Joint Demand Response Parties' Reply Brief on Appeal of PRR 854

Submitted by	Company	Date Submitted
Melanie Gillette, EnerNOC 916-671-2456 mgillette@enernoc.com	Joint Demand Response Parties	March 30, 2016

Despite the obfuscation in CAISO's Response to Appeals to PRR 854 ("CAISO Response"), the necessary analysis in this appeal is straight forward. CAISO's repeated insistence on adoption of an *ultra vires* change to a Business Practice Manual (BPM) that modifies the rates, terms and conditions of service of Local Capacity Resources without a tariff change has turned a misuse of process and legal authority into a spectacle that has consumed hundreds of hours of time by market participants in order to prevent CAISO from implementing an unlawful BPM without a tariff change.

CAISO's Response advances the flawed theory that it can adopt whatever "assumptions" it chooses for the purposes of conducting its Local Capacity Technical Study, and turn those "assumptions" into a new "20-minute requirement" applicable to certain Local Capacity Resources participating in the CAISO market.[1] Further, CAISO seeks to "clarif[y]" the "requirement" that it fabricated in its study by including it in its BPM without approval from the CPUC on a matter exclusively reserved to CPUC authority, without respecting the proper CAISO stakeholder procedures, and without application to FERC to adopt new or modify existing requirements applicable to Local Capacity Resources in the CAISO tariff.[2] CAISO even claims that PRR 854 does not modify any requirement of any resource,[3] without explanation.

This appeal is not a minor procedural critique, but rather it demonstrates that PRR 854 violates the Federal Power Act and FERC regulations; contradicts CAISO tariff in effect today;

[1] CAISO Response, §III.A.1, Page 3.
[2] *Id.* at 4-5

usurps the authority[4] that resides with the CPUC for determining resource adequacy requirements; and is flawed in its justification. Additionally, nearly identical efforts by other RTO/ISOs have been invalidated by FERC on at least two recent occasions.

1) <u>Approval of PRR 854 without a tariff amendment violates the Federal Power Act.</u>

Ironically, the precise problem with the CAISO approach is clearly revealed in a FERC decision that was quoted in the CAISO response: ". . . [T]he BPM, rather than the tariff is a more appropriate place for specific information regarding the Local Capacity Study **because the study will not have a material effect on rates, terms and conditions of service."**[emphasis added][5] In PRR 854, CAISO seeks to adopt a brand new requirement in its BPM that clearly is a new term and condition of service applicable to certain Local Capacity Resources, and clearly will impact the quantity and eligibility of such resources that will impact rates charged pursuant to CAISO market settlements.

CAISO is not the first RTO/ISO seeking to circumvent federal law requirements that terms and conditions of service be incorporated in its tariff.[6] In 2013, PJM market stakeholders approved a change to PJM Manual 18 (the equivalent to a Business Practice Manual in CAISO) that included requirements for market participants to submit a "DR Sell Offer Plan" prior to participation in capacity auctions. FERC rejected the PJM procedure stating:

> The changes proposed by PJM implement practices that significantly affect jurisdictional rates, terms and conditions of service, and accordingly must be submitted to the Commission pursuant to section 205 of the FPA. The FPA requires all practices that significantly affect rates, terms and conditions of service to be on file with the Commission, and these practices must be included in a Commission-accepted tariff rather than other documents. [footnotes omitted][7]

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[4] As discussed below, this authority exists not only under state law, but also is expressly reserved to the CPUC under the CAISO tariff.
[5] California Indep. Sys. Operator Corp., 122 FERC ¶ 61017, 61057-58 (Jan. 9, 2008).
[6] The requirement we refer to is Section 205(c) of the Federal Power Act, as implemented pursuant to 18 CFR §35.1.
[7] Demand Response Coalition v. PJM, 143 FERC ¶61,061, FERC Docket EL13-57-000, ¶17 (April 19, 2013).

In 2012, using almost identical language, FERC also rejected a NYISO Technical Bulletin in lieu of a tariff change that set forth a new requirement that determined available capacity eligible for enrollment as demand response capacity by behind the meter generators.[8]

These two FERC cases are virtually identical to, and not legally distinguishable from, PRR 854 now pursued by CAISO. In fact, the CAISO scheme is even more clearly *ultra vires* because the new language contained in the BPM creates a new term and condition of service emanating from an "assumption" buried in a study that FERC affirmatively stated is not supposed to affect "rates, terms and conditions of service."[9] Moreover, unlike the PJM and NYISO cases, adoption by the CAISO of a "20-minute requirement" for Local Resource Adequacy exceeds CAISO's authority expressly incorporated in its tariff.

2) <u>PRR 854 violates the CAISO tariff and impinges upon CPUC jurisdiction.</u>

Section 40.4.1 of the CAISO tariff reads, in relevant part, that "[t]he CAISO **shall** use the criteria provided by the CPUC or Local Regulatory Authority to determine and verify, if necessary, the Qualifying Capacity of all Resource Adequacy Resources."[emphasis added]. This section does not create an exception for CAISO to impose its own resource adequacy requirements created through backdoor assumptions through a study. In fact, the same section later states, "**[o]nly if the CPUC**, Local Regulatory Authority or federal agency **has not established** any Qualifying Capacity criteria, or chooses to rely on the criteria in this CAISO Tariff, will the provisions of Section 40.8 apply."[emphasis added]. The CAISO tariff has unambiguously recognized that the determination of criteria for eligibility and determination of resources is with the CPUC and others. These sections make clear that the tariff does not reserve authority to CAISO to impose its own contradictory supplemental requirements where, as is the

[8] Energy Spectrum, Inc., et al v. NYISO, 141 FERC ¶61,197, FERC Docket EL12-56-000, ¶51 (December 10, 2012).
[9] *See* fn. 5.

case here, the CPUC has exercised its authority that is explicitly recognized in the tariff to adopt resource adequacy requirements. Indeed, the CPUC rejected the adoption of a 20-minute dispatch requirement for 2016 that CAISO now seeks to improperly supersede with PRR 854.[10]

In light of all of the above, CAISO's pursuit of PRR 854 is disconcerting: it contradicts a CPUC's decision on this specific issue, on a subject matter in which the CAISO tariff itself recognizes as the exclusive authority of the CPUC, and seeks to do so outside of a tariff application to FERC.

3) CAISO's Justification of PRR 854 Is Not Supported by NERC Standards.

The procedural problems above negate the need to delve too deeply into the substantive weaknesses of CAISO's rationale. Nevertheless, despite its lengthy narrative, CAISO cannot dispute the fact that the plain language of the NERC standards it cites does not impose specific requirements on any resource.[11] Instead, the NERC standards create requirements upon CAISO as the system operator, and do not impose mandatory requirements upon specific system or local resource adequacy resources. Also, CAISO cannot dispute the fact that it stands alone among all RTO/ISOs in the United States in interpreting (incorrectly) that the NERC standards create mandatory requirements upon specific resources. No other RTO/ISO market, including those with relatively mature capacity markets, and all of which are subject to the same NERC standards, has adopted a minimum dispatch time requirement for DR, or any capacity resource, as short as the 20-minute window CAISO argues is mandated pursuant to NERC.

An untrue claim does not become true by simply repeating it over and over again. The Appeals Committee should reject PRR 854.

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[10] CPUC Decision 15-06-063, §5.2.2, p.35 (June 25, 2015).

[11] Including for purposes of determining resource adequacy requirements, much less sanction undue discrimination against certain classes of resources.