

124 FERC ¶ 61,205
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

California Independent System Operator Corporation Docket Nos. ER08-1203-000
EL08-85-000

ORDER CONDITIONALLY ACCEPTING AMENDMENT AND INSTITUTING A
SECTION 206 INVESTIGATION

(Issued August 29, 2008)

1. On July 1, 2008, pursuant to section 205 of the Federal Power Act (FPA),¹ the California Independent System Operator Corporation (CAISO) filed Amendment No. 2 to the Participating Load Agreement (PLA) between the CAISO and the California Department of Water Resources State Water Project (SWP) to extend the term of the PLA. In this order, the Commission conditionally accepts Amendment No. 2, effective August 31, 2008, as requested by the CAISO. We also institute a paper hearing proceeding in Docket No. EL08-85-000 pursuant to section 206 of the Federal Power Act (FPA)² to investigate the justness and reasonableness of waiving the 60-day notice requirement contained in the original PLA in certain situations. Pursuant to section 206, we are establishing a refund effective date as of the date notice appears in the *Federal Register*, and seek comment on the proposed waiver of the 60-day notice requirement.
2. We find that this action is necessary because the CAISO's original filing did not request a waiver of the notice requirement but instead raised this possibility in response to SWP's comments on the CAISO's filing. Due process requires that interested persons receive notice of a change and the opportunity to comment prior to a Commission decision. Furthermore, SWP has conditioned its acceptance of Amendment No. 2 on the Commission's approval of the waiver requested. It is unclear whether SWP is interested in extending the PLA in the absence of a waiver. Thus, conditional approval of the amendment will allow SWP to elect not to continue the PLA should we deny the requested waiver.

¹ 16 U.S.C. § 824d (2006).

² 16 U.S.C. § 824e (2006).

I. The PLA and Amendments

3. The CAISO explains that the PLA sets forth the terms and conditions that govern the provision by Load resources of Ancillary Services and Supplemental Energy in a manner analogous to the Participating Generator Agreement with regard to generating resources. The purpose of the PLA, according to the CAISO, is to increase participation of Load resources in the CAISO markets. The CAISO explains that the original PLA between the CAISO and SWP was filed with the Commission on July 20, 2001,³ and was accepted by the Commission by letter order issued on September 13, 2001. The CAISO also states that Amendment No. 1 to the PLA was filed on May 24, 2006,⁴ and was accepted by the Commission by letter order issued on July 13, 2006, subject to certain non-substantive changes.

4. The CAISO explains that Amendment No. 1 has a termination date of September 10, 2008. The purpose of Amendment No. 2 is to revise the termination date, contained in section 3.2 of the PLA, to provide that the PLA will terminate on September 10, 2011, or upon such earlier date as may be permitted pursuant to section 3.2.1 or 3.2.2, subject to Commission acceptance of a timely notice of termination. The CAISO represents that the SWP agrees with the CAISO that the benefits of the PLA justify extending its term pursuant to Amendment No. 2.

II. Notice of Filing and Responsive Pleadings

5. Notice of the CAISO's July 1, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 41,061 (2008), with interventions or protests due on or before July 22, 2008. A timely motion to Intervene and Comment was filed by SWP. A timely motion to Intervene, Motion to Reject or, in the Alternative, Protest was filed by the Metropolitan Water District of Southern California (MWD). The CAISO filed an Answer to Motions and Comments and Motion to File Answer and Answer to Protests.

A. Comments

6. SWP comments that it supports the revised PLA to extend its agreement with the CAISO. However, SWP explains that because of recent developments potentially affecting involuntary interruptions of firm Participating Load, SWP requests the following clarification to the PLA: “[C]onsistent with Section 3.2.2 of the PLA, SWP may remove all or part of its pump load from Participating Load status immediately, if

³ Docket No. ER01-2632-000.

⁴ Docket No. ER06-1045-000.

water management needs so require.”⁵ SWP further explains that it is the primary provider of demand response to the CAISO and provides a significant amount of Non-Spinning Reserves from its pump loads to the CAISO grid. However, SWP contends that it is only able to provide reliability support to the power grid when water management conditions so permit. According to the SWP, recent developments have increased the urgency of SWP’s need for reliable transmission service for its pump load when that load is not bid into CAISO markets for reliability services. Such situations include having the Governor declaring a state-wide drought emergency as well as severe environmental restrictions at SWP’s Harvey O. Banks pumps in the San Francisco Bay/Delta region. SWP avers that it is essential that it have the ability to pump as much as possible in any window of opportunity when environmental conditions allow. For these reasons, SWP requests that the Commission’s acceptance of Amendment No. 2 be conditioned upon the inclusion of the clarification to section 3.2.2 as explained above.

7. SWP also raises concerns that section 31.3.1.3 of the Market Redesign and Technology Upgrade (MRTU) tariff may target Participating Load located in load pockets for curtailment, which may have the effect of jeopardizing SWP’s water operations through interruption of firm pump load. To remedy this potential problem, SWP requests that the Commission require the CAISO to add the clarification that “Participating Load, which pays all CAISO reliability charges applied to firm load, is in fact firm and not interruptible load except for those instances in which it has been bid into CAISO markets to drop load.”⁶ SWP contends that the use of Participating Load has been raised, but not yet fully explained, in the stakeholder process concerning Parameter Tuning of Uneconomic Adjustments. SWP states that it hopes Participating Load, which must be priced nodally if demand response is to be viable, will not be used under section 31.3.1.1(b)(2) as an interruptible load when it has not bid into CAISO markets to provide Ancillary Services. SWP further expresses concern that the tariff lists Self-Scheduled Participating Load in the same category as generators that may be dispatched based on their Participating Generator Agreements to relax constraints. SWP also observes that the Commission has ordered the CAISO to provide a full explanation in a compliance filing of the impact of former MRTU section 31.3.1.2, which has been moved to MRTU section 31.3.1.3.⁷ Because of its concerns regarding section 31.3.1.3 of the MRTU tariff, SWP requests that the Commission accept the PLA Amendment No. 2 on the condition that the CAISO add the revision explained above.

⁵ SWP Comments and Motion to Intervene at 2.

⁶ *Id.* at 2.

⁷ *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,313, at P 163 (2007).

8. MWD filed a Motion to Reject or, in the Alternative, Protest the CAISO's amended PLA with SWP. Metropolitan argues that "SWP is not a 'public utility' as defined in the FPA and the demand response services that the SWP would provide to the CAISO pursuant to the Second Amended PLA are not, therefore, subject to FERC review pursuant to subdivision (f) of section 201 of the FPA."⁸ MWD contends that SWP cannot volunteer to be FERC-jurisdictional, and the Commission has no jurisdictional basis upon which to review the filing. Therefore, MWD argues that the Commission should reject the instant filing.

9. In the alternative, MWD argues that if the Commission does not reject the filing, then the PLA requires extensive revision. MWD contends that, although the CAISO proposes to modify the PLA by extending the termination date from September 10, 2008 to September 10, 2011, the PLA requires other changes to conform to the CAISO's Simplified and Reorganized (S&R) Tariff,⁹ which is to provide a tariff structure for MRTU. MWD argues that the Amended PLA is not revised to update its numerous references to the CAISO Tariff to the correct S&R Tariff provisions. MWD also questions whether the CAISO contemplates that the Second Amended PLA will extend, unmodified, through implementation of MRTU because the Second Amended PLA will extend well after the commencement of MRTU. MWD requests that the PLA parties commence negotiation of a further amendment to the PLA to accommodate the changes due to MRTU implementation because, according to MWD, it will be difficult or impossible to implement the Second Amended PLA once the CAISO commences MRTU.

B. CAISO Answer

10. The CAISO explains in its answer that the sole purpose of Amendment No. 2 is to extend the term of the current PLA. The CAISO agrees with the SWP that the Commission should accept the amended PLA, subject to the clarification offered by the SWP that, consistent with section 3.2.2 of the amended PLA, the SWP may remove all or part of its pump load from Participating Load status immediately, if water management needs so require. Section 3.2.2 states that, "in accordance with Section 4.4 [of the amended PLA] to eliminate Load which it no longer provides for and such modification shall be effective upon receipt by the [CA]ISO." The CAISO also explains that, although section 4.4 of the amended PLA includes a 60-day notice requirement for any changes to the technical information of Schedule 1, the CAISO has no objection to waiving this notice requirement to the extent necessary to permit SWP to remove all or part of its

⁸ MWD Motion to Intervene, Reject, or in the Alternative, Protest at 5-6.

⁹ *Cal. Indep. Sys. Operator Corp.*, 114 FERC ¶ 61,199 (2006).

pump load from Participating Load status immediately, if water management needs so require.

11. Finally, with respect to the SWP's motion, the CAISO disagrees with the SWP's request that the Commission accept the PLA subject to the condition that Participating Load, when not bidding into the CAISO markets to provide load drop, be treated as firm load when using CAISO transmission, on a non-discriminatory basis with any other firm load. The CAISO argues that there is no need for this requested condition because the CAISO is already required to submit to the Commission, at least 62 days prior to the implementation of MRTU, a filing that includes clarification of how section 31.3.1.3 will operate.¹⁰

12. The CAISO disagrees with MWD's challenge to the Commission's jurisdiction over the amended PLA. The CAISO contends that the Commission already has determined that the *pro forma* PLA, similar to other *pro forma* CAISO agreements, is a service agreement that governs the jurisdictional rates, terms and conditions of services that the CAISO provides as a public utility. Further, the CAISO argues that the amended PLA is based on the *pro forma* PLA, with specific provisions that reflect the circumstances of SWP as a Participating Load. The CAISO also comments that the Commission accepted the PLA as originally filed in 2001 as well as the first amendment to the PLA in 2006. Finally, the CAISO requests that the Commission accept Amendment No. 2 as filed.

13. The CAISO also disagrees with the protest by the MWD that Commission should direct the CAISO to revise the amended PLA to conform to the provisions of the current CAISO Tariff and, in anticipation of the implementation of MRTU, revisions to conform to MRTU. The CAISO explains that in the order accepting the CAISO's S&R Tariff on which the current CAISO Tariff is based, the Commission stated that it "accept[s] the S&R Tariff with the clear understanding that the S&R Tariff was not intended to make any substantive changes to the [then-]current tariff."¹¹ Further, the CAISO argues that it has posted on the CAISO Website a table of tariff section number cross-references that allow Market Participants to "translate" old references to tariff section numbers into more up-to-date references to tariff section numbers. The CAISO, therefore, concludes that the

¹⁰ The CAISO in its answer cites to *California Independent System Operator Corp.*, 119 FERC ¶ 61,313, at PP 162-64 (2007); Notice of Extension of Time, Docket Nos. ER06-615-000, *et al.* (February 1, 2008). The first of the above cited Commission issuances directed the CAISO to submit a clarification referred to section 31.3.1.2.

¹¹ *Cal. Indep. Sys. Operator Corp.*, 114 FERC ¶ 61,199, at P 15 (2006).

references in the amended PLA to the CAISO Tariff can be readily understood with regard to the current CAISO Tariff.

14. With respect to the MRTU Tariff section 31.3.1.3(b)(2) concerns raised by MWD, the CAISO argues that it has filed updated versions of all the *pro forma* agreements, including the *pro forma* PLA, in the revisions to the MRTU Tariff filed with the Commission on December 21, 2007 (December 21 filing).¹² The CAISO comments that once the Commission accepts the updated versions of these *pro forma* agreements, the CAISO intends to coordinate with all stakeholders to harmonize all agreements with the new MRTU versions. According to the CAISO, this effort will take many months and, at this point, it would be premature to undertake this effort for SWP, or any other party, to an executed *pro forma* agreement. For the immediate interim period, the CAISO argues that provisions of most or all of those agreements incorporate by reference all applicable provisions of the CAISO Tariff. Further, these agreements specify that the CAISO Tariff will prevail in the event of any inconsistency with the agreements, as is the case with sections 1.2(a) and 4.5 of the amended PLA. The CAISO contends that these provisions are sufficient to ensure appropriate interpretation of any outdated provisions of the agreements pending harmonization with new MRTU versions.

III. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise directed by the decisional authority. We will accept CAISO's answer because it has provided information that assisted us in our decision-making process.

B. Determination

16. As a preliminary matter, the Commission denies MWD's Motion to Reject Amendment No. 2 for lack of jurisdiction. Contrary to the assertion made by MWD, the Commission is not exercising jurisdiction over SWP in this proceeding. Rather, pursuant to section 205 of the FPA, the Commission is vested with jurisdiction over the rates, terms and conditions of transmission service provided by the CAISO, a Commission-jurisdictional entity. The PLA is a transmission service agreement between the CAISO and SWP for service within the CAISO network. Further, the PLA is a *pro forma* CAISO

¹² Docket Nos. ER06-615 and ER08-367.

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tariff agreement approved by the Commission to govern service provided by the CAISO. Finally, on two prior occasions, in 2001 and 2006, the Commission considered and approved the PLA between the CAISO and SWP.¹³

17. For the reasons explained below, we are initiating a section 206¹⁴ paper hearing proceeding in Docket No. EL08-85-000 to investigate the justness and reasonableness of granting the requested waiver of the 60-day notice requirement contained in the PLA. While we conditionally accept Amendment No. 2 to extend the termination date of the PLA between the CAISO and SWP to September 10, 2011, we cannot grant the requests of the CAISO and SWP to accept changes to Amendment No. 2 because we find that the record contains procedural flaws. We note that although the parties executed Amendment No. 2, the comments filed by SWP on July 22, 2008 indicate that SWP's endorsement of Amendment No. 2 is conditioned upon the Commission's acceptance of two substantive clarifications. The two clarifications requested by SWP are:

(1) consistent with Section 3.2.2 of the Agreement SWP may remove all or part of its pump load from Participating Load status immediately, if water needs so require, and

(2) Participating Load, which pays all CAISO reliability charges applied to firm load, is in fact firm and not interruptible load except for those instances in which it has been bid into CAISO markets to drop load.

18. The CAISO filed an Answer agreeing with the first clarification, but disagreeing with the second. The CAISO agrees with SWP's request that it need not provide 60-day notice prior to removing from Participating Load status if water management needs so require. However, as to the second clarification, the CAISO comments that MRTU tariff language involving the role of Participating Load as firm load is still being finalized and has yet to be submitted to the Commission. For these reasons, the CAISO argues that it is premature for the CAISO to provide a substantive reply to the second of the SWP's requested clarifications.

19. Based upon each of these submissions, the record before us includes an amendment to the PLA to extend the duration of the agreement, comments from the SWP and CAISO reflecting a subsequent agreement between the parties that requires a

¹³ *Cal. Indep. Sys. Operator Corp.*, Docket No. ER01-2632-000 (Sept. 13, 2001) (unpublished letter order); *Cal. Indep. Sys. Operator Corp.*, Docket No. ER06-1045 (July 13, 2006) (unpublished letter order).

¹⁴ 16 U.S.C. § 824e (2006).

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modification to a Commission approved *pro forma* agreement and, finally, an issue unresolved between the parties involving MRTU provisions that are still being completed by the CAISO.

20. As to the first revision sought by SWP, which seeks waiver for SWP of the tariff's 60-day notice requirement, we find that the Commission cannot accept a substantive revision to the instant *pro forma* PLA without first complying with the FPA's procedural safeguards of public notice of the requested waiver and the opportunity for comment by interested persons. Because these procedures have not been followed, we conclude that the most efficient solution is to accept Amendment No. 2 conditionally, subject to our consideration of the requested waiver.

21. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b), as recently amended by section 1285 of the Energy Policy Act of 2005,¹⁵ requires that the Commission establish a refund effective date that is no earlier than the date of the publication of the notice of the initiation of the Commission's investigation in the *Federal Register*, and no later than five months after the publication date. We establish a refund effective date to be the date the notice appears in the *Federal Register*, as the appropriate refund effective date for this proceeding.

22. Because expeditious resolution of this issue is necessary, we establish a comment deadline of 15 days from the date of this order. Reply comments may be filed 15 days thereafter. The Commission is simply investigating whether it is just and reasonable to grant a waiver of the 60-day notice requirement contained in section 4.4 of the PLA to allow SWP to remove all or part of its pump load from Participating Load status immediately, if water needs so require. For this reason, interested persons should limit their comments to this issue alone and not to repeat arguments previously considered by the Commission.

23. In addition, section 206 requires that, if no final decision has been rendered by the earlier of the refund effective date or the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. Given the nature of the matter to be resolved, we expect that we should be able to render a decision by December 30, 2008.

24. Finally, we clarify below certain issues raised in this proceeding.

¹⁵ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980-81 (2005).

25. As to SWP's request that the Commission's acceptance of Amendment No. 2 also be conditioned upon the Commission acceptance of additional language regarding the role of Participating Load as firm load, we agree with the CAISO that this issue is not properly before us. Any concerns SWP or other entities have regarding the role of Participating Load pursuant to the MRTU tariff may be considered within the MRTU proceeding, but are beyond the scope of this proceeding.

26. We also deny MWD's requests that the Commission direct the parties to revise Amendment No. 2. Although MWD argues that Amendment No. 2 does not conform to the current CAISO tariff, we accept the CAISO's explanation that, to the extent tariff section numbers do not correspond to the CAISO's tariff, the CAISO website offers a table of tariff section number cross-references that allow Market Participants to locate more up-to-date references. The CAISO also explains that it has submitted to the Commission revisions to the MRTU, including the *pro forma* PLA, in Dockets Nos. ER06-615 and ER08-367. The effective date for implementation of MRTU has not been announced.¹⁶ However, the CAISO states that it intends to work with stakeholders to harmonize all agreements and to address any inconsistencies. We agree with the CAISO that, because the CAISO is in the process of transitioning to MRTU, it is not necessary at this time for the Commission to direct the CAISO to revise Amendment No. 2 to conform to the MRTU Tariff.

The Commission orders:

(A) Amendment No. 2 is hereby conditionally accepted, effective August 31, 2008.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by section 206 of the FPA, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R., Chapter I), a paper hearing investigation shall be held concerning the justness

¹⁶ CAISO, February 29, 2008, Motion to Modify Effective Date of Tariff Sheets of the California Independent System Operator Corporation, Docket Nos. ER06-615-016 and ER08-367-000. [". . . at present the CAISO is unable to determine the new MRTU implementation date because further market simulation must first be completed. The CAISO will promptly notify the Commission and Market Participants in writing once the new MRTU implementation date, and the new effective date of the MRTU Tariff is determined."] The Commission granted the CAISO's motion by letter order dated March 26, 2008.

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and reasonableness of granting a waiver of the 60-day notice requirement provision contained in the PLA of the CAISO and SWP.

(C) Within 15 days from the date of this order, interested persons may submit comments on the limited issue of the justness and reasonableness of granting the waiver, consistent with the body of this order. Interested persons are not to raise issues previously considered. Reply comments may be filed 15 days thereafter.

(D) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of this proceeding under section 206 of the FPA in Docket No. EL08-85-000.

(E) The refund effective date in Docket No. EL08-85-000, established pursuant to section 206(b) of the FPA, shall be the date notice appears in the *Federal Register*.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)

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