed awarding PG&E an

⁵ *Id.* (Glick, Comm’r, dissenting at 2).

⁶ *CPUC v. FERC*, 879 F.3d at 977-79.

⁷ *Id.* at 977; *see id.* at 979 (“FERC needed to inquire into PG&E’s specific circumstances, i.e., whether it could unilaterally leave the Cal-ISO and thus whether an incentive adder could induce it to remain in the Cal-ISO.”)

⁸ *Id.* at 978-79 (explaining that the Commission’s award of an incentive adder to PG&E was an unexplained departure from the Commission’s longstanding policy).

⁹ *Id.* at 979.

¹⁰ *Pac. Gas & Elec. Co.*, 168 FERC ¶ 61,038, at PP 42-50 (2019).

¹¹ Order No. 679 provides that a transmission-owning public utility that is a member of an RTO will be presumed eligible for the RTO-Participation Incentive. *See Promoting Transmission Investment through Pricing Reform*, Order No. 679, Promoting Transmission Investment through Pricing Reform, Order No. 679, 116 FERC ¶ 61,057, at P 327, order on reh’g, Order No. 679-A, 117 FERC ¶ 61,345 (2006), order on reh’g, 119

RTO participation adder on the grounds that the incentive is not justified because PG&E is required to remain in CAISO, they have not rebutted that presumption of eligibility, thereby entitling PG&E to a 50-basis point ROE adder. Nevertheless, the Commission's reasoning—particularly its decision to resolve this proceeding based entirely on an inquiry into whether PG&E is required to remain in CAISO—suggests that if state law actually required PG&E to remain in CAISO, an RTO-Participation Incentive might well be inappropriate.

4. Finally, the record in this proceeding reinforces the importance of taking a hard look at the RTO-Participation Incentive in the Commission's ongoing proceeding to examine its transmission incentives policy.¹² The Commission's current approach to incentivizing RTO participation hands transmission owners across the country hundreds of millions of dollars every year¹³ with little indication that any of that money makes a meaningful difference in their decisions to enter or remain in an RTO. RTOs provide numerous benefits and there is widespread state support for transmission owners participating in RTOs. Given the broad, and seemingly growing, consensus on the importance of RTOs, the Commission must carefully review whether the RTO-Participation Incentive remains money well spent and is consistent with our obligation under the FPA to ensure that transmission rates are just and reasonable.¹⁴

For these reasons, I respectfully concur.

Richard Glick
Commissioner

FERC ¶ 61,062 (2007).

¹² *Inquiry Regarding the Commission's Electric Transmission Incentives Policy*, 166 FERC ¶ 61,208 (2019); *see also id.* P 38 (posing questions regarding the RTO-Participation Incentive).

¹³ PG&E alone earns \$30 million annually from the RTO-Participation Incentive. *See* Protest of the California Public Utilities Commission, Docket No. ER16-2320-001, at 9-10; *see also* Protest of the California Public Utilities Commission, Docket No. ER18-169-000, at 10 (stating that SoCal Edison would earn over \$25 million from the RTO-Participation Incentive in 2018).

¹⁴ 16 U.S.C. § 824d, 824e; *see also* 16 U.S.C. 824s(d) (providing that “[a]ll rates approved under the rules adopted pursuant to this section, including any revisions to the rules, are subject to the requirements of sections 824d and 824e of this title that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential”).

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