

176 FERC ¶ 61,159
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

California Independent System Operator Corporation Docket No. ER21-2753-000

ORDER GRANTING REQUEST FOR WAIVER

(Issued September 15, 2021)

1. On August 24, 2021, pursuant to Rules 207(a)(5) and 212 of the Commission's Rules of Practice and Procedure,¹ the California Independent System Operator Corporation (CAISO) filed a petition for a limited waiver of section 25.1 of its Open Access Transmission Tariff (Tariff) to allow it to immediately interconnect two generating units to address potential capacity shortfalls and maintain reliability. We grant CAISO's waiver request, as discussed below.

I. Waiver Request

2. CAISO states that it needs additional generating capacity. Citing its 2021 Summer Loads and Resources Assessment (2021 Summer Assessment),² CAISO highlights potential challenges in meeting demand during extreme heat waves that will be exacerbated by a second year of lower-than-normal hydropower capability and an increased possibility of extreme weather events. CAISO notes that, since September 2020, it has been working to enhance operational procedures to operate reliably this summer but cautions that conservation during extreme events will remain critical to avoid shedding load.³

3. CAISO states that, consistent with the 2021 Summer Assessment, California Governor Gavin Newsom issued an emergency proclamation on July 30, 2021 authorizing various measures to mitigate the strain on California's energy grid. According to CAISO, these measures enabled the California Energy Commission (CEC)

¹ 18 C.F.R. §§ 385.207(a)(5), 385.212 (2021).

² 2021 Summer Loads and Resource Assessment, *California ISO*, (May 2021), www.caiso.com/Documents/2021-Summer-Loads-and-Resources-Assessment.pdf

³ Petition at 2-3.

and California Department of Water Resources (CDWR) to begin deploying a number of modular gas turbine generators. CAISO states that these generators each have a generating capacity of 30 MW and can be installed in as few as 11 days at existing generation sites. Further, CAISO states that the generators can start in five minutes and ramp to full capacity within half an hour.⁴

4. CAISO states that, in collaboration with CDWR and participating transmission owners, it identified two potential sites deemed feasible for implementation in September 2021 located within Pacific Gas and Electric Company (PG&E) and the Balancing Authority of Northern California (BANC) territories.⁵ Specifically, CAISO states that this petition pertains to the installation of two generating units at the former Greenleaf 1 energy center in Yuba City, California, within PG&E's service territory. CAISO states that the Greenleaf 1 site is ideal because the cogeneration facilities located there are currently mothballed, awaiting repowering or conversion to other technologies, but still connected to the CAISO grid. As such, CAISO states that the existing interconnection service capacity of 49.2 MW can accommodate most of the 60 MW of temporary generating capacity. Further, CAISO states that, pursuant to the analyses it has conducted, the grid and Greenleaf 1 site can accommodate the additional 10.8 MW of interconnection capacity needed for the two emergency generating units without the need for network upgrades. CAISO states that the site owner, Calpine Corporation (Calpine), agreed to potential short-term interconnections of these emergency generating units. CAISO notes that it, PG&E, and Calpine intend to amend their existing generator interconnection agreement (GIA) and market agreements to reflect these interconnections once the Commission has ruled on this petition.⁶

5. CAISO asserts that this limited waiver is necessary because section 25.1 of the Tariff would require an interconnection request for the additional 10.8 MW of interconnection capacity at the Greenleaf 1 site. However, CAISO states that neither an independent study interconnection request nor a cluster study interconnection request could accommodate this interconnection in time to aid CAISO during the late summer and early fall periods of high demand and low hydropower capability.⁷

⁴ *Id.* at 3.

⁵ CAISO states that, because the BANC site is outside of the CAISO balancing authority area, it is not part of this petition. CAISO states that generating units connecting at that site will do so pursuant to the relevant tariff. *Id.* n.7.

⁶ *Id.* at 3-5.

⁷ *Id.* at 5-6. CAISO also notes that its fast track interconnection process limits increases to 5 MW and, therefore, cannot accommodate these interconnections. *Id.* n.11.

6. CAISO asserts that its request for limited waiver satisfies the Commission's four conditions for granting waiver. First, CAISO states that it has acted in good faith because these interconnection projects resulted from the Governor's proclamation, issued only weeks before CAISO filed its petition. Further, CAISO states that it, PG&E, CWDR, CEC, and Calpine have worked expeditiously to ensure that these units can be interconnected safely in time to address potential capacity shortfalls this year.

7. Second, CAISO states that the waiver is limited in scope because it will apply only to these generating units and only for three years. CAISO notes that interconnections generally have a lifetime of 30 years and, therefore, three years represents a very short period for an interconnection. CAISO states that, if the interconnection customers seek to retain the increased interconnection capacity at these sites beyond three years, they will be required to obtain it pursuant to the regular Tariff procedures.⁸

8. Third, CAISO states that the waiver addresses the concrete problem of a potential shortage of generating capacity this year and in coming years, due to generator retirements, historically low hydropower capability, and increasing demand due to extreme weather events. CAISO asserts that interconnecting these units on a temporary basis will help it avoid reliability issues until sufficient generating capacity has come online. Fourth, CAISO states that the waiver will not have undesirable consequences. CAISO states that, along with PG&E, it has already performed the reliability studies required for these generating units and can confirm that neither online generating facilities nor interconnection customers in the queue will be adversely affected by this waiver. Moreover, CAISO explains that it is not allocating any deliverability capacity or otherwise increasing the net qualifying capacities to account for the higher generating capacity. Thus, CAISO asserts that online generators and currently queued interconnection customers maintain their *status quo* in actual circumstances and potential opportunities. In addition, CAISO states that these generating units can interconnect without the need for additional interconnection facilities or network upgrades that would present substantial costs to ratepayers. Finally, CAISO states that granting this waiver does not result in any technology or developer preference because CAISO only worked with CEC and CDWR to identify feasible interconnection sites and had no influence in selecting the generating units themselves.⁹

⁸ *Id.* at 6-7. CAISO also notes that, until the generating unit owners complete necessary permitting requirements, these units will not operate or deliver energy without a directive from the Department of Energy under Federal Power Act (FPA) section 202(c).

⁹ *Id.* at 7-8.

9. CAISO states that, in order to ensure these generating units can help mitigate the potential capacity shortfalls, outages, and contingencies CAISO may face imminently due to extreme weather, fires, and low hydropower capability, CDWR plans to interconnect the generating units in mid-September 2021.¹⁰

II. Notice of Filing and Responsive Pleadings

10. Notice of CAISO's filing was published in the *Federal Register*, 86 Fed. Reg. 48,421 (Aug. 30, 2021), with interventions and protests due on or before August 31, 2021. Calpine; NRG Power Marketing LLC; Modesto Irrigation District; Northern California Power Agency; Southern California Edison Company; the City of Roseville, California; and the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California filed timely motions to intervene. PG&E; Vistra Corp. and Dynegy Marketing and Trade, LLC (collectively Vistra); and CDWR filed timely motions to intervene and comments. On September 3, 2021, CAISO filed an answer.

A. Comments

11. PG&E and CDWR support granting the waiver. CDWR supports CAISO's request for expedited action because the generators are needed for system reliability as soon as possible.¹¹ PG&E states that it and CAISO completed the required reliability studies and asserts that neither online generators nor interconnection customers in the queue are adversely affected by the waiver.¹²

12. Vistra states that it supports the objective of ensuring that "first-ready" projects are allowed to proceed promptly toward commercial operation, but that CAISO's decision to use a waiver request to effectively establish a new fast-track process for emergency generation resources is extraordinary and inconsistent with Commission precedent.¹³

13. Vistra asserts that, while CAISO frames its request as a one-time, limited waiver that will apply to two resources, the petition effectively asks the Commission to allow CAISO to establish a new process for interconnecting emergency generation on an expedited basis. Vistra states that the Commission has previously made clear that a waiver request cannot be used to establish a new process not set out in the existing

¹⁰ *Id.* at 9.

¹¹ CDWR Comments at 3-4.

¹² PG&E Comments at 3.

¹³ Vistra Comments at 3.

tariff.¹⁴ Vistra notes that CAISO expressly acknowledges that the waiver is intended to compensate for the lack of tariff provisions that could accommodate an emergency or temporary interconnection.¹⁵

14. Vistra claims that the need to quickly interconnect resources will persist,¹⁶ and that it is essential such requests be handled through a transparent set of tariff procedures with appropriate safeguards to protect other interconnection customers. If the Commission approves the waiver request, Vistra states that the Commission should make clear that its decision is limited to the generation resources that are the subject of this proceeding and that CAISO must make an FPA section 205 filing amending its tariff if it wishes to fast track any additional emergency generation resources going forward. Vistra asserts that the Commission's action on the instant waiver request is likely to prove critical to informing how CAISO handles future requests for expedited interconnection.¹⁷

B. CAISO Answer

15. CAISO asserts that Vistra's claims about future interconnections are speculative, inaccurate, and misleading. CAISO states that the only petition for relief CAISO has requested is for a single accelerated study to increase one existing interconnection customer's capacity from 49.2 MW to 60 MW.¹⁸

16. Next, CAISO explains that its petition would not create a new tariff process. CAISO states that if it were implementing a new tariff process, it would have no way of studying increases in interconnection service. CAISO explains that it has several interconnection study processes, including for fast-track energy-only interconnection

¹⁴ *Id.* (citing *ISO New England Inc.*, 164 FERC ¶ 61,003 (2018) (finding that a waiver request is not an appropriate vehicle for creating a new process that is not included in the tariff) (*ISO-NE*); *Genbright LLC*, 170 FERC ¶ 61,079, at P 30 (2020) (denying a request for waiver that would permit interconnection projects to evade the ISO-NE interconnection study process because it was not limited in scope) (*Genbright*)).

¹⁵ *Id.* at 4-6.

¹⁶ Vistra states that it understands that the CEC and CDWR are taking immediate steps to deploy thousands of additional MW of generation to address projected supply shortfalls. Vistra specifically notes that the CEC and CDWR have already announced that they have procured 150 MW of emergency generation capacity and are in the process of identifying additional capacity to bring online on an expedited basis. *Id.* at 6-7.

¹⁷ *Id.* at 6-11.

¹⁸ CAISO Answer at 2.

requests. CAISO emphasizes that it conducted its studies of the increase to the interconnection capacity at the Greenleaf 1 site under all of its preexisting methodologies and existing tariff processes.¹⁹ Moreover, CAISO notes that its Tariff has provisions describing its ability to perform accelerated interconnection studies.²⁰

17. CAISO further argues that Vistra's citations to Commission precedent are inapposite and taken out of context. For instance, CAISO states that ISO New England, Inc.'s (ISO-NE) petition for waiver was a highly complex filing seeking waivers in numerous ways, including performing studies it had not performed previously, and then retaining units based on those studies under different rules than what ISO-NE's tariff prescribed. In contrast, CAISO states that its petition seeks to suspend section 25.1 of its Tariff to study the Greenleaf 1 site interconnection service increase more quickly than under its existing tariff processes.²¹

III. Discussion

A. Procedural Matters

18. 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.

19. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2020), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept CAISO's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

20. We grant CAISO's request for limited waiver of Tariff section 25.1 to accommodate the immediate interconnection of the two specified generating units. 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

¹⁹ *Id.* at 4-5.

²⁰ "The CAISO may apply to FERC in coordination with the [i]nterconnection [c]ustomer for a waiver of the timelines in this GIDAP to meet the schedule required by an order, ruling, or regulation of the Governor of the State of California, the CPUC, or the CEC." *Id.* at 4 (citing CAISO Tariff, appendix DD, § 8.6).

²¹ *Id.* at 4-5.

third parties.²² We find that the circumstances of CAISO's waiver request satisfy these criteria.

21. First, we find that CAISO acted in good faith because the Governor's emergency proclamation was issued on July 30, 2021, and CAISO submitted the waiver request promptly after ascertaining the feasibility and safety of interconnecting these generating units on an expedited basis. Second, we find that the waiver is limited in scope because it applies only to two generating units (and all but 10.8 MW of the capacity of these units can be accommodated using existing interconnection service capacity) for a limited period of time (i.e., three years).²³ Third, we find that the waiver addresses the concrete problem of a potential capacity shortfall in the end-of-summer and early-fall period when CAISO historically has faced tight system conditions.²⁴ Fourth, we find that the waiver will not have undesirable consequences, such as harm to third parties, because the temporary interconnection of these two generating units will preserve the *status quo* for online generators and already-queued interconnection customers and will not require new interconnection facilities or network upgrades.

22. Vistra asserts that the Commission has repeatedly rejected waiver requests seeking to implement new tariff processes. We agree with Vistra that a filing under FPA section 205 is required to establish a new tariff process. However, we find that the circumstances of the instant waiver request differ from those in *ISO-NE* and *Genbright*.²⁵

23. In *ISO-NE*, the Commission expressed concern that ISO-NE's request for waiver of multiple tariff provisions to retain two retiring generating units for fuel security purposes would "not only suspend tariff revisions but also alter the existing conditions upon which a market participant could enter into a cost-of-service agreement (for a transmission constraint that impacts reliability) and allow for an entirely new basis (for

²² 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).

²³ This waiver applies only to CAISO's limited request set forth in its Petition regarding interconnection service at the Greenleaf 1 site and does not serve as a blanket waiver for interconnecting additional emergency generation resources. As noted below, we encourage CAISO to make every effort to avoid the need for similar waiver requests in the future.

²⁴ For instance, CAISO refers to its 2021 Summer Loads and Resources Assessment finding that "capacity shortfalls this summer may be mitigated by additional extraordinary measures accessed under extreme or emergency conditions to limit the risk of actual firm load shedding." Petition at 2.

²⁵ *Genbright*, 170 FERC ¶ 61,079.

fuel security concerns that impact reliability) to enter into such an agreement.”²⁶ Here, in contrast, CAISO does not request to alter the circumstances under which a generator may interconnect, because the Tariff already permits a customer in Calpine’s circumstances to seek to modify an existing interconnected unit in a manner that increases the plant’s total capability by submitting an interconnection request.²⁷ Moreover, CAISO states that it studied the increase in interconnection capacity at the Greenleaf 1 site under its preexisting methodologies and existing tariff processes.²⁸ Thus, CAISO does not propose a new tariff process in this filing; rather, it seeks waiver of an existing Tariff provision – section 25.1 – in order to allow the expedited interconnection of two generating units on a temporary basis.

24. In *Genbright*, the Commission found that the requested waiver was not limited in scope because it would allow Genbright LLC’s projects to “avoid ISO-NE’s complex interconnection study process, including the system impact study, which is ISO-NE’s comprehensive reliability evaluation.”²⁹ Unlike the interconnections at issue in *Genbright*, which ISO-NE had never studied, CAISO explains that it and PG&E “have already performed the reliability studies required for these generating units, and can confirm that neither online generating facilities nor interconnection customers in the queue are affected adversely by this waiver.”³⁰

25. Vistra also argues that allowing hundreds or thousands of megawatts of capacity to advance to the front of the queue could have profound consequences for other interconnection customers. While we acknowledge Vistra’s concerns, we find that granting waiver in this limited instance does not permit such an outcome. The Commission reviews waivers on a case-by-case basis, and we emphasize that waiver here is limited to the facts in the record before us regarding these two specified generating units and is not a blanket waiver that would apply to additional projects.

26. Importantly, we note that prior to submitting this request for waiver, CAISO has taken several actions under its tariff to retain or attract additional capacity. During the last 18 months, CAISO has denied the requests of all five existing generating facilities that notified CAISO of their intent to mothball or retire. Instead, CAISO designated

²⁶ *ISO-NE*, 164 FERC ¶ 61,003 at P 47.

²⁷ *See* CAISO Tariff, § 25.1(b).

²⁸ CAISO Answer at 4-5.

²⁹ *Genbright*, 170 FERC ¶ 61,079 at P 30.

³⁰ Petition at 7.

these units as Reliability Must Run units.³¹ In addition, in July and August 2021, CAISO issued four notices of Significant Event and Exceptional Dispatch Capacity Procurement Mechanism (CPM) designations to multiple generating units. While the CPM term is 30 days, CAISO offered 60-day extensions to these resources but none accepted.³² Finally, CAISO has requested an emergency order from the Department of Energy under FPA section 202(c) that would allow the generating units discussed in this waiver request, along with four other units, to provide energy beyond their permitted levels.³³ Given the exigent circumstances currently faced by CAISO, we find that good cause exists to grant this limited waiver as another tool to help CAISO address the anticipated capacity shortfalls. But we emphasize that CAISO must make every effort to avoid these sorts of waiver requests in the future.³⁴

27. The dissent argues that the waiver CAISO seeks is retroactive because certain tariff deadlines to interconnect the two generating units have already expired. However, this misunderstands CAISO's request and the waiver granted here. The requested waiver is not retroactive in nature. CAISO requests waiver of Section 25.1 of its Tariff, which would otherwise require the generator to submit an interconnection request for the incremental 11 MW of interconnection service. It is irrelevant that CAISO seeks this waiver in order to interconnect the generators by September 15, 2021 and that, under the normal study process that would otherwise follow an interconnection request, interconnection by that date would be infeasible. That fact alone does not make CAISO's

³¹ CAISO, Request for Emergency Order Pursuant to Section 202(c) of the Federal Power Act at 4 (Sept. 7, 2021) (202(c) Request). *See, e.g., Midway Sunset Cogeneration Company*, 175 FERC ¶ 61,003 (2021); *KES Kingsburg, L.P.*, 175 FERC ¶ 61,255 (2021).

³² *See* July and August 2021 Significant Event and Exceptional Dispatch Capacity Procurement Mechanism Designations Report (<http://www.caiso.com/Documents/JulyandAugust2021SignificantEventandExceptionalDispatchCPMReport.pdf>).

³³ 202(c) Request at 6.

³⁴ We encourage CAISO, and other entities in the West, to continue to work expeditiously to address resource adequacy concerns and minimize the need for these sorts of waiver requests. The Commission recently held a "Technical Conference to Discuss the Resource Adequacy Developments in the Western Interconnection," where panelists discussed addressing Western Resource Adequacy concerns through a variety of approaches, including improving existing resource adequacy processes and increased regional coordination. *Notice of Technical Conference re Resource Adequacy Developments in the Western Interconnection*, Docket No. AD21-14 (Mar. 16, 2021).

request retroactive. CAISO merely seeks waiver to facilitate interconnection in response to emergency circumstances, regardless of when that interconnection ultimately may happen; and CAISO states that the waiver addresses the lack of tariff provisions that could accommodate an emergency or temporary interconnection. In any event, several interconnection processes under CAISO's tariff do not have set deadlines—so to the extent that CAISO would have utilized those processes, there is no deadline that CAISO failed to meet.³⁵ Moreover, CAISO's tariff expressly provides for a waiver of timelines to meet requirements imposed by regulators or by the Governor of the State of California.³⁶ Indeed, CAISO has requested waiver in order to satisfy a proclamation issued by the Governor. This tariff provision provides sufficient notice to regulated parties, meaning there is no filed rate doctrine problem here.

28. Finally, we expect the limitations of this waiver to be transparently memorialized in the forthcoming revisions to the generator interconnection agreements between Calpine, CAISO, and PG&E that CAISO states will be amended following Commission action on this request.³⁷ For instance, such revisions could reflect that: (1) rights to the 10.8 MW of incremental interconnection capacity terminate three years from the date of this order; (2) if Calpine seeks to increase its existing 49.2 MW of interconnection rights beyond the three-year period covered by this waiver, it must submit an interconnection request consistent with the tariff; and (3) if Calpine seeks to repower its mothballed unit to utilize its existing 49.2 MW of interconnection rights following the expiration of the waiver, it would need to submit a new repowering request at that time pursuant to the tariff.

³⁵ “Interconnection Customers may submit Interconnection Requests for processing under the Independent Study Process or the Fast Track Process at any time during the year.” CAISO Tariff, Appendix DD, § 3.3.2.

³⁶ CAISO Tariff, Appendix DD, § 8.6 (“CAISO may apply to FERC in coordination with the Interconnection Customer for a waiver of the timelines in this GIDAP to *meet the schedule* required by an *order, ruling, or regulation of the Governor of the State of California*, the CPUC, or the CEC”) (emphasis added).

³⁷ Petition at 4.

The Commission orders:

CAISO's waiver request is 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)

Debbie-Anne A. Reese,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corporation Docket No. ER21-2753-000

(Issued September 15, 2021)

DANLY, Commissioner, *dissenting*:

1. The California Independent System Operator Corporation (CAISO) seeks to waive not only the timelines but also the interconnection terms and conditions of its filed rate to permit the immediate interconnection of two generators.¹ CAISO seeks this latest emergency relief because of the ongoing and persistent failure of its markets to attract and retain adequate resources to maintain reliability.² I dissent from today’s order because the waiver is retroactive and therefore illegal.³ It also fails to satisfy at least three of the four factors of the four-factor test we apply to waiver requests: it plainly harms third parties (every other entity seeking interconnection), has undesirable consequences (creating a new emergency loophole to CAISO’s interconnection process), and is not limited in scope (it waives nearly the entire interconnection process). Worst of all, the waiver is unnecessary—the Commission has clear authority under section 206 of the Federal Power Act (FPA) to address the emergency.⁴

2. Unambiguous, uninterrupted and controlling judicial precedent holds that a utility can only charge the rate on file. This is called the filed rate doctrine.⁵ It is a core tenet of utility regulation. The Commission also has no authority to permit utilities to charge rates other than those on file unless there is advance notice that the rate may change or the Commission has approved a tariff allowing the utility to charge different rates

¹ CAISO August 24, 2021 Petition at 1-8; *see also* CAISO September 3, 2021 Answer at 4 (citing CAISO Open Access Transmission Tariff (Tariff), App. DD, § 8.6).

² CAISO August 24, 2021 Petition at 1-3, 6-7. “The CAISO needs additional generating capacity.” *Id.* at 2.

³ *Cal. Indep. Sys. Operator Corp.*, 176 FERC ¶ 61,159 (2021) (September 15 Order).

⁴ 16 U.S.C. § 824e.

⁵ *See Waiver of Tariff Requirements*, 171 FERC ¶ 61,156, at P 5 (2020) (Proposed Policy Statement) (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (*Arkla*); *Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951)).

prospectively. This is called the rule against retroactive ratemaking.⁶ This rule is also a core tenet of utility regulation and is a necessary adjunct to the filed rate doctrine. There would be little point in having rates on file if rate changes can be retroactively applied. Both the filed rate doctrine and the rule against retroactive ratemaking also apply to non-rate terms and conditions in filed tariffs.⁷

3. As the D.C. Circuit *very* recently explained, “[t]he filed rate requirement is stringent and admits of no equitable adjustments by the Commission or this court.”⁸ Because this rule is so hard and fast, the Commission cannot retroactively waive the filed rate, even in the most compelling circumstances, including emergencies. The Commission, however, has been in the practice of routinely granting retroactive waivers and it usually does so without even acknowledging that it has engaged in retroactive ratemaking.⁹ In many of these cases, no one opposes the waiver and thus no one can appeal the Commission’s order. But the absence of opposition does not make the unlawful lawful.

4. The waiver at hand is one of several actions CAISO has recently taken to address its energy crisis.¹⁰ CAISO now seeks to interconnect the two generation resources at

⁶ *Id.* (citing *Arkla*, 453 U.S. at 578).

⁷ *Id.* at P 6; *Ok. Gas & Elec. Co. v. FERC*, No. 20-1062, Slip Op. at 13-14 & n.3 (D.C. Cir. 2021) (*Oklahoma Gas*) (citations omitted).

⁸ *Oklahoma Gas*, Slip Op. at 17.

⁹ *See, e.g., SunEnergy1, LLC*, 176 FERC ¶ 61,004 (2021) (Danly, Comm’r, dissenting at PP 9-13); *Buchanan Cnty. Solar Project, LLC*, 175 FERC ¶ 61,109 (2021) (Danly, Comm’r, dissenting); *Rolling Hills Generating, L.L.C.*, 175 FERC ¶ 61,108 (2021) (Danly, Comm’r, dissenting); *Novera Energy, LLC*, 175 FERC ¶ 61,107 (2021) (Danly, Comm’r, dissenting); *TGE Pennsylvania 202, LLC*, 175 FERC ¶ 61,080 (2021) (Danly, Comm’r, dissenting at PP 4-6); *Leeward Renewable Energy, LLC*, 175 FERC ¶ 61,079 (2021) (Danly, Comm’r, dissenting at PP 1, 4-6); *Grover Hill Wind, LLC*, 174 FERC ¶ 61,240 (2021) (Danly, Comm’r, dissenting at P 1); *RRE Power LLC*, 174 FERC ¶ 61,052 (2021) (Danly, Comm’r, dissenting at PP 1-2); *Stoney Creek Solar LLC*, 174 FERC ¶ 61,054 (2021) (Danly, Comm’r, dissenting at PP 1-2); *Glidepath Ventures, LLC*, 173 FERC ¶ 61,085 (2020) (Danly, Comm’r, dissenting at PP 1-5); *Lightsource Renewable Energy Dev., LLC*, 172 FERC ¶ 61,294 (2020) (Danly, Comm’r, dissenting at PP 1-4).

¹⁰ *See, e.g.,* Depart. of Energy, Order No. 202-21-2 (issued Sept. 10, 2021) (emergency order issued pursuant to FPA 202(c), 16 U.S.C. § 824a(c), determining that an emergency exists in California due to a shortage of electric energy, a shortage of facilities for the generation of electric energy, and other causes and authorizing specific

issue on September 15, 2021—today—to avert a shortfall in generation. The majority cites a savings clause provision in the CAISO Tariff that “[t]he CAISO may apply to FERC in coordination with the [i]nterconnection [c]ustomer for a waiver of the timelines in . . . [the Generator Interconnection and Deliverability Allocation Procedures (GIDAP)] to meet the schedule required by an order, ruling, or regulation of the Governor of the State of California, the [California Public Utilities Commission (CPUC)], or the [California Energy Commission (CEC)].”¹¹ The scope of this savings clause is simply too narrow to justify the approval of CAISO’s waiver request.

5. Appendix DD to CAISO’s Tariff sets forth the GIDAP. Section 8.6 of Appendix DD pertains to the Accelerated Phase II Interconnection Study Process. It provides:

The Phase II Interconnection Study shall be completed within one hundred fifty (150) calendar days following the later of (1) the posting of the initial Interconnection Financial Security or (2) the completion of the re-assessment in preparation for the Phase II Interconnection Study under Section 7.4, where the

electric generation resources located within California to test and operate at their maximum generation output levels when directed to do so by CAISO notwithstanding air quality or other permit limitations through Nov. 9, 2021); Depart. of Energy, Order No. 202-20-2 (issued Sept. 6, 2020) (FPA 202(c), 16 U.S.C. § 824a(c), emergency order was issued to CAISO authorizing specific electric generating units located within the CAISO balancing authority area to operate at their maximum generation output levels due to an ongoing “Extreme Heat Event” and to preserve the reliability of bulk electric power system through Sept. 13, 2020); *see also Cal. Indep. Sys. Operator Corp.*, 175 FERC ¶ 61,245 (2021) (order accepting tariff revisions subject to further compliance filing to modify load, export, and wheeling priorities in the day-ahead and real-time optimization process and establish related market rules); *Cal. Indep. Sys. Operator Corp.*, 175 FERC ¶ 61,168 (2021) (order on tariff revisions to enhance CAISO’s resource adequacy rules by: (1) adopting a minimum state of charge requirement for storage resources that provide resource adequacy capacity; (2) requiring substitute capacity for all maintenance outages of resource adequacy resources; (3) clarifying that extending the scope or duration of an existing outage requires a new outage request; and (4) updating the local capacity technical study criteria and permitting CAISO to designate capacity under the backstop capacity procurement mechanism if there are deficiencies relative to the revised criteria); *Cal. Indep. Sys. Operator Corp.*, 175 FERC ¶ 61,167 (2021) (order on tariff revisions regarding the import capability allocation process); *Cal. Indep. Sys. Operator Corp.*, 175 FERC ¶ 61,160 (2021) (order on tariff revisions to ensure CAISO has the appropriate operational tools and market rules to address tight supply conditions).

¹¹ September 15 Order at P 27 & n.36; *see also* CAISO September 3, 2021 Answer at 4 (citing CAISO Tariff, App. DD, § 8.6).

Interconnection Request meets the following criteria: (i) the Interconnection Request was not grouped with any other Interconnection Requests during the Phase I Interconnection Study or was identified as interconnecting to a point of available transmission during the Phase I Interconnection Study, and (ii) the Interconnection Customer is able to demonstrate that the general Phase II Interconnection Study timeline under GIDAP Section 8.5 is not sufficient to accommodate the Commercial Operation Date of the Generating Facility.

In addition to the above criteria, the CAISO may apply to FERC in coordination with the Interconnection Customer for a waiver of the timelines in this GIDAP to meet the schedule required by an order, ruling, or regulation of the Governor of the State of California, the CPUC, or the CEC.¹²

6. Examining section 8.6 of Appendix DD, we see that it purports to do no more than allow CAISO to apply “for a waiver of the timelines in [the] GIDAP” under certain specified circumstances, including gubernatorial orders. That is not what CAISO requested. CAISO’s pleading “requests a limited waiver of Section 25.1 of its tariff.”¹³ Section 25.1 is the “Applicability” sub-section of section 25 “Interconnection of Generating Units and Facilities.” Section 25 contains more than “the timelines in [the] GIDAP.”¹⁴ It contains all of the interconnection requirements for all interconnection processes in the tariff.

7. CAISO, and the Commission, rely upon a provision that cannot serve as the basis for approving CAISO’s request. By its own terms, the waiver provision only applies to the timelines contained within that section of the tariff (Appendix DD) and not to every interconnection-related provision throughout the whole of the tariff. If notice is the fundamental concern underlying the filed rate doctrine and its judicially-recognized exceptions,¹⁵ it is evident that a narrow provision related to timelines in a single appendix

¹² CAISO Tariff, App. DD, § 8.6.

¹³ CAISO August 24, 2021 Petition at 1; CAISO Tariff, § 25.1.

¹⁴ CAISO Tariff, § 25.

¹⁵ Utilities have the ability to include provisions in their tariffs that permit consideration of requests to retroactively waive provisions, such as procedures and requirements, and indeed some utilities have done so. One such example may be found in the tariff of PJM Interconnection, L.L.C. (PJM), which describes the conditions under which a capacity market seller may seek a remedial waiver from the Commission if the seller does not timely take actions to remove its resource from the capacity market or exempt its resource from the must-offer requirements. *See* PJM, Intra-PJM Tariffs, OATT, Attach. DD, Market Power Mitigation (22.0.0), § 6.6(g) Offer Requirement for Capacity Resources; *see also, e.g., AEP Generation Res. Inc.*, 170 FERC ¶ 61,103 (2020)

is insufficient to provide notice for the waiver of the applicability of *all* interconnection procedures and requirements throughout the entire tariff.

8. But even if we were to ascribe this unduly expansive request to no more than inartful pleading, the terms of section 8.6 of Appendix DD specify, unambiguously, that the provision entitles CAISO to seek waiver of only one thing: timelines. But timelines are not the only thing that CAISO seeks to waive. Today, the date of issuance, is the day that CAISO plans to interconnect their two generators. Obviously, such an action would require the waiver of timelines. But it would also require the waiver of other requirements of the interconnection process. According to CAISO, “neither an independent study interconnection request nor a cluster study interconnection request could accommodate this interconnection in time to aid the CAISO during the late summer and early fall periods of high demand and low hydro levels.”¹⁶ CAISO further explains “[l]ikewise, the CAISO’s fast track interconnection process limits increases to 5 MW. Interconnection customers cannot combine fast track interconnection requests to circumvent the 5 MW limit.”¹⁷ In its Answer, CAISO contends the “only petition for relief the CAISO has requested is for a single accelerated study to increase one existing interconnection customer’s capacity from 49.2 MW to 60 MW.”¹⁸ CAISO states that it is

(granting a waiver request in accordance with the remedial waiver provision in PJM’s tariff). The utilities are in a better position than the Commission to determine which of their own tariff provisions could reasonably be subject to such a waiver. By granting requests for the waiver of tariff provisions, we obviate the need for a utility to ever make such a determination and file the necessary tariff revisions. *See also Long Island Power Auth.*, 176 FERC P 61,118 (2021) (Danly, Comm’r, dissenting at P 4) (“The best would be for the tariff to include a provision that allows for waiver of these requirements under specified circumstances.”); *Harbor Cogeneration Co., LLC*, 175 FERC P 61,232 (2021) (Danly, Comm’r, dissenting at P 5) (“To prevent harsh results, the solution is to amend the tariff to provide actual notice of potential retroactive changes to the filed rate.”); *Glidepath Ventures, LLC*, 173 FERC P 61,085 (2020) (Danly, Comm’r, dissenting at P 5) (“[T]he way for the Commission to provide for retroactive waivers of tariff provisions without exceeding our legal authority is to allow utilities to include provisions in their tariffs providing notice that certain of their tariff provisions could be subject to waiver after the fact.”); *Sunflower Elec. Power Corp.*, 173 FERC ¶ 61,054 (2020) (Danly, Comm’r, dissenting at PP 5, 17 & nn.52-53).

¹⁶ CAISO August 24, 2021 Petition at 5 & n.11.

¹⁷ *Id.* at 5 n.11.

¹⁸ CAISO September 3, 2021 Answer at 2. CAISO also states it is interconnecting 49.2 MW of the 60 MW at Greenleaf under normal tariff processes. *Id.* at 4.

“merely performing common interconnection studies on an expedited basis”¹⁹ and “ensures its studies have not taken any shortcuts or otherwise relaxed technical standards.”²⁰ CAISO’s characterizations of its request obscure the full breadth of what it is requesting—the waiver of both timeline and non-timeline requirements, the latter of which are not waivable by the plain terms of section 8.6 of Appendix DD.

9. For example, CAISO does not state whether here, as under normal circumstances, the interconnections would follow the independent study process or cluster study process.²¹ Assuming the interconnection request would be eligible for and follow the independent study process (when the cluster process does not accommodate the desired commercial operation date), a non-exhaustive list of steps that CAISO’s tariff would ordinarily require it to take (and that the record and the order do not specifically address) include: holding a scoping meeting,²² charging the interconnection customer the actual costs of the interconnection studies,²³ and depositing all interconnection study deposits in an interest bearing account at a bank or financial institution designated by CAISO.²⁴

¹⁹ *Id.* at 4 n.9.

²⁰ CAISO August 24, 2021 Petition at 5 n.9.

²¹ CAISO notes that it “elected not to have the interconnection customer submit two consecutive fast track interconnection requests, which the CAISO considers circumventing the tariff.” CAISO September 3, 2021 Answer at 4 n.8.

²² CAISO Tariff, App. DD, § 4.3: “Within five (5) Business Days after the CAISO notifies the Interconnection Customer that the Generating Facility associated with its Interconnection Request has satisfied the electrical independence test set forth in Section 4.2, the CAISO shall establish a date agreeable to the Interconnection Customer and the applicable Participating TO(s) for the Scoping Meeting.”

²³ CAISO Tariff, App. DD, § 3.5.1.2: “Except as otherwise provided in Section 3.5.1.1, the CAISO shall charge and the Interconnection Customer(s) shall pay the actual costs of the Interconnection Studies. Where an Interconnection Study is performed by means of a Group Study, the cost of the Group Study will be charged pro rata to each Interconnection Request assigned to the Group Study. The cost of Interconnection Studies performed for an individual Interconnection Request, not part of a Group Study, will be charged solely to the Interconnection Customer that submitted the Interconnection Request.”

²⁴ CAISO Tariff, App. DD, § 3.5.1.1: “The CAISO shall deposit all Interconnection Study Deposits in an interest bearing account at a bank or financial institution designated by the CAISO. The Interconnection Study Deposit shall be applied to pay for prudent costs incurred by the CAISO, the Participating TOs, or third parties at the direction of the CAISO or Participating TOs, as applicable, to perform and administer

Similarly, a representative list of actions that CAISO's Tariff would require of the interconnection customer (and that the record here and the order do not specifically address) includes: providing an interconnection study deposit of \$150,000,²⁵ submitting items such as a load flow model, a site drawing, and a single-line diagram in order to initiate an interconnection request,²⁶ and paying the actual costs of all interconnection studies.²⁷

10. There is no provision in the CAISO tariff that allows for a waiver of the non-timeline tariff provisions and therefore the waiver CAISO seeks, at least as to the non-timeline provisions, is retroactive. This is true even though the interconnection itself will be in the future (later today). By granting the waiver, the Commission holds that these two special resources did not have to comply with all of the other interconnection procedures and requirements that apply to every resource, even if timelines are waived.

11. CAISO argues in a footnote that its waiver request is not retroactive because “[t]his petition does not address the failure of the CAISO or the interconnection customer to comply with an existing tariff provision.”²⁸ This essentially argues that since CAISO did not go ahead and interconnect the resources without the Commission's permission, but instead plans to interconnect them after it has permission, the waiver is prospective. CAISO is wrong. The test for retroactivity is not whether a utility waits for permission before it bypasses its filed rate. Everyone else seeking to interconnect has had to—and must still—comply with all the interconnection rules. With this waiver, these two special

the Interconnection Studies and to meet and otherwise communicate with Interconnection Customers with respect to their Interconnection Requests.”

²⁵ CAISO Tariff, App. DD, § 3.5.1: “To initiate an Interconnection Request, except as set forth for the Fast Track Process in Section 5, and have the Interconnection Request considered for validation under Section 3.5.2, the Interconnection Customer must submit all of the following during the Cluster Application Window, or at any time during the year for proposed Generating Facilities applying for processing under the Independent Study Process: (i) An Interconnection Study Deposit of \$150,000....”

²⁶ CAISO Tariff, App. DD, § 3.5.1.

²⁷ CAISO Tariff, App. DD, § 3.2(d): “Each Interconnection Customer shall pay the actual costs of all Interconnection Studies, and any additional studies the CAISO determines to be reasonably necessary in response to the Interconnection Request. The CAISO shall reimburse the Participating TO for the actual cost of any portion of all Interconnection Studies that such Participating TO performs at the direction of the CAISO.”

²⁸ CAISO August 24, 2021 Petition at 8 n.16.

resources are *excused* from their non-compliance with the terms and conditions applicable to all other resources. This is retroactive ratemaking.

12. Since the waiver seeks impermissible retroactive ratemaking, we have no power to grant it and it must be denied. But even if it were not illegally retroactive, it still fails to meet at least three of the four elements of our standard waiver test for granting waivers. 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.²⁹ While I reserve judgment as to whether CAISO's request satisfies the first factor,³⁰ I do wonder how many more of CAISO's waiver requests we can consider to be in good faith while CAISO steadfastly refuses to reform its tariff in the face of obvious market failures. Regulation by waiver, of course, means that CAISO never has to fix anything as it can simply seek further waivers.

13. The second factor asks whether the waiver is of limited scope.³¹ I struggle to understand how this waiver can be claimed to be limited in scope. It only applies to two resources but I have little doubt the majority would grant the same waiver the next time, and the next time, and indeed, every time there is an emergency. It is also, by its own terms, exceptionally expansive: nearly the entire interconnection process, more than mere timelines, will be bypassed. It makes one wonder how much of the tariff can be waived and while still finding a waiver to be limited in scope. If the Commission can waive the whole interconnection process, could it waive the entire tariff?

14. The third factor requires the requested waiver to address a concrete problem.³² This waiver does not. The problem that CAISO faces is that it does not have emergency interconnection procedures that would allow these two resources to immediately interconnect. That is a glaring oversight as this case aptly demonstrates. Instead of granting this waiver, I would find that, pursuant to FPA section 206, the record already before us (CAISO's Petition) demonstrates that the CAISO interconnection process is unjust and unreasonable because it lacks emergency procedures. I would order CAISO to file such procedures immediately. Emergency procedures set forth in the tariff would provide criteria by which to allow expedited interconnection. Such a tariff provision would relieve CAISO of any accusation of arbitrary treatment of certain favored parties.

²⁹ 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).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

The Commission would be relieved of having to face the prospect of entertaining yet more retroactive waiver requests. As I tried to do in December 2020, I would also initiate a further section 206 investigation into why CAISO's markets continue to fail to procure sufficient generation to meet reliability needs.

15. The fourth waiver factor requires the Commission to consider whether a waiver would have undesirable consequences, such as harm third parties.³³ Allowing these two special resources to bypass the interconnection terms and conditions of the tariff harms those generators seeking interconnection, who have complied and must still comply with these provisions. The special resources have gained a significant and privileged status—connection to the transmission system—at the expense the others.

16. I am perplexed by my colleagues' reluctance to employ our section 206 authority to address the widespread failures of CAISO's markets. How much more serious do the problems in California have to become for my colleagues to agree that we must take affirmative steps to address what is clearly a crisis? A perpetual state of emergency has not been enough. Rolling blackouts were not enough. A routine reliance on reliability must-run agreements has not been enough. Regular emergency CAISO filings are not enough. Do we require a total breakdown of the CAISO power system and markets before we will act?

17. The primary argument I have heard against a section 206 "intervention" into the CAISO markets is the notion that we should give California a chance to sort out its own problems. The Commission, so the argument goes, would be overstepping its authority and dictating to California what it should do. We have given CAISO many, many chances, and CAISO has failed. Faced with these repeated failures, we *must* act. We have a duty to act when we witness CAISO's markets fail to produce the just and reasonable rates that ensure the development and retention of sufficient generation.

18. Another argument is that we will lose the ability to consult with CAISO if there is a pending 206 complaint. This concern is animated, in part, by a special solicitude that many believe should be afforded the ISOs and RTOs. This belief holds ISOs and RTOs in a heightened regard, viewing their actions as somehow less suspect—perhaps because they view the ISOs and RTOs as quasi-governmental. They are not. ISOs and RTOs are utilities, no more, no less. Accordingly, they are subject to the Commission's oversight and are as amenable to actions under FPA section 206 as any other utility. I find it hard to imagine that the Commission would be as gracious and accommodating were an investor-owned utility responsible for even a fraction of the long-standing and unremediated deficiencies attributable to CAISO.³⁴

³³ *Id.*

³⁴ *See, e.g.,* CAISO August 24, 2021 Petition at 2 ("The CAISO needs additional

19. Lastly, I wish to remind the Commission of its powers and its obligations. We are an administrative agency with limited statutory authority. We can only amend tariffs under our section 205 or section 206 authorities.³⁵ We have no authority to grant retroactive waivers.³⁶ And while the majority apparently disagrees with me and has declared this waiver to be prospective, I hope that today's issuance is not another example of the Commission's startling disregard for judicial precedent regarding the filed rate doctrine, especially in light of the D.C. Circuit's recent rearticulation of our obligations in *Oklahoma Gas*.³⁷

For these reasons, I respectfully dissent.

James P. Danly
Commissioner

generating capacity.”); *id.* at 7 (“Although the CAISO is interconnecting new generating units and energy storage resources every month, the CAISO still faces potential capacity shortfalls due to generator retirements, historically low hydro levels, and increasing demand due to extreme weather . . . Interconnecting these generating units on a temporary basis will help the CAISO avoid reliability issues until sufficient generating capacity has come online.”); *Staff Presentation on California Independent System Operator (EL21-19-000)*, FERC (Dec. 17, 2020), <https://www.ferc.gov/news-events/news/staff-presentation-california-independent-system-operator-el21-19-000>).

³⁵ 16 U.S.C. §§ 824d, 824e.

³⁶ *See, e.g., Sunflower Elec. Power Corp.*, 173 FERC ¶ 61,054 (2020) (Danly, Comm’r, dissenting at P 5).

³⁷ *Oklahoma Gas*, Slip Op. at 2-3. “Once a tariff is filed, the Commission has no statutory authority to provide equitable exceptions or retroactive modifications to the tariff.” *Id.* at 3.