Decision 02-09-023 September 5, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Authority to Institute a Rate Stabilization Plan with a Rate Increase and End of Rate Freeze Tariffs.	Application 00-11-038
Emergency Application of Pacific Gas and Electric Company (U 39 E) to Adopt a Rate Stabilization Plan.	Application 00-11-056
Petition of The Utility Reform Network for Modification of Resolution E-3527.	Application 00-10-028

ORDER MODIFYING DECISION (D.) 02-03-058 AND DENYING REHEARING OF THE DECISION, AS MODIFIED

This order modifies Decision (D.) 02-03-058 (Decision) and denies Pacific Gas and Electric Company's (PG&E) application for rehearing of the Decision, as modified. The Decision determined that certain "Disputed ISO Charges," which had been paid by DWR, were properly part of Pacific Gas and Electric Company's (PG&E) and Southern California Edison Company's (Edison) utility retained generation (URG) revenue requirements. Thus, the Decision ordered PG&E and Edison to reimburse the California Department of Water Resources (DWR) for these charges.

I. BACKGROUND

The dispute between DWR and the utilities over these ISO charges arises from the Federal Energy Regulatory Commission's (FERC) proceedings addressing the creditworthiness requirements in the California Independent System Operator's (ISO's) tariff. These requirements apply to, *inter alia,* Utility Distribution Companies (UDCs) (such as PG&E and Edison) and to Scheduling

Coordinators (such as the California Energy Resources Scheduling division (CERS) of DWR). (See ISO Tariff § 2.2.3.2) Scheduling Coordinators and UDCs that do not meet the ISO tariff's creditworthiness requirements are subject to a limitation on their ability to trade with, and may not submit schedules to, the ISO. (See generally, *California Independent System Operator* (March 27, 2002) 98 FERC ¶ 61,355, at p. 62,419; ISO Tariff, § 2.2.7.3.) In order to be creditworthy, an entity must either maintain an "Approved Credit Rating" as defined in the ISO tariff, or post security. (*Id.*)

In January 2001, the deterioration of PG&E's and Edison's financial condition prevented them from meeting the ISO's creditworthiness requirements. Thus, in a February 14, 2001 order, the FERC determined how the creditworthiness provisions should be implemented in light of the utilities' financial problems. The FERC kept the creditworthiness requirements in place, allowing an exception only for UDCs scheduling their own generation. However, the UDCs were required to obtain a creditworthy party to cover their net short position. (98 FERC ¶ 61,355, at p. 62,419.) DWR subsequently agreed to serve as the creditworthy buyer for PG&E's and Edison's net short positions. (*Id.*)

On November 7, 2001, the FERC issued an order (November 7 Order) addressing, among other things, a motion filed by several California generators and municipal utilities (collectively, "Generators"). The motion alleged that the ISO had violated both the creditworthiness requirements in its tariff and the FERC's February 14 order. Generators argued that the ISO violated its own tariff by failing to enforce the credit support requirements of the tariff. Generators also asserted that the ISO was permitting DWR to schedule power for the net short loads without requiring DWR to meet the explicit responsibilities and financial obligations imposed on a Scheduling Coordinator. (*California Independent System Operator* (November 7, 2001) 97 FERC ¶ 61,151, at p. 61,655; see also *Id.*, n.16.) In answer to the motion, the ISO asserted that the

FERC's February order only required a creditworthy buyer for purchases, and the fact that DWR stood behind the utilities rendered the utilities "creditworthy" for purposes of the ISO's tariff. (97 FERC ¶ 61,151, at p. 61,656.) Moreover, since the ISO settlement provisions did not provide for third party guarantors, the ISO believed that PG&E and Edison, and not DWR, should be invoiced for the power purchases backed by DWR. (*Id.*) The ISO asserted that its tariff did not provide for sending bills to third party guarantors. Thus, based on its interpretation of the FERC's February 14 order, the ISO did not invoice DWR for the charges associated with procuring power to cover the utilities' net short positions. The ISO's stance resulted in a serious practical problem: since the utilities (the ones invoiced for DWR-backed power purchases) did not pay the ISO's invoices, the ISO was not collecting money for its charges. As a result, the generators were not being paid by the ISO.

In the November 7 Order, the FERC disagreed with the ISO's tariff interpretations and stated that: "[w]e also disagree with the ISO and DWR's representation that under the Tariff the ISO must invoice the non-creditworthy UDCs, or that a new contractual arrangement is necessary for DWR to assume financial responsibility as the guarantor for the non-creditworthy UDCs." (97 FERC ¶ 61,151, at p. 61,659.) The FERC tied the requirement that a creditworthy counterparty back the transaction to its must-offer requirement, noting that "[t]he must offer requirement assumes a matching must pay requirement. (97 FERC ¶ 61,151, at p. 61,659.) The FERC concluded that "because DWR functions as a Scheduling Coordinator for [the] net short position of PG&E and Edison, DWR must abide by the requirements of the ISO Tariff and the Scheduling Coordinator Agreement." (*Id.*) Under the ISO tariff, the ISO is required to "invoice, collect payments from, and distribute payments to DWR, as the Scheduling Coordinator . . ., including transactions where DWR serves as the creditworthy counterparty for the applicable portion of PG&E's and SoCal Edison's load." (*Id.*) In part, this finding relied on the settlement provisions of the ISO tariff, negating the ISO's claim that DWR was "a guarantor, . . . not the debtor under the ISO settlement procedures." (Compare 97 FERC ¶ 61,151, at p. 61,656 with 97 FERC ¶ 61,151, at p. 61,659, fn. 25.)

A dispute between DWR and the utilities over ultimate responsibility for certain ISO charges emerged after this order. Under the ISO tariffs, Scheduling Coordinators are assessed a variety of charges. (See ISO Tariff § 11.1.6.) In a December 6, 2001 letter to Commissioner Brown, DWR outlined the different charges levied by the ISO and indicated that it believed that DWR was "ultimately" responsible for what DWR called "energy-related costs," while the utilities were "ultimately" responsible for various "non-energy costs" (such as penalties incurred by the utilities in the operation of their own generation, the ISO's Grid Management Charge (GMC), and transmission costs).[1] DWR engaged this issue at the FERC in a December 12, 2001 Protest of an ISO filing (which was in turn a response to the November 7 order). DWR protested that:

> instead of invoicing CERS only for costs relating to the "net short position, i.e., power that is not self-supplied by the UDCs" (Order, at 61,653 n.2), the ISO has invoiced CERS for amounts (1) relating not only to "power that is not self-supplied," but also covering all costs associated with load of the UDCs and (2) admittedly in excess of the IOUs' net short position. (Protest of DWR to California ISO Compliance Filing, dated December 12, 2001, at p. 5.)

PG&E and Edison, along with PG&E's unsecured creditors, asserted in response to DWR's protest that the November 7 order required DWR to actually assume liability for <u>all</u> ISO charges. (98 FERC ¶ 61,355, at pp. 62,423, 62,426.)

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[1] See DWR's December 6, 2001 memorandum to Commissioner Brown, beginning with the third paragraph.

In an order issued March 27, 2002 (March 27 Order), the FERC clarified its creditworthiness requirements and denied rehearing of the November 7 Order. The March 27 Order reaffirms that DWR should pay the ISO charges associated with its role as the Scheduling Coordinator and creditworthy buyer for PG&E's and Edison's net short positions. (98 FERC ¶ 61,355, at p. 62,434.) However, the March 27 Order also denies a request from PG&E and Edison that the ISO tariff be revised to clarify that PG&E and Edison should not be responsible for the Disputed ISO Charges. Most significantly for purposes of this rehearing request, the FERC held that "it is beyond the scope of this ruling to determine if the non-creditworthy UDCs remain ultimately liable for the purchases DWR procured on their behalf and which it is immediately responsible for paying." (98 FERC ¶ 61,355, at p. 62,426.)

The Decision was issued on March 25, 2002, ahead of the Commission's main decision on Utility Retained Generation (URG). The Commission found that ISO cost issues were ripe for decision, in part because DWR and Edison had reached agreement about how the Disputed ISO Charges should be handled. (Decision, at p. 2.) Furthermore, the Decision noted that if it had not acted at its March 21st meeting, it would have faced a requirement to raise DWR's 2001-2002 revenue requirement by $609 million.[2] (Decision, at p. 2.)

PG&E filed a timely application for rehearing of the Decision.[3] We have carefully considered all the arguments presented by PG&E and are of the opinion that no grounds for rehearing have been demonstrated. However, we note that the Decision should be modified to clarify the nature of DWR's recovery of the Disputed ISO Costs and to correct two clerical errors. Therefore, D.02-03-058

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[2] This requirement stems from a February 21, 2002 letter from DWR. The Disputed ISO Charges allocated to PG&E in the Decision is approximately $268.5 million.

[3] The Decision does not implement the provisions of AB 1X and thus, is not subject to expedited appeal under Public Utilities Code sections 1731(c) and 1768. In this instance, the Decision is subject to the timeframes established under sections 1731(b) and 1756(a). However, PG&E filed its rehearing application within the 10-day timeframe established by section 1731(c), "in an abundance of caution."

is modified as discussed below, and PG&E's application for rehearing of the Decision, as modified, is denied.

II. DISCUSSION

PG&E claims the Decision is in error for two reasons. First, it alleges that the Disputed ISO Charges are DWR costs that cannot be allocated to PG&E. Second, it asserts that the Decision conflicts with and is preempted by the FERC's Orders. Most of the application's arguments hinge on PG&E's main assertion: DWR, and only DWR, bears legal responsibility for the Disputed ISO Charges. PG&E bases its assertion on the FERC's November 7 and March 27 Orders, which required the ISO to invoice DWR for all charges associated with DWR's role as the creditworthy buyer of the utilities' net short positions. As discussed below, PG&E's reliance on the FERC's orders for its assertion is misplaced, and provides no basis for finding error.

A. The Disputed ISO Charges Can Be Allocated to PG&E

PG&E raises a number of legal arguments why the Disputed ISO Charges should be considered DWR's costs. Most of these arguments are based on state law.

PG&E first asserts that the Disputed ISO Charges are "part of the costs DWR is incurring to meet the needs of utility customers." (Application, at p. 2.) However, whether or not the amounts billed to DWR merely because DWR is creditworthy should be treated the same as costs associated with DWR's purchase of the net short is the question at issue here, not a point that can be assumed. A review of the Disputed ISO Charges indicates that these charges are not related to DWR's procurement of the utilities' net short, but are related to PG&E's provision of electricity to its customers using PG&E's generation.[4] PG&E cannot

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[4] The Disputed ISO Charges are: Grid Management Charge (GMC), Congestion, Demand Relief, Summer Reliability, Wheeling Charges, Voltage Support and Penalties.

demonstrate that these costs are the same as DWR's energy costs by simply stating that DWR incurs them to meet the needs of utility customers.

In addition, this claim does not meet the standards for an application for rehearing. An application must "set forth specifically the . . . grounds on which the applicant considers the decision or order to be unlawful." An applicant may not seek judicial review on grounds not set forth in an application for rehearing. (Pub. Util. Code, § 1732.) This requirement gives the Commission an opportunity to review and correct its orders before they are challenged in court. PG&E's claims about the nature of the Disputed ISO Charges are not clear enough to allow the Commission to review its order and address any claim of error. Thus, we reject PG&E's claims on this basis.

Next, PG&E makes a number of claims that are based, in part, on its erroneous assumption that the Disputed ISO Charges are uniquely DWR's responsibility. The application claims that under AB 1X "the mechanism" to recover the Disputed ISO Charges is DWR's revenue requirement. (Application, at p. 2.) This claim would only be correct if the Disputed ISO Charges were, in fact, DWR's responsibility. AB 1X only governs costs that DWR properly incurs as part of its power purchase program, and does not address the recovery of other costs. (Water Code, § 80134, subd. (a)(2); D.02-02-051, at p. 29.) Further, AB 1X does not mandate that DWR's revenue requirement contain these specific costs. (Water Code, § 80110.) Nor does AB 1X make DWR the exclusive payer of all costs that can be characterized as having some relationship to DWR's program. The statute clearly contemplates that utilities remain obligated to serve customers in their service territories, and that DWR's main role is as a supplier of power. (Water Code, §§ 80002, 80002.5.)

Similarly, the application claims that DWR costs cannot be "shift[ed]" to PG&E. (Application, at p. 3.) Again, this claim is conclusory. The basis for the claim that it is improper to order the utilities to pay these costs is because the Disputed ISO Charges are uniquely DWR's responsibility. We do not need to reach this claim because the Decision does not do this. The Decision determines that the Disputed ISO Charges are the ultimate responsibility of the utilities and should be included in the utilities' URG revenue requirements. (Decision, at p. 22.)

The application also maintains that the Commission cannot include the Disputed ISO Charges in PG&E's 2002 revenue requirement because there is no independent legal requirement that PG&E assume responsibility for these costs. "The Commission has no authority . . . to compel a utility to assume liability for a cost for which it is not contractually or legally liable." (Application, at p. 3, fn. 3.) However, our authority is not as limited as PG&E suggests. The Commission is not required to include in a utility's revenue requirement only those costs that some other agency or legal requirement has already allocated to that utility. As the regulator of electric utility retail rates, the Commission has authority to establish what components will be included in a utility's rates. The Public Utilities Code gives the Commission specific powers to regulate utilities, and Section 701 gives the Commission power to "supervise and regulate" and to "do all things . . . necessary" in the exercise of its powers. Thus, we have discretion to determine that utilities should pay for items incidental to the provision of electricity in their service territories – whether or not a third party would be liable if the utility did not pay.

Only when the Commission evinces an "officious desire to run [a utility's] business," and that desire has "nothing to do with the 'relationship of the utility to the customer'," or does not "affect the manner in which the utility provides the affected services," can a utility successfully assert that the Commission's orders are outside its authority. (*General Tel. Co. v. Public Utilities Com.* (1983) 34 Cal.3d 817, 827.) However, that is not the case here. (*Id*., distinguishing *Pac. Tel. & Tel. Co. v. Public Utilities Com.* (1950) 34 Cal.2d

882.) The Disputed ISO Charges are part of the provision of electric service to PG&E's customers. Thus, the only question here is whether they are part of the costs of providing electricity assumed by DWR or whether they are costs that remain with PG&E. By its terms, AB 1X did not absolve utilities of their responsibility to provide service to customers, and we acted within our discretion to include these charges in PG&E's revenue requirement.

In a similar vein, the application asserts that the Disputed ISO Charges must be borne by DWR because the FERC has ordered the ISO to send invoices to DWR. (Application, at p. 3.) As discussed in more detail below, this argument reads too much into the FERC's orders. The FERC's determination that the ISO must invoice DWR for the Disputed ISO Charges is not a determination that the utilities will not bear "ultimate" responsibility for paying those charges. Indeed, as noted above, the November 7 Order appears to avoid the question of whether DWR was ultimately responsible for these charges. The order simply relies on DWR's role as a Scheduling Coordinator to require payment; it does not adjudicate who is responsible for the debt. (97 FERC ¶ 61,151, at pp. 61,659-61,660.) Thus, contrary to PG&E's allegation, the Decision does not encourage DWR to "shirk" its responsibilities under the November 7 Order. Rather it deals with a different issue: who has <u>ultimate</u> responsibility for costs that DWR is <u>immediately</u> responsible for paying.

The application further claims that the Decision errs because it contradicts past decisions. According to PG&E, the Commission has already decided that utilities should not be "responsible for DWR's ISO costs." (Application, at p. 3.) The decisions the application refers to in support of this claim are not on point. In D.01-01-061, the Commission ordered utilities to set aside a portion of the money collected in rates to pay for power purchased by DWR. This decision implemented Section 200 of the Water Code, which was enacted under SB 7X. Later, following the enactment of AB 1X, D. 01-02-077 determined that any shortfall should be recovered through DWR's revenue requirement. The application mistakenly draws from these two decisions the conclusion that the Commission has ruled that utilities should not be responsible for the specific ISO charges at issue here. In fact, as the decision addressing the rehearing of D.01-01-061 points out, the Commission only addressed how costs should be handled under the two different statutes. (D.01-05-035, at p. 5.) D.01-01-061 properly addressed any shortfall created by Water Code 200 charges in light of the rate freeze then in effect, but AB 1X ensured that no shortfall would exist.

PG&E additionally argues that its customers, but not PG&E directly, are responsible for the Disputed ISO Charges because the costs in question are costs incurred by DWR "to provide power pursuant to AB 1x 1." (PG&E Application, at p. 4.) This argument is without merit, since the issue is not <u>how</u> the costs are to be recovered from customers (DWR's revenue requirement or utility retail rates), but rather <u>who</u> bears ultimate responsibility for Disputed ISO Charges. As discussed above, under AB 1X, DWR is only responsible for costs associated with procuring energy and energy-related services for the net short. All other costs are PG&E's responsibility. In this instance, the Commission concluded that the Disputed ISO Charges are not associated with DWR's provision of the utilities' net short. Thus, AB 1X is not applicable in this instance and our determination that these costs are ultimately the responsibility of the utilities does not demonstrate error. We do note, however, that the Decision does not clearly state that recovery of the Disputed ISO Costs is not governed by AB 1X. Accordingly, we modify the Decision, at page 16, to include this clarification.

PG&E also makes a policy argument that the Disputed ISO Charges do not need to be included in PG&E's revenue requirement because DWR may revise its own revenue requirement to recover these costs. (Application, at p. 4.) This argument does not demonstrate any legal error. In addition, there are a number of policy arguments that favor including these amounts in PG&E's revenue requirement. As the Decision points out, both SDG&E and Edison entered into letter agreements with DWR to reimburse DWR for certain ISO charges which have been paid by DWR. (Decision, at p. 15.) Based on these letter agreements, we exercised our discretion and determined that the Disputed ISO Charges were properly PG&E's ultimate responsibility. The "ISO charges assigned to PG&E are for the most part consistent with those assigned to Edison and SDG&E in their respective letter agreements with DWR." (Decision, at p. 15.) Furthermore, PG&E's current rate structure already recovers amounts for these charges and there is no policy reason to have DWR recover amounts for these same costs. If PG&E is collecting money from ratepayers for these items, PG&E should bear responsibility for them.

Finally, PG&E appears to imply that a "commingling" of revenues could occur as a result of the Decision. (Application, at p. 4, fn. 5.) Commingling of revenue raises certain bankruptcy concerns. PG&E collects payments from customers for electricity provided by both itself and DWR. If revenue from the sale of DWR's electricity is not properly segregated from revenue from the sale of PG&E's electricity, DWR's revenue might become subject to bankruptcy court jurisdiction. The application for rehearing suggests that ordering PG&E to pay DWR for ISO Charges that are determined to be PG&E's responsibility might create such a commingling. This is not the case. PG&E will not be collecting monies for the ISO charges on behalf of DWR. Rather PG&E will remit to DWR PG&E's own funds to reimburse DWR for ISO charges that DWR has paid on PG&E's behalf. Thus, monies collected by PG&E for the sale of DWR's power will remain segregated, according to the Commission's various orders, and are not affected by this Decision.

B. The Decision Is Not Preempted by the FERC's Orders.

PG&E's assertions that the Decision is preempted is primarily based on its reading of the March 27 Order. According to PG&E, the March 27 Order amounts to a determination both that DWR is responsible for all charges invoiced by the ISO and that PG&E has no responsibility for any of these charges. (Application, at p. 5.) Thus, it maintains that the Commission "cannot compel PG&E to reimburse DWR."[5] (Application, at p. 5) The application asserts that the Commission simply does not have this authority, "absent agreement between DWR and PG&E." (Application, at p. 5.)

PG&E overstates the March 27 Order by concluding that the FERC affirmatively decided that the Disputed ISO Costs should be paid by DWR and not by the utilities. Indeed, both the November 7 and March 27 Orders merely indicate that the ISO should bill DWR for the Disputed ISO Charges and that DWR should pay those bills. The FERC addressed what it perceived as the immediate problem with the functioning of the electricity market, the inability of the ISO to pay generators.[6] Thus, the fact that the FERC ordered the ISO to send invoices to DWR is not dispositive of the question of who (DWR or the utilities) is ultimately liable for these costs. In fact, the March 27 Order specifically refuses make such a determination. Referring explicitly to the utilities' arguments that they "should not be retroactively liable for these DWR purchases," the FERC stated that: "since the May 11 Compliance Filing did not include any agreement between the ISO and DWR or any purchasing agreements with PG&E and SoCal

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[5] This is similar to PG&E's state law claim that the Commission cannot create an obligation on PG&E's part where none exists in law or contract (Application, at p. 3, fn. 3) discussed above.

[6] The November 7 Order focuses on this issue, listing three reasons why the FERC chose strictly to enforce the creditworthiness provisions by ordering the ISO to bill DWR: (1) suppliers needed to be paid, (2) purchasers must always pay these costs to prevent "unilateral shifting of unacceptable risk to . . . suppliers," and (3) prices would have risen had suppliers begun to worry about not being paid by the ISO. (97 FERC ¶ 61,151, at pp. 61,658-61,659.) The FERC explicitly linked these reasons to what it perceived as a trade off with its "must offer" requirement. "The must offer requirement assumes a matching must pay requirement." (97 FERC ¶ 61,151, at p. 61,659.)

Edison, it is beyond the scope of this proceeding for the Commission to determine if the non-creditworthy UDCs remain ultimately liable for the purchases DWR procured on their behalf and for which it is immediately responsible for paying." (98 FERC ¶ 61,355, at p. 62,426 (emphasis added).)[7]

Furthermore, the cases cited by PG&E are not on point, since they address situations where the FERC has explicitly ruled on an issue, and a state Commission has made a different determination. In *Nantahala Power & Light v. Thornberg* (1985) 476 U.S. 953, FERC required a public utility to calculate costs for wholesale ratemaking by assuming it received a 22.5% share of certain low-priced power. The state Commission, on the other hand, required the utility to set retail rates assuming that it received a 24.5% share of the low-priced power. The Court criticized the state Commission for acting "despite the fact" that FERC had adopted a different allocation, and for "nowhere tak[ing] into account FERC's allocation of the same power." (*Nantahala*, *supra*, 476 U.S. at pp. 960-961.)

Similarly, in *Public Utilities Com. of Cal. v. F.E.R.C.* (D.C. Cir. 1998) 143 F.3d 610, 615, the FERC specifically considered the extent of its jurisdiction and held that the particular issue was, under the terms of the Natural Gas Act, within the FERC's jurisdiction, and outside the jurisdiction of the states. Thus, the CPUC tariff at issue in that case "was illegal precisely because the CPUC intruded into [the] FERC's jurisdiction over the interstate transportation of

[7] Interestingly, the utilities thought it was necessary to request that the FERC revise the ISO tariff to state that they were not financially responsible for these costs. (98 FERC ¶ 61,355, at p. 62,426.) This request suggests that, despite PG&E's arguments to the contrary in its application for rehearing, the November 7 Order did not conclude that DWR was ultimately responsible for the Disputed ISO Charges.

natural gas." (143 F.3d at p. 617.)[8] In *Mass. Dept. Pub. Util. v. FERC* (1st Cir. 1984) 729 F.2d 886, the state commission ordered a utility to take an action that FERC explicitly ruled was impermissible. Again the court based its ruling on the FERC's explicit determination that the state commission's order contravened the statute granting FERC authority.[9]

Unlike the situations in these cases, the FERC in this instance has not explicitly ruled that DWR has ultimate financial responsibility for the Disputed ISO Charges. Rather, it has simply ruled that DWR "is immediately responsible for paying" these charges.[10] (98 FERC ¶ 61,355, at p. 62,426.) Accordingly, the FERC orders do not preempt the Decision.

PG&E also points out that the Disputed ISO charges involve more than just energy charges. (Application, at p. 6.) PG&E may be arguing that such charges are properly allocated to DWR, and that the FERC's allocation should not be disturbed. However, as discussed previously, the FERC's conclusions that DWR is to be invoiced these non-energy charges is based on its reading of the ISO

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[8] *Public Utilities Com. of Cal. v. F.E.R.C.*, *supra*, also held that the FERC could not defer to California once it had determined that jurisdiction had been conferred upon it. (*Public Utilities Com. of Cal. v. F.E.R.C.*, *supra*, at p. 612.) In that case, the D.C. Court of Appeal concluded that once the FERC had determined the state tariff was pre-empted, the FERC was required to take action to implement the federal scheme. (*Id*.) Here, however, the FERC has not made such a determination, and its careful avoidance of the issue of ultimate responsibility is not an impermissible act of deferring the issue to the states akin to the action in *Public Utilities Com. of Cal. v. F.E.R.C*. Rather, the FERC has determined that this issue is outside the scope of its proceeding. The U.S. Supreme Court has approved one FERC order that did not extend as far as the theoretical reach of FERC's jurisdiction, but instead chose not to resolve complex issues that were outside the scope of the proceeding. (*New York v. F.E.R.C.* (2002) 535 U.S. __, 152 L.Ed.2d 47.)

[9] By way of further example, *Duke Energy Trading and Marketing, LLC v. Davis* (9th Cir., 2001) 276 F.3d 1042, 1056, finds pre-emption where California's actions "directly nullify [certain] provisions of the FERC-approved [wholesale] rate schedule, and hence cross the 'bright line' between state and federal jurisdiction."

[10] In the March 27 Order, the FERC directed DWR to use "the ISO Tariff Sections 11 and 13 concerning billing, settlement and dispute resolution to resolve" the issue of whether the ISO invoices include costs associated with PG&E and Edison's self supplying. (98 FERC ¶ 61,355, at p. 62,434.) It could be argued that this indicates that the FERC, not the Commission, shall determine whether DWR or PG&E is ultimately responsible for the Disputed ISO Charges. However, these tariff sections address disputes over whether the costs should be invoiced at all, not who is ultimately responsible for those costs. Accordingly, this statement does not preclude us from deciding the issue of ultimate cost responsibility.

tariff and Scheduling Coordinator Agreement. This Decision does not change the FERC's determination that the ISO is to invoice DWR for these charges; rather it determines whether DWR should be reimbursed for these charges, as they are ultimately the financial responsibility of the utilities. Thus, there is no conflict with FERC's orders and no preemption.

PG&E's assertion that the Commission has no authority to "compel" PG&E to reimburse DWR for DWR's expenses is based on its arguments that the Disputed ISO Charges are "DWR's FERC tariff obligations" and this Commission cannot require PG&E to reimburse the party who paid those charges. (Application, at p. 5.) This claim presupposes the conclusion that the FERC has asserted its jurisdiction and determined who should bear ultimate responsibility for the Disputed ISO Charges. However, this is not the case. As the March 27 Order makes clear, the FERC determined that DWR has an "immediate" responsibility to pay was based on DWR's responsibilities as a Scheduling Coordinator, but avoided determining which party had "ultimate" responsibility for these costs. Accordingly, the Commission has not been preempted by the FERC in this instance. Indeed, as caselaw suggests, the FERC could properly decide to defer jurisdiction to the Commission on this matter, especially since the issue of ultimate cost responsibility is part of the determination of utility retail rates, an area clearly within the Commission's jurisdiction. (See, e.g., *New York v. F.E.R.C.*, *supra*, 535 U.S. __; discussion in footnote 8, *supra*.)

Finally, the application points out that the March 27 Order was issued two days after the Decision. (Application, at p. 5.) The application appears to suggest that the Decision must be altered because its only basis for ordering PG&E to refund the Disputed ISO Charges to DWR was that applications for rehearing of the November 7 Order remained outstanding. This is not the case. The March 27 Order serves to reaffirm the November 7 Order. Additionally, it clearly notes that "it is beyond the scope of this proceeding for the [FERC] to determine if the non-creditworthy UDCs remain ultimately liable" for the Disputed ISO Charges. (98 FERC ¶ 61,355, at p. 62,426.) Thus, the Decision is consistent with the FERC's March 27 Order.

III. CORRECTION OF CLERICAL ERRORS

We note that there are two clerical errors in the Decision. Accordingly, these errors are also corrected in this order.

IV. CONCLUSION

PG&E's application for rehearing fails to demonstrate legal error in Commission Decision (D.) 02-03-058.

IT IS THEREFORE ORDERED THAT:

1. D.02-03-058 is modified as follows:
   a. On page 7, footnote 5, the fourth full sentence should be corrected to read: "PG&E argues that it does not meet ISO creditworthiness requirements and therefore cannot be responsible for ancillary services provided in ISO markets."
   b. On page 15, the last word on the last line of the page should be changed from "Be" to "By." The corrected sentence shall read: "By taking these actions, we presume that we have now met our obligations to DWR and we also presume that the Edison Letter Agreement is part of that obligation."
   c. On page 16, the last full paragraph is deleted and replaced with the following: "While we adopt an approach that requires the utilities to reimburse DWR for ISO-related costs, this method does not violate AB 1X. AB 1X is not implicated in this instance because we are considering utility costs, not DWR's costs. We have provided for recovery of these utility costs from customers, i.e., the ratepayers will be paying for these costs as part of the utilities' URG revenue requirements.

> Since we are taking a balancing account approach, the utilities have little risk in this regard. We recognize that the utilities have little control over these costs. Thus, we intend to audit the costs to ensure that DWR is paid on a timely basis and that any revenues associated with RMR or the provision of ancillary services are credited appropriately."

2. Rehearing of D.02-03-058, as modified, is denied.

This order is effective today.

Dated September 5, 2002 at San Francisco, California.

LORETTA M. LYNCH
President
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

Commissioner Henry M. Duque, being necessarily absent, did not participate.