175 FERC ¶ 61,043
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

California Independent System Operator Corporation Docket No. ER21-395-000

ORDER GRANTING WAIVER REQUESTS

(Issued April 15, 2021)

1. On November 12, 2020, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,[1] California Independent System Operator Corporation (CAISO) submitted a request for limited waiver of sections 37.5.2 and 37.11 of its Open Access Transmission Tariff (Tariff) in order to: (1) excuse CAISO from assessing penalties against NV Energy, Inc. (NV Energy) for late meter data revisions; and (2) permit CAISO to distribute the funds it collects from NV Energy that approximate the market impact of its error using CAISO's established penalty distribution methodology as if it were a penalty assessed under tariff section 37.9.[2] As discussed below, we grant CAISO's limited waiver requests.

I. Background

2. CAISO explains that it financially settles its markets through an iterative process that includes an initial settlement statement three business days after the trading day and several subsequent recalculation settlement statements. CAISO states that the final recalculation settlement statement produced in the ordinary course of business is published 55 business days after the trading day (T+55B) and the next recalculation settlement statement after T+55B is published nine months after the trading day (T+9M). The T+9M statement is optional. According to CAISO, scheduling coordinators may submit meter data for CAISO to use on the T+9M statement by the 172nd business day

[1] 18 C.F.R. § 385.207 (2020).

[2] CAISO requests that the Commission consider each aspect of the waiver requests on its own as severable from each other. Waiver Request at 1.

after the trading day (T+172B). If CAISO publishes a T+9M statement, then it will calculate those statements based on that new meter data.[3]

3. CAISO explains that, although scheduling coordinators may submit new or revised meter data to be used on the T+9M statement, a scheduling coordinator's failure to submit any meter data by the 48th business day after the trading day (T+48B) or its submission of revised meter data for the T+9M statement violates the Tariff.[4] According to CAISO, this violation subjects the scheduling coordinator to a penalty of $1,000 for each trading day with missing or late data pursuant to tariff sections 37.5 and 37.11. CAISO states that the penalty applies on a scheduling coordinator basis, rather than a per-meter basis; a scheduling coordinator with errors for multiple meters on the same trading day is subject to a single penalty. However, a scheduling coordinator that fails to submit meter data for the T+55B settlement statement and also fails to submit meter data for the T+9M settlement statement faces an additional penalty of $3,000 (totaling $4,000 for every trading day with missing meter data). CAISO explains that the overall purpose of these penalties is to incentivize scheduling coordinators to provide accurate and timely meter data.[5]

4. According to CAISO, where the late or revised meter data is not processed on the T+9M and the initial error was to the scheduling coordinator's benefit, CAISO calculates a market adjustment that approximates the financial impact on the market.[6] Pursuant to tariff section 37.11.2, the funds collected from the market adjustment are returned to the market based on the average of the pro rata share of unaccounted for energy charged in the utility service area during the period of the inaccurate meter data event.[7]

5. CAISO explains that its meter data penalties are part of its Rules of Conduct, which it administers through a process defined in the tariff section 37. If CAISO believes a market participant may have committed a tariff violation subject to CAISO penalties, it conducts an investigation, providing notice and an opportunity for the market participant

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[3] *Id.* at 2.

[4] *Id.* at 3; CAISO, CAISO eTariff, § 10.3.6, Settlement Quality Meter Data Submission (11.0.0), § 10.3.6.4 ("Scheduling Coordinators submitting Actual Settlement Quality Meter Data after [T+48B] but up to the T+172B have failed to provide complete and accurate Settlement Quality Meter Data.").

[5] Waiver Request at 3.

[6] CAISO, CAISO eTariff, § 37.11.2, Inaccurate Actual SQMD Penalty Without Recal. Settl Stmt. (0.0.0).

[7] *Id.*; Waiver Request at 3-4.

to present relevant information. CAISO explains that, where it determines a penalty is warranted, the market participant may obtain immediate review of CAISO's determination by directly appealing to the Commission, in which case the penalty will be tolled until the Commission renders its decision on appeal.[8]

6. CAISO states that, on July 15, 2020, NV Energy notified CAISO that it reported incorrect meter data for the two meters at the Kings Beach Generation Facility (Kings Beach) for the December 1, 2015 through April 21, 2020 trading days. NV Energy explained to CAISO that, on June 28, 2020, it discovered it inadvertently had been reporting station power values as the plant's generating output. NV Energy further explained the error was due to these meters reporting output on channel one of the meter and station power on channel three, whereas all other generator meters for which NV Energy has responsibility have the opposite configuration.[9]

7. CAISO explains that, following the required investigation, CAISO notified NV Energy that its meter data errors violated CAISO's Tariff and that NV Energy faced a penalty of $685,000 and a market adjustment of $35,668.51. CAISO states that these charges appeared on the T+12B settlement statement for the October 27, 2020 trading day. In calculating this penalty, CAISO explains that, although NV Energy's error covered 1,451 trading days, the sanction at issue is limited by two factors.

8. First, CAISO already assessed NV Energy $69,000 in late meter data penalties for other issues with the Kings Beach meters for 69 of the trading days covered by the error at issue here. According to CAISO, because a scheduling coordinator can only be assessed meter data penalties once for the same trading day, CAISO excluded these days from the calculations regarding the error at issue here.

9. Second, CAISO's Tariff provides that any penalties resulting from the investigation must be assessed within one year after discovery of the events constituting the violation, but no later than three years after the date of the violation.[10] CAISO thus states that the three-year limitations period on assessing penalties means that CAISO cannot levy penalties for trading days before November 1, 2017. According to CAISO, the penalty thus only considers trading days three years or less from the date on which the penalties are assessed. CAISO states that the combination of these two factors results in 685 trading days subject to penalties, for a total penalty of $685,000. CAISO further explains that, of the 1,451 trading days affected by the issue at Kings Beach, 1,290 of those days will not have a T+9M statement processed with the correct meter data because

[8] CAISO, CAISO eTariff, § 37.8.10; Waiver Request at 4.

[9] Waiver Request at 5.

[10] CAISO, CAISO eTariff, § 37.10.1, Time Limitation (1.0.0).

the meter data submission window has passed. Of those 1,290 trading days, 593 are still within the three-year limitations period. CAISO states that the corresponding market adjustment calculated per tariff section 37.11.2 is $35,668.51.[11]

II. Request for Waiver

10. CAISO filed a request for limited waiver of two provisions within its tariff section 37, governing CAISO's Rules of Conduct. Specifically, CAISO requests limited waiver of tariff section 37.5.2, which requires market participants to submit accurate and timely meter data, and tariff section 37.11, which details the method for calculating penalties related to the submission of meter data. CAISO states that it is concerned that the rules of conduct provisions have not created the appropriate outcome in this instance, in light of the excessive penalty amount and inappropriate allocation of the market adjustment.[12]

11. CAISO states that, before October 1, 2011, its meter data penalties were based on a percentage of the error. CAISO states that the penalty was 30% of the value of the energy in error if the scheduling coordinator identified the error and 75% of the error if CAISO discovered the error. In proposing the change to a per-day penalty, CAISO stated the percentage-based penalty was "overly burdensome for submitting correcting meter data and that an appropriate incentive for the market participants to submit accurate and timely settlement quality meter data would be a set sanction of $1,000 for each trade day corrected."[13] CAISO explains that it was concerned that percentage-based penalties set mixed incentives by imposing exorbitant penalties for meter data violations.[14]

12. CAISO explains that Pacific Gas and Electric Company (PG&E) filed a waiver request with the Commission for penalties assessed shortly before the penalty methodology was changed. According to CAISO, there the percentage-based penalty created a $5.77 million penalty, whereas the per-day penalty would have created an $845,000 penalty. In response to PG&E's waiver request, CAISO explained that the 30% penalty can create "a penalty that is disproportionate to the severity of the violation" because "a single configuration error in how meter data gets reported from a particular resource can lead to flawed meter data reporting over many days."[15] CAISO states that

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[11] Waiver Request at 5-6.

[12] *Id.* at 1, 6.

[13] *Id*. at 6-7 (quoting CAISO Settlements Process Timeline Changes Transmittal Letter, Docket No. ER11-4176-000, at 18 (filed Aug. 1, 2011)).

[14] *Id.* at 7.

[15] *Id.* (citing CAISO Comments on Waiver, Docket No. ER12-1009-000, at 3-4

shortly thereafter, Exelon Corporation filed a similar waiver request. CAISO states that it filed similar comments in response and the Commission again approved the request.[16]

13. CAISO explains that its concern in prior cases was that the percentage-based penalty created excessive penalties where there was a persistently large meter data error, whereas the per-day penalty created a more proportionate penalty and more reasonable incentives for compliance. CAISO states that it did not consider the opposite scenario — the case where a per-day penalty yielded a disproportionate penalty if there were a persistently small meter data error. CAISO states that it now faces this scenario.

14. CAISO states that in NV Energy's case, the estimated value of the energy error under the prior percentage-based penalty structure would be $69,663.86, which translates to a 30% penalty of $20,899.16. CAISO states that on the other hand, under the current penalty structure a penalty of $685,000 on that $69,663.86 error represents a 983% penalty. CAISO states that this far surpasses the 30% penalty that CAISO acknowledged in prior proceedings was excessive. As explained above, CAISO states that NV Energy already has paid $69,000 in penalties for other issues with the Kings Beach meter data on 69 of the trading days at issue here. CAISO states that this represents approximately a 100% penalty, which is still well above the penalty under the prior methodology. CAISO asserts that it is unnecessarily punitive to impose penalties beyond that level.[17]

15. CAISO also expresses concern with how the market adjustment will be allocated. According to CAISO, NV Energy was the only party assessed unaccounted for energy in its service area during the trading days involved. Under its Tariff, CAISO thus would assess the market adjustment to NV Energy and then immediately allocate the funds back to NV Energy. CAISO asserts that this outcome, where NV Energy effectively faces no market adjustment, is inconsistent with the disgorgement principle that underlies the market adjustment tariff provisions.[18]

16. CAISO explains that it seeks a waiver that would excuse NV Energy's additional $685,000 in meter data penalties and permit CAISO to distribute NV Energy's $35,668.51 market adjustment as if it were a penalty assessed under tariff section 37.9 – i.e., to scheduling coordinators that were not assessed a penalty in 2020, *pro rata* by grid management charge paid. CAISO states that distributing the market adjustment using the penalty distribution process provides an established and administrable approach that, to a

(filed Feb. 22, 2012)).

[16] *Id.* at 7-8 (citing *Exelon Corp.*, 141 FERC ¶ 61,070 (2012)).

[17] *Id.* at 8.

[18] *Id.* at 8-9.

degree, offsets the loss of funds to the rules of conduct penalty pool that would occur if the Commission were to grant the requested waiver on NV Energy's penalty. CAISO maintains that this approach is also beneficial because it avoids the complicated market impact and cost causation inquiries posed by NV Energy's status as a participant in the energy imbalance market.[19]

17. CAISO states that its waiver requests satisfy the Commission's traditional four waiver criteria. First, CAISO asserts that both CAISO and NV Energy have acted in good faith. CAISO states that it brought the waiver requests to the Commission as soon as feasible after the penalties were assessed, and that NV Energy brought the meter data error to CAISO as soon as feasible after the error was identified. Second, CAISO states that the waiver requests are of limited scope in that they pertain only to matters arising from the incorrect meter data reported from Kings Beach. Third, CAISO asserts that the waivers address the following concrete problems: (1) the first waiver addresses NV Energy meter data penalties far in excess of what is necessary to support the objectives of the penalties; and (2) the second waiver facilitates CAISO allocating the market adjustment funds in a more appropriate manner and ensures the market adjustment does not merely shift funds within NV Energy. Finally, CAISO states that the waiver requests are structured to avoid undesirable results because excusing the $685,000 in penalties that are beyond the $69,000 in penalties that NV Energy already paid avoids the undesirable consequence of imposing unreasonably high meter data penalties.[20]

18. CAISO contends that it is not requesting an impermissible retroactive waiver. According to CAISO, the Commission recently noted that the key factor the Commission considers in evaluating whether a requested waiver would violate either the filed rate doctrine or the rule against retroactive ratemaking is whether the ratepayers had sufficient notice that the approved rate was subject to change.[21] CAISO asserts that tariff section 37, which is the subject of this waiver request, provides clear notice to the market that consequences outlined in that tariff section are subject to further Commission review. CAISO explains that tariff section 37.8.10 provides that, if CAISO determines a penalty is warranted, the market participant "may obtain immediate review of the CAISO's determination by directly appealing to FERC." CAISO contends that this portion of CAISO's filed rate directly enables the Commission to perform its own after-the-fact review of NV Energy's penalty and the disposition of its market adjustment and changes what would be purely retroactive ratemaking into a functionally prospective process by

[19] *Id.* at 9-10.

[20] *Id.* at 10-11.

[21] *Id.* at 12 (citing *Pac. Gas & Elec. Co.*, 173 FERC ¶ 61,051, at P 14 (2020)).

placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision.[22]

III. Notice and Responsive Pleadings

19. Notice of CAISO's filing was published in the *Federal Register*, 85 Fed. Reg. 73,697 (Nov. 19, 2020), with interventions and protests due on or before December 3, 2020. Calpine Corporation filed a timely motion to intervene. NV Energy filed a timely motion to intervene and comments in support of CAISO's filing, and an alternative request for a partial waiver and appeal of CAISO's sanction.

20. NV Energy states that it supports CAISO's waiver requests. NV Energy states that the partial waiver would allow CAISO to modify the penalty that would otherwise be assessed to NV Energy for its error in submitting incorrect meter data for Kings Beach. NV Energy explains that, absent waiver, an inadvertent mistake in the original metering set-up for the facility would result in a penalty of $685,000, which is disproportionate to an error of only 1.06 MWh/day for a balancing authority area that has an average demand of approximately 101,832 MWh/day. NV Energy states that, while the error was inadvertent, it understands that a penalty is appropriate; however, NV Energy contends that the penalty should be commensurate with the scope of the mistake. NV Energy asserts that, if granted, CAISO's partial waiver requests achieve a just and reasonable balance.[23] NV Energy also supports CAISO's request for waiver to address the distribution of market adjustment funds that approximate the market impact of the error and would otherwise result in CAISO allocating the funds back to NV Energy. NV Energy agrees that it should not receive the funds back for its meter error.[24]

21. NV Energy asserts that CAISO's waiver requests do not violate the filed rate doctrine, do not violate the rule against retroactive ratemaking, and are consistent with Commission precedent. NV Energy also contends that CAISO's waiver requests satisfy the Commission's criteria for granting waiver and the proposed penalty is in line with waiver requests granted previously by the Commission for metering errors.[25] Specifically, NV Energy states that the underlying error was made in good faith in that the metering error was unintentional and based on the fact that all other generation units owned by or under contract with NV Energy use channels three or four for generation

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[22] *Id.* at 12-13 (citing *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 797 (D.C. Cir. 1990)).

[23] NV Energy Comments at 2-3, 15-16.

[24] *Id.* at 3, 16-17.

[25] *Id.* at 3, 13-14, 18-19.

output and channel one for plant consumption. NV Energy explains that it also filed corrective meter data following its discovery of the error, consistent with CAISO's Tariff. NV Energy also states that the waiver requests are of limited scope because the meter error that triggered the penalty was only 1.06 MWh/day, and the generation facility is small, seldom used, and does not bid into the Western energy imbalance market. Further, NV Energy asserts that the waiver remedies a concrete problem in that it will mitigate the imposition of a penalty formula that CAISO states "produces an overly punitive result out of line with the purposes those penalties should serve."[26] Finally, NV Energy states that the partial waiver does not have undesirable consequences and that no third party will be impacted. NV Energy explains that it will continue to be penalized for any late submission of corrected meter data in the future and will be subject to the same incentives as all other market participants to ensure that accurate meter data is provided to CAISO on a timely basis.[27]

22. NV Energy also includes an alternative request for a partial waiver and appeal of CAISO's sanction seeking the same relief as requested by CAISO. NV Energy states that, if CAISO's partial waiver request is deemed impermissible as retroactive relief, it seeks waiver pursuant to tariff section 37.8.10, which authorizes a market participant that has received a sanction to seek immediate review by appealing directly to the Commission.[28]

IV. Discussion

A. Procedural Matters

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Substantive Matters

24. As discussed below, we grant CAISO's requests for limited waiver of CAISO Tariff sections 37.5.2 and 37.11 in order to: (1) excuse CAISO from assessing additional penalties to NV Energy for late meter data revisions; and (2) permit CAISO to distribute

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[26] *Id.* at 20; Waiver Request at 1.

[27] NV Energy Comments at 19-20.

[28] *Id.* at 17-18.

the funds it collects from NV Energy using CAISO's established penalty distribution methodology to scheduling coordinators without a penalty assessed in 2020.[29]

25. The Commission has granted waiver of tariff provisions where: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.[30] We find that the circumstances of CAISO's waiver requests satisfy these criteria.

26. First, we find that CAISO acted in good faith. CAISO explains that the error was not immediately detected due to the extremely small volumes of energy at issue, approximately 1.06 MWh/day, and the fact that Kings Beach is a seldom-used resource that is not bid into the Western energy imbalance market. The record demonstrates that NV Energy brought the meter data error regarding Kings Beach to CAISO's attention as soon as feasible after it was identified, promptly filed corrective meter data, and confirmed that the other units in its balancing area were being correctly reported. Moreover, CAISO submitted the waiver requests to the Commission as soon as feasible after its investigation of the Tariff violation.

27. Second, we find that the waiver requests are limited in scope because they are one-time waivers of two Tariff provisions that pertain only to matters arising from the incorrect meter data reported from Kings Beach, as discussed above. Further, as CAISO explains, the metering set-up error that resulted in NV Energy's erroneous reporting is unique to the Kings Beach facility.

28. Third, we find that each waiver request addresses a concrete problem. Granting the first waiver request, regarding collection of penalties from NV Energy, decreases a meter data penalty obligation to NV Energy that CAISO asserts is far in excess of what is necessary to support the objective of the penalty, which is to provide an incentive for market participants to submit accurate and timely settlement quality meter data. CAISO has sufficiently demonstrated that a 983% penalty of $685,000 on an error with an

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[29] In *Hanwha Q-CELLS USA Corp.*, 174 FERC ¶ 61,013 (2021) and *Mission Solar LLC*, 174 FERC ¶ 61,014 (2021), the Commission explained that the appropriate vehicle to appeal penalties imposed under the CAISO Tariff is to file a complaint with the Commission under Rule 206 or Rule 218, consistent with tariff section 37.8.10, which permits market participants to appeal the imposition of penalties imposed pursuant to tariff section 37. 18 C.F.R. §§ 385.206, 385.218. We note that in this proceeding CAISO is seeking waiver of its own Tariff, rather than a market participant appealing the imposition of penalties under CAISO's Tariff.

[30] *See, e.g.*, *Citizens Sunrise Transmission LLC*, 171 FERC ¶ 61,106, at P 10 (2020); *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

estimated value of $69,663.86 is unnecessarily punitive. Granting the second waiver request, regarding the allocation of market adjustment funds, ensures the market adjustment does not merely shift funds within NV Energy, and instead treats those funds as a discrete penalty assessed against NV Energy.

29. Finally, we find that granting the waiver requests will not have undesirable consequences, such as harming third parties. As CAISO and NV Energy note, the goal of the rules of conduct process is not to maximize assessed penalties, but instead to incentivize compliance.[31] Consistent with that goal, we find that the waiver requests strike a balance between incentivizing compliance and avoiding disproportionately high penalties,[32] and therefore that they avoid undesirable consequences that would occur absent waiver. Under the proposed waivers, NV Energy will incur meter data penalties of $104,668.51.[33]

30. While we are granting CAISO's requests for limited waivers, the instant waiver requests demonstrate that CAISO's current Tariff may lead to disproportionate penalties and improper allocation of market adjustment funds in certain circumstances. Accordingly, we encourage CAISO to consider proposing modifications to its Tariff to better align its penalty and market adjustment allocation provisions with its stated intent to incentivize compliance while avoiding disproportionately high penalties. Such revisions could help CAISO avoid similar outcomes and the need to request waiver of its Tariff in the future.

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[31] *See Cal. Indep. Sys. Operator Corp.*, 106 FERC ¶ 61,179 (2004) ("Since the proposed Rules of Conduct are intended to ensure the fair and efficient operation of the CAISO market, the penalties should be designed to deter conduct that is inconsistent with the fair and efficient operation of the markets. Where the violation could result in conduct that could be harmful to the reliability of the grid, it would be appropriate for the penalty to be significantly higher to serve as a deterrent for the conduct. However, the penalties should not be so high that they are not commensurate with the targeted conduct and, thus, are not just and reasonable.").

[32] *See, e.g.*, *Pac. Gas & Elec. Co.*, 138 FERC ¶ 61,007, at P 13 (2012) (finding that a penalty adjustment from $5.77 million to $845,000 "is reasonable based on the disproportionate amount of the penalty to the violation").

[33] This amount is the sum of the meter data penalties of $69,000 already assessed to NV Energy and the market adjustment of $35,668.51.

The Commission orders:

CAISO's waiver requests are hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corporation Docket No. ER21-395-000

(Issued April 15, 2021)

DANLY, Commissioner, *dissenting*:

In today's order, the Commission once again permits a retroactive change to a filed tariff without acknowledging that it is doing so. Although styled a "waiver," in fact the Commission does more than simply "excuse CAISO from assessing penalties against NV Energy, Inc. . . . for late meter data revisions."[1] In fact, the Commission has allowed CAISO to retroactively change the method for calculating the penalties for late meter data revisions and change the method for distributing those penalties. As I have more fully explained in my dissents to previous orders, by doing so the Commission grants a retroactive tariff change that violates the filed rate doctrine and rule against retroactive ratemaking without providing any explanation as to why the Commission believes it is acting within its legal authority.[2]

For these reasons, I respectfully dissent.

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James P. Danly
Commissioner

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[1] *Cal. Indep. Sys. Operator Corp.*, 175 FERC ¶ 61,043, at P 1 (2021).

[2] *See Sunflower Elec. Power Corp.*, 173 FERC ¶ 61,054 (2020) (Danly, Comm'r, dissenting at P 5).