

UNITED STATES OF AMERICA 105 FERC ¶ 61, 207
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

California Independent System Operator Corporation Docket Nos. ER03-218-004,
ER03-219-004, and
EC03-81-001

ORDER GRANTING AND DENYING REHEARING AND CONDITIONALLY
ACCEPTING COMPLIANCE FILING AND GRANTING MOTION TO WITHDRAW
ELEMENTS OF THE COMPLIANCE FILING

(Issued November 17, 2003)

1. In a May 2, 2003 Order, the Commission, reversing a January 24, 2003 Order, preauthorized the Cities of Anaheim, Azusa, Banning, and Riverside, California (collectively, Southern Cities), pursuant to Section 203 of the Federal Power Act (FPA), to withdraw their transmission facilities and entitlements from the California Independent System Operator's (CAISO) operational control in the limited circumstance when an impending or actual adverse tax action creates a risk that the tax-exempt status of their financing may be lost.¹ In light of that reversal, CAISO filed a motion to withdraw (Motion to Withdraw) elements of its compliance filing (Compliance Filing) that was made pursuant to the directives in the January 24 Order. In this order, we grant and deny a request for rehearing of the May 2 Order and conditionally accept the CAISO's Compliance Filing and grant its Motion to Withdraw.

I. Background: January 24 Order

2. The January 24 Order accepted various amendments by the CAISO to its Transmission Control Agreement (TCA), providing for the addition of the Southern Cities as participating transmission owners (PTOs), and (in order to implement those amendments to the TCA) certain revisions to its Open Access Transmission Tariff (Tariff), allowing the CAISO to assume operational control of the facilities and entitlements being turned over to it by the Southern Cities. That order also directed that Section 3.4.1 (Right to Withdraw Due to Adverse Tax Action) of the proposed revised

¹ California Indep. Sys. Operator Corp., 102 FERC ¶ 61,061 (January 24 Order), order granting reh'g, 103 FERC ¶ 61,113 (2003) (May 2 Order).

TCA be changed to reflect that any withdrawal from the CAISO by one of the Southern Cities would require filings under Sections 203 and 205 of the FPA to transfer control over the jurisdictional facilities from the CAISO back to one of the Southern Cities and approval by the Commission before such a transfer became effective. The January 24 Order also required the CAISO to develop procedures for a PTO's withdrawal. In addition, the January 24 Order directed the CAISO to develop a mechanism for its Transmission Register² that would allow market participants to have access to it and, at the same time, not compromise its security. Specifically, the January 24 Order directed the CAISO to implement reasonable screening procedures that would allow it, on a case-by-case basis, to give all legitimate market participants access, if they requested it, to the information in the Transmission Register.

3. The Southern Cities and others filed requests for rehearing of the January 24 Order. The rehearing requests stated that if there is an actual or impending adverse tax action that could result in the loss of the tax exempt status for bonds that the Southern Cities used to acquire their facilities and/or entitlements, they must be able to withdraw their transmission facilities and entitlements from the CAISO's operational control without approval from the Commission.

II. Compliance Filing

A. Notice of Filing and Responses

4. Notice of the compliance filing was published in the Federal Register, 68 Fed. Reg. 22,371 (2003), with comments, protests, and interventions due on or before May 6, 2003. The Metropolitan Water District of Southern California (Metropolitan) filed a timely motion to intervene and comment.

B. Compliance Filing

5. On April 15 2003, the CAISO filed, consistent with the Commission's January 24 Order, the Compliance Filing. The CAISO requested that the Commission not act on it until the Commission issued an order addressing the requests for rehearing of the January 24 Order. Among other things, the Compliance Filing, in order to comply with Commission's directives in the January 24 Order, revised Section 3.4 of the TCA to require that any notice of withdrawal of a PTO from the CAISO must be filed with the Commission and must be approved by it before becoming effective. Furthermore, with

² The Transmission Register, which lists facilities under the CAISO's operational control, was available (prior to the January 24 Order) to the public by way of the CAISO's website.

regard to the January 24 Order's requirement that the CAISO develop procedures for a PTO's withdrawal, the CAISO stated that it would develop such procedures once the Commission's order on rehearing was issued.

6. As for the January 24 Order's directive to develop a mechanism for the Transmission Register that would allow market participants to have access to it, the CAISO explained in the Compliance Filing that it was working on crafting such a mechanism and expected that the procedure would be finalized shortly. In this regard, the CAISO is allowing PTOs to review and comment on the draft procedures. When that process is completed, the CAISO stated that it will send out a notice to market participants regarding the new procedures and post them on its website.³ According to the CAISO, the revised procedures in Section 4.2.4 of the TCA will allow market participants that can demonstrate a legitimate need for the information, in accordance with screening procedures to be posted on the CAISO's home page, to have access to the data from the Transmission Register.

C. Metropolitan's Comment

7. Metropolitan stated that the CAISO's proposed change to Section 4.2.4 of the TCA, regarding the Transmission Register, is inconsistent with the Commission's directive in the January 24 Order. According to Metropolitan, by posting a procedure on its website, the CAISO avoids the Commission reviewing whether the revised procedures provide market participants with adequate access and an opportunity for stakeholder comment before the procedures become finalized.

III. May 2 Order

8. In the May 2 Order, the Commission, reversing its holding in the January 24 Order, granted preapproval, pursuant to Section 203 of the FPA, for the Southern Cities to withdraw their transmission facilities and entitlements from the CAISO's operational control in the limited circumstance when an impending or actual adverse tax action creates a risk that the tax exempt status of their financing may be lost.⁴ In addition, that order excused the CAISO from making Section 203 and 205 filings upon the eventuality of such a withdrawal. The May 2 Order also denied, as an impermissible collateral attack on another proceeding, the State Water Project of the California Department of Water

³ Pending the implementation of the final screening procedures, according to a market notice dated February 19, 2003 on the CAISO's home page, the CAISO will provide market participants, which can demonstrate a current legitimate business need, a copy of the requested Transmission Register information.

⁴ 103 FERC ¶ 61,113 at P 5.

Resources' (DWR) request that many of the new entitlements proposed to be turned over to the CAISO's operational control by the Southern Cities are generation tie lines (Gen Ties) and, therefore, should not be transferred to the CAISO.

IV. Motion to Withdraw Elements of the Compliance Filing

A. Notice of Filing and Responses

9. Notice of the Motion to Withdraw was published in the Federal Register, 68 Fed. Reg. 26,595 (2003), with comments, protests, and interventions due on or before June 16, 2003. None was filed.

B. Motion to Withdraw

10. On May 5, 2003, in light of the fact that the May 2 Order removed the requirement that the CAISO comply with certain directives of the January 24 Order, the CAISO filed the Motion to Withdraw elements of the Compliance Filing. Specifically, the CAISO seeks to withdraw those elements of the Compliance Filing related to obtaining the Commission's preapproval for the withdrawal of facilities facing an adverse tax action and to developing withdrawal procedures to accommodate such a preapproved withdrawal.

V. Request for Rehearing

11. On June 2, 2003, DWR requested rehearing of the May 2 Order's preauthorization for the Southern Cities to withdraw their transmission facilities and entitlements from CAISO's operational control in the event of an adverse tax action. DWR states that Section 203 of the FPA does not contemplate such a pre-granting of approval for a future disposition of facilities. Furthermore, according to DWR, the Commission does not have the authority to approve or not approve any entity's withdrawal from the CAISO.⁵ Rather, it is the Commission's obligation to consider and decide whether the CAISO can dispose of facilities, not whether non-jurisdictional entities can withdraw.

12. In this regard, DWR maintains that it is the jurisdictional CAISO that is required to apply for and obtain Commission approval at the time of any proposed disposition of facilities in the future. Accordingly, DWR argues that the Commission, in the May 2 Order, should have maintained the requirement from the January 24 Order that the CAISO revise its TCA so that a withdrawal by a tax-exempt PTO will require the CAISO

⁵ DWR Request for Rehearing at 4 (citing Atlantic City Elec. Co., et al. v. FERC, 295 F.3d 1 (D.C. Cir. 2002), petition to enforce mandate granted, 329 F.3d 856 (D.C. Cir. 2003)).

to make Section 203 and 205 filings to transfer control over the jurisdictional facilities under the control of the CAISO back to the PTO. In particular, DWR requests that the Commission require the CAISO: (1) obtain, pursuant to Section 203, the Commission's approval for such a withdrawal; and (2) make appropriate filings under Section 205 to reflect the corresponding reduction in costs resulting from such a withdrawal, as well as making appropriate filings to amend its TCA and Tariff accordingly. Without such requirements, DWR states that it and other CAISO customers will continue to pay for costs for facilities that are no longer in the CAISO's control.

13. With regard to the Commission's refusal in the January 24 and May 2 Orders to consider DWR's request that the Commission address the Gen Ties issue in this proceeding, DWR states that, contrary to the May 2 Order, the elements of collateral estoppel are not met in the present circumstances for two reasons. First, the issue regarding the Gen Ties has not yet been litigated in any of the proceedings involving the Southern Cities' transfer of facilities to the CAISO, and second, the Commission has not yet issued a final determination of the Gen Ties issue in any other proceeding.

14. In addition, the Southern Cities filed an answer to DWR's request for rehearing, and, in response, DWR filed an answer to the Southern Cities' answer.

VI. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2002), the timely, unopposed motion to intervene of Metropolitan serves to make it a party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2002), generally prohibits an answer to a request for rehearing and, accordingly, an answer to that answer. We are not persuaded to allow either the Southern Cities' answer to DWR's request for rehearing or DWR's answer to Southern Cities' answer; accordingly, we reject them.

B. Commission's Response: Request for Rehearing

1. Procedures for a Withdrawal

16. We deny DWR's request for rehearing that the Commission should require the CAISO to make a Section 203 filing if one of the Southern Cities withdraws its facilities from the CAISO. When the Southern Cities joined the CAISO, they did not transfer the ownership of their facilities. Pursuant to the TCA and the Tariff, each of the Southern Cities retained ownership of their facilities and turned over to the CAISO only certain operational responsibilities relating to the provision of transmission services using their facilities. As the Commission explained in the Guidance on Regional Transmission

Organization and Independent System Operator Requirements under the FPA, “[f]or any transfer of operational control of jurisdictional transmission facilities to or from an . . . ISO, which does not involve a transfer of ownership or other proprietary interest in transmission facilities or a lease of jurisdictional facilities, the Commission will no longer require a public utility to make a filing pursuant to Section 203 of the FPA with respect to such a transfer.”⁶

17. In the Guidance Order, we also stated that the Commission will require a Section 205 filing to determine “whether a specific proposed withdrawal of a participant is consistent with the FPA.”⁷ However, in the limited circumstance when an impending or actual adverse tax action creates a risk that the tax exempt status of a non-public utility may be lost, we pre-grant authorization under Section 205 for that non-public utility to withdraw its transmission facilities and entitlements from the CAISO’s operational control without the Commission’s prior approval. Such an exception is necessary to ensure that the transfer of operational control of Southern Cities’ facilities and entitlements in transmission facilities to the CAISO will not jeopardize the status of their federal tax exempt bonds. Furthermore, granting such a withdrawal provision is consistent with the Commission’s stated policy of encouraging the participation of non-public utilities in regional organizations without jeopardizing the tax-exempt status of their financing.⁸ Thus, because the public interest is served by having the Southern Cities participate in the CAISO, pursuant to Section 205 of the FPA, we preauthorize the Southern Cities to withdraw their transmission facilities and entitlements from the CAISO’s operational control (*i.e.*, the CAISO is preauthorized to dispose those jurisdictional facilities back to the Southern Cities) in the limited circumstances discussed above.

18. We agree with DWR that the CAISO’s rates should be adjusted to reflect the withdrawal of a non-public utility. Accordingly, we will require the CAISO to revise Section 3.4 of the TCA so that it states that the CAISO will make a Section 205 filing in the event of a withdrawal of a non-public utility from the CAISO and modify the TCA and Tariff accordingly. In the context of withdrawals by non-public utilities, the purpose of this Section 205 filing will be to adjust the CAISO’s rates as necessary to reflect the non-public utility’s withdrawal from the CAISO. In this regard, the CAISO’s Section 205 filing will not be used to impede a non-public utility from withdrawing its facilities from the CAISO but, instead, to make sure that the resulting adjustments to the CAISO’s rates, TCA, and Tariff from such a withdrawal are consistent with the FPA.

⁶ 104 FERC ¶ 61,248 at P 2 (2003) (emphasis in original) (Guidance Order).

⁷ See id. at 3 (footnote omitted).

⁸ See generally Order No. 888 and Order No. 2000.

2. Gen Ties Issue

19. DWR reiterates arguments concerning Gen Ties being transferred to the CAISO that it advanced earlier and that the Commission responded to in the January 24 and May 2 Orders.⁹ Because we have already addressed those arguments twice and DWR has not proffered any new argument regarding that matter, we deny DWR's request for rehearing regarding this matter. We note that although the issues DWR has raised about the rate treatment of the Gen Ties have not yet been resolved, they are beyond the scope of this proceeding.

C. Commission's Response: Compliance Filing and Motion to Withdraw

20. With respect to the issue regarding the CAISO's Transmission Register in the Compliance Filing, we will not require, at this time, that the CAISO develop a particular mechanism to provide market participants access to the Transmission Register, as requested by Metropolitan. We reiterate that the CAISO must implement screening procedures that, on a case-by-case basis, will give all legitimate market participants access, if they request it, to the information in the register.¹⁰ Accordingly, we will not interrupt the CAISO's ongoing attempts to develop appropriate screening procedures.

21. However, to ensure that market participants have equal access with PTOs to the information in the Transmission Register, we agree with Metropolitan that when the procedures are finalized, the CAISO must file them with the Commission, as well as posting them on its website. Therefore, we require the CAISO to revise Section 4.2.4 of the TCA so that it provides that the screening procedures for the Transmission Register will be filed with the Commission. At the time of that filing, interested parties may comment on the screening procedures, and the Commission will review the procedures to make sure that they are consistent with the January 24 Order (*i.e.*, give all legitimate market participants, if they have a legitimate business need, access to this information).¹¹

22. In addition, we grant the CAISO's Motion to Withdraw its revised Section 3.4 of the TCA.

⁹ See January 24 Order, 102 FERC ¶ 61,061 at P 27 (“DWR’s concerns . . . [regarding the Gen Ties issue] is more appropriately addressed in the pending settlement proceedings involving the rate-related impacts of the Southern Cities’ participation in the CAISO (including the transmission revenue requirements.”); May 2 Order, 103 FERC ¶ 61,113.

¹⁰ See January 24 Order, 102 FERC ¶ 61,061 at 61,158 P 22.

¹¹ Id.

The Commission orders:

(A) The CAISO's Compliance Filing is conditionally accepted and its Motion to Withdraw is granted, as discussed in the body of this order.

(B) The CAISO is directed to file revisions to Section 4.2.4 of the TCA, regarding the Transmission Register (within ten days from the day they are finalized) and to revise Section 3.4 of the TCA so that it provides that the CAISO will make a Section 205 filing in the event of a withdrawal of facilities from its control, as discussed in the body of this order.

(C) DWR's request for rehearing is granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.