

140 FERC ¶ 61,169
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

California Independent System Operator Corporation Docket No. ER12-1856-000

ORDER ON COMPLIANCE FILING

(Issued August 31, 2012)

1. On May 25, 2012, California Independent System Operator Corporation (CAISO) filed tariff revisions in response to the directives in Order Nos. 741 and 741-A.¹ Specifically, CAISO submitted revisions to its Open Access Transmission Tariff (tariff) to establish itself as the central counterparty for all CAISO market transactions. As discussed in this order, the Commission finds that CAISO's proposed revisions comply with the requirements set forth in Order Nos. 741 and 741-A. For the reasons discussed below, we conditionally accept CAISO's proposed tariff revisions to be effective September 1, 2012, as requested.

I. Background

2. In Order No. 741, the Commission adopted reforms to strengthen the credit policies used in organized wholesale electric power markets. Citing its statutory responsibility to ensure that all rates charged for the transmission or sale of electric energy in interstate commerce are just, reasonable, and not unduly discriminatory or preferential,² the Commission directed regional transmission organizations (RTOs) and independent system operators (ISOs) to revise their tariffs to address the following reforms: implementation of shortened settlement timeframes, restrictions on the use of unsecured credit, elimination of unsecured credit in all financial transmission rights or equivalent markets, clarification of legal status to continue the netting and set-off of transactions in the event of bankruptcy, establishment of minimum criteria for market

¹ *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, FERC Stats. & Regs. ¶ 31,317 (2010), *order on reh'g*, Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 (2011), *order denying reh'g*, Order No. 741-B, 135 FERC ¶ 61,242 (2011).

² 16 U.S.C. §§ 824d, 824e (2006).

participation, clarification regarding the organized markets' administrators' ability to invoke "material adverse change" clauses to demand additional collateral from market participants, and adoption of a two-day grace period for "curing" collateral calls. The Commission directed each RTO and ISO to submit tariff changes by June 30, 2011, with an effective date of October 1, 2011. In Order No. 741-A, the Commission extended the deadline for complying with the requirement regarding the ability to offset market obligations in bankruptcy to September 30, 2011, with the relevant tariff revisions to take effect January 1, 2012. The Commission subsequently extended CAISO's deadline for complying with the requirement to May 25, 2012.³ On May 25, 2012, CAISO submitted the compliance filing at issue in this proceeding.⁴

II. Notice of Filing and Responsive Pleadings

3. Notice of CAISO's filing was published in the *Federal Register*, 77 Fed. Reg. 33,209 (2012), with interventions and protests due on or before June 15, 2012. Timely motions to intervene were filed by Calpine Corporation; J.P. Morgan Ventures Energy Corporation; Macquarie Energy LLC; Modesto Irrigation District; NRG Companies; Pacific Gas and Electric Company, and the City and County of San Francisco Public Utilities Commission.

4. Timely motions to intervene and comments were filed by California Municipal Utilities Association (CMUA); the City of Santa Clara, California, and the M-S-R Public Power Agency (SVP/M-S-R); Northern California Power Agency (NCPA); the California Department of Water Resources State Water Project (SWP); and the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside (Six Cities). On July 3, 2012, CAISO filed an answer.

³ Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 at P 25 (extending the compliance date to September 30, 2011); *Notices of Extension of Time*, Docket No. RM10-13-000 (September 13, 2011, January 24, 2012 and April 30, 2012) (extending the compliance date to January 31, 2012, then to April 30, 2012, then to May 25, 2012).

⁴ CAISO previously addressed the other six credit reform requirements from Order No. 741. *See Cal. Indep. Sys. Operator Corp.*, 136 FERC ¶ 61,194, at PP 27, 49 (2011); *Cal. Indep. Sys. Operator Corp.*, 138 FERC ¶ 61,181, at P 19 (2012); *Cal. Indep. Sys. Operator Corp.*, 140 FERC ¶ 61,097, at P 23 (2012).

III. Discussion

A. Procedural Matters

5. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

6. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept CAISO's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

1. Ability to Offset Market Obligations

7. Order No. 741 directed each RTO and ISO to adopt steps to address the risk that it may not be allowed to use netting and set-offs if a market participant enters bankruptcy.⁵ The Commission required each RTO and ISO to submit tariff revisions reflecting one of the following options: (1) establish a central counterparty; (2) require market participants to provide a security interest in their transactions in order to establish collateral requirements based on net exposure; (3) propose another alternative, which provides the same degree of protection as the two above-mentioned options; or (4) establish credit requirements for market participants based on their gross obligations.⁶

a. CAISO Filing

8. CAISO submitted tariff revisions to establish itself as the central counterparty for all market transactions. CAISO proposes to become the central counterparty for each scheduling coordinator, congestion revenue rights holder, black start generator, or participating transmission owner for the purchase or sale of any product, service, or other transaction that it financially settles under its tariff.⁷ CAISO explains it will not serve as the central counterparty for energy procured for use in Mexico, but will continue to act as an agent for the respective scheduling coordinators. CAISO also proposes tariff revisions to clarify that it will be the central counterparty on a prospective basis only, and provides language intended to maintain the status quo for any product warranties.

⁵ Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 117.

⁶ *Id.*

⁷ CAISO Filing at 4.

9. CAISO proposes to revise its tariff to reassign to itself the responsibility for pursuing the collection of market participant defaults from scheduling coordinators. CAISO explains that it will have the right to pursue collection on behalf of the market for any market participant defaults that cannot be covered through financial security. CAISO states it will remain revenue-neutral in the event of a default by allocating any payment shortfall to the market. CAISO also proposes language to limit its liability for making payments for any given settlement period to the aggregate amount that it has received or recovered for that settlement period.⁸

10. CAISO states that it proposes language to require each scheduling coordinator to provide a resale certificate or proof that the seller is exempt from sales or use taxes. CAISO states it has been advised to obtain this documentation to support its tax exemptions. CAISO also includes language clarifying that it is not the entity listed on an “E-Tag” and, thus, is not the entity responsible for procuring greenhouse gas emission permits.⁹

11. In addition to proposing tariff revisions, CAISO requests waivers and clarifications. CAISO requests waiver of the Commission’s regulations regarding market-based rate authorization and wholesale sale of electric energy, capacity, and ancillary services at market-based rates. CAISO also requests waiver of the Commission’s Electronic Quarterly Reporting requirements which arise from serving as a central counterparty. CAISO asserts that the Commission should waive these provisions because it is a revenue-neutral, nonprofit corporation that does not negotiate prices in its markets. CAISO also requests that the Commission clarify that it will not be subject to any greater reporting obligations or annual charges than those to which it is currently subject.¹⁰

b. Protests and CAISO’s Answer

i. Compliance with State Regulations

12. CMUA, NCPA, and SVP/M-S-R contend that CAISO’s status as the central counterparty may negatively affect compliance with greenhouse gas regulations and renewable portfolio standards.¹¹ Regarding greenhouse gas regulations that require a first

⁸ *Id.* at 5.

⁹ *Id.* at 6.

¹⁰ *Id.* at 7.

¹¹ CMUA Protest at 4-6; NCPA Protest at 8-10; SVP/M-S-R Protest at 9-10.

deliverer of energy into California to acquire emission permits, CMUA, NCPA, and SVP/M-S-R express concern that, as a counterparty, CAISO may need to purchase emission permits and would pass this cost on to market participants.¹² CMUA, NCPA and SVP/M-S-R acknowledge that CAISO believes it has addressed the potential problem with its proposed “E-Tag” tariff language, but state that much depends on how the state agencies interpret the CAISO tariff language. SVP/M-S-R asks CAISO to clarify that its “E-Tag” language applies to the entire CAISO grid, not just intertie transactions. NCPA suggests that CAISO work with the California Air Resources Board to ensure CAISO does not incur greenhouse gas compliance obligations.¹³

13. Regarding renewable portfolio standards, CMUA, NCPA and SVP/M-S-R explain that CAISO’s counterparty role could jeopardize the “bundled” nature of renewable energy and its associated renewable energy credit. CMUA, NCPA and SVP/M-S-R state that once the energy and its associated renewable energy credit are unbundled, the energy is reclassified to a less valuable product and no longer satisfies particular compliance obligations. NCPA and SVP/M-S-R suggest that CAISO coordinate with the California Public Utilities Commission to avoid this conflict.¹⁴ CMUA states that these issues may be resolved with proper consideration; however, CMUA explains that market participants have not had the opportunity to thoroughly vet this issue during the CAISO stakeholder process.

14. CAISO responds that it will continue to work with the California Air Resources Board to ensure that it does not become liable for purchasing emissions permits. CAISO opposes SVP/M-S-R’s request that it modify its proposed “E-Tag” language, stating that its proposal applies generally to the delivery of energy into, on, and through the CAISO-controlled grid, and that its proposal does not require further revision.¹⁵ In addition, CAISO states that it will continue to work with stakeholders and relevant state agencies regarding market participants’ compliance with California’s renewable portfolio standard obligations.¹⁶

¹² See, e.g., CMUA Protest at 6.

¹³ NCPA Protest at 9.

¹⁴ See *id.* at 9; SVP/M-S-R Protest at 9-10.

¹⁵ CAISO Answer at 7.

¹⁶ *Id.*

ii. **Tax-Exempt Municipal Bonds**

15. CMUA, NCPA, SVP/M-S-R and Six Cities argue that CAISO has not addressed how its role as a central counterparty will affect the tax-exempt nature of municipal bonds used to finance generation assets.¹⁷ Specifically, they explain that generation developers using such bonds cannot enter into transactions that result in more than ten percent of the power being sold for private use, and that the penalty for violating this provision is losing the tax-exempt nature of the interest paid on the bonds. Six Cities and NCPA argue that, because these market participants are supplying themselves, there is no “sale.”

16. CMUA, NCPA, SVP/M-S-R, and Six Cities argue that CAISO should revise its tariff to exempt a load-serving market participant’s self-supply or self-scheduled transactions that serve its own load from the set of the transactions in which CAISO acts as the central counterparty.¹⁸ CMUA, NCPA and Six Cities note that the Commission approved a similar exemption in the counterparty proposal of PJM Interconnection, L.L.C. (PJM), and that Midwest Independent Transmission System Operator, Inc., has proposed a similar exemption. CMUA, NCPA and Six Cities also state that CAISO has already included an exception for transactions involving energy from Mexico. If the Commission does not direct CAISO to revise its tariff to exempt these market participants, Six Cities requests that the Commission hold a technical conference or settlement procedures to address its concerns. With additional time, Six Cities explains, it may be possible to seek comment from the Internal Revenue Service regarding how CAISO’s status as a central counterparty affects the tax-exempt status of municipal bonds. NCPA indicates that it has had discussions with bond counsel and is optimistic that CAISO’s proposal will not cause a serious problem; however, NCPA and Six Cities argue that CAISO should add a savings provision to its tariff, embodying a commitment to implement revised treatment if the central counterparty construct creates problems for the tax-exempt financed projects in the future.

17. In addition, Six Cities, as a participating transmission owner, asks for clarification that the central counterparty rules are not intended to affect the tax-exempt status of transmission facilities that were financed with tax-exempt bonds.¹⁹ Six Cities explains that this clarification would be consistent with the Transmission Control Agreement between CAISO and other participating transmission owners, which includes detailed

¹⁷ CMUA Protest at 7-8; NCPA Protest at 4-5; SVP/M-S-R Protest at 7-8; Six Cities Protest at 2-11.

¹⁸ See Six Cities Protest at 3-5.

¹⁹ *Id.* at 9-10.

language providing for remedies in the event of any adverse tax actions related to the tax-exempt status of the transmission facilities under CAISO's control.

18. CAISO responds that it believes that sales to CAISO as the central counterparty do not violate "private use" restrictions for the tax-exempt bonds. CAISO states that it cannot exclude bilateral and self-supply transactions because, unlike PJM, it has no mechanism for excluding such transaction from its central settlement and clearing function. CAISO adds that excluding significant portions of its financial settlements from the central counterparty structure would undermine the purpose of Order No. 741.

19. CAISO also opposes Six Cities' proposal for a savings clause, under which CAISO would immediately modify its tariff to include exceptions if market participants receive notice of adverse actions related to their tax-exempt financing. CAISO argues that Six Cities' proposal lacks sufficient detail, but CAISO remains committed to working with stakeholders to resolve these concerns.²⁰

20. CAISO agrees with Six Cities' request to revise its tariff regarding the tax-exempt status of transmission facilities. Specifically, CAISO proposes to revise section 11.29(a)(iii) to state that its status as the central counterparty is not intended to affect the tax-exempt status of transmission facilities or entitlements subject to its control.²¹

iii. Federal Preference Power

21. CMUA, NCPA, Six Cities, and SVP/M-S-R argue that CAISO's status as the central counterparty may result in federal power recipients violating their preference power contracts, which prohibit recipients from reselling their preference power allotments, particularly those from the Western Area Power Administration (WAPA).²² CMUA, NCPA, and SVP/M-S-R note that, despite WAPA's letter informing customers that CAISO's status as a central counterparty will not violate its restrictions on the use of federal preference power, WAPA maintains the right to reexamine this issue as CAISO's tariff evolves. CMUA adds that WAPA's letter fails to insulate both WAPA and its customers from judicial challenge.²³ Thus, CMUA, Six Cities, and SVP/M-S-R assert that CAISO should revise its tariff to clarify that it will not act as the central counterparty

²⁰ CAISO Answer at 2-4.

²¹ *Id.* at 8.

²² CMUA Protest at 8; NCPA Protest at 7; Six Cities Protest at 2; SVP/M-S-R Protest at 8.

²³ CMUA Protest at 9.

for federal preference power transactions, similar to that of ISO New England, Inc.²⁴ NCPA suggests that CAISO revise its tariff to include a savings clause acknowledging that CAISO will promptly file new tariff language to provide an exemption if the tariff affects federal preference power transactions in the future.²⁵ Alternatively, Six Cities requests that the Commission hold a technical conference or settlement procedures to address its concerns.²⁶

22. CAISO responds that its status as the central counterparty is not intended to affect transactions involving federal preference power. CAISO notes that WAPA's letter reaffirms that the protestors' transactions with CAISO as the counterparty should not violate preference power agreements. CAISO argues that WAPA's letter resolves the protestors' concerns and that granting any other relief is unnecessary.²⁷ Further, CAISO states that, if WAPA changes its position as the CAISO tariff evolves, CAISO remains free to consider future tariff amendments at that time. Lastly, CAISO dismisses CMUA's assertion that WAPA's letter exposes preference power recipients to judicial challenge, noting that CMUA fails to explain how such a challenge could arise or identify a law or regulation that could form the basis for such a challenge.²⁸

iv. Other Issues

23. SVP/M-S-R express concern regarding CAISO's proposal to have the exclusive right to collect debts when a default occurs. SVP/M-S-R explain that previously market participant creditors each had a right to pursue collection from market participant debtors. SVP/M-S-R contend that CAISO's proposal may limit their rights as creditors in a defaulting market participant's bankruptcy proceeding.

24. SVP/M-S-R also argue that CAISO should provide market participants with the same sales tax resale certificates it requires from market participants. By doing so, SVP/M-S-R states that they, too, will be able to demonstrate that their sales to CAISO are exempt from sales tax as sales for resale.²⁹

²⁴ *Id.*; Six Cities Protest at 6; SVP/M-S-R Protest at 8.

²⁵ NCPA Protest at 8.

²⁶ Six Cities Protest at 7-8.

²⁷ CAISO Answer at 5.

²⁸ *Id.*

²⁹ SVP/M-S-R Protest at 11.

25. CAISO responds that its assumption of the responsibility to collect market participant defaults is central to Order No. 741's policy. CAISO explains that it is in the best position to collect such defaults because it is the only party that can set off amounts that market participants would otherwise owe to the debtor. In the event that this process does infringe on a market participant's rights, such as a market participant's standing to contest another utility's plan of reorganization in bankruptcy court, CAISO states that it could explore the possibility of entering into an agreement with the market participant to reassign a portion of its claim.³⁰ CAISO adds that such an agreement may require Commission approval.

26. CAISO dismisses SVP/M-S-R's request that it provide market participants with resale certificates, stating that SVP/M-S-R have not provided sufficient detail to justify such a requirement. However, CAISO states that it will, if requested, work with market participants to document its own status as a reseller so that market participants do not unnecessarily incur state taxes.³¹

c. Commission Determination

27. We find CAISO's proposal to establish itself as the central counterparty to market-related transactions complies with the requirements set forth in Order Nos. 741 and 741-A. The establishment of CAISO as the central counterparty addresses ambiguity regarding the identity of contracting parties in market-related transactions by clarifying that there is a single, specified counterparty to market participants. CAISO's proposal thus represents a reasonable solution to address a potential mutuality risk, and we also note that it received support from stakeholders.³² We will, therefore, conditionally accept CAISO's proposed tariff revisions, as discussed below.

28. Regarding California's greenhouse gas regulations, we find that protestors' concerns are speculative, as there is no evidence that CAISO will incur compliance obligations. As NCPA explains, the California Air Resources Board is currently developing the greenhouse gas regulations, and no party has shown that the state rules will necessarily interpret CAISO's counterparty role as a "first deliverer" of energy in California. We also note CAISO's commitment to continue to work with the California Air Resources Board as the rules are developed. Further, we reject SVP/M-S-R's concern that CAISO's proposed "E-Tag" language might be misconstrued as only applying to interchange transactions. We agree with CAISO that this language applies to

³⁰ CAISO Answer at 9-10.

³¹ *Id.* at 9.

³² *See* CAISO Filing at 3.

the delivery of energy into, on, and through the CAISO-controlled grid and, by using the term “CAISO Controlled Grid,” does not require further revision.

29. Further, we reject protestors’ arguments regarding CAISO’s central counterparty status and compliance with California’s renewable portfolio standards as speculative. Again, no party has shown an actual conflict with state rules, and CAISO has committed to work with the relevant state agencies.

30. We also reject protestors’ arguments regarding CAISO’s central counterparty status violating “private use” restrictions for tax-exempt bond financing as speculative. We find that protestors have not demonstrated that a real conflict exists, and note that NCPA stated that its bond counsel suggested that the proposal may not be a problem for already-financed projects. While CAISO has provided a limited exclusion for energy procured for use in Mexico, that exclusion is required to comply with Mexican law.

31. Six Cities request a savings clause, whereby the tariff would be immediately modified to include appropriate exceptions if market participants receive notice concerning their tax status. We recognize that protestors wish to maintain their tax-exempt status, but there is no information in the record to conclude that CAISO’s status as the central counterparty will, in fact, adversely affect bond-financed projects. To the extent that CAISO’s instant proposal affects the tax-exempt status of some stakeholders, CAISO, working with its stakeholders, may address this issue in a filing that demonstrates that their new proposal would provide the market the same degree of protection as the counterparty requirement.³³

32. We will not direct CAISO to revise its tariff to exempt federal preference power transactions from those transactions for which it serves as the central counterparty. WAPA’s letter provides two examples where it concludes that CAISO’s central counterparty role is not a violation of WAPA’s contractual resale provisions.³⁴ We agree with CAISO that WAPA’s letter adequately addresses protestors’ concerns.

³³ We do not here prejudice the ultimate resolution of any such filing.

³⁴ NCPA Protest, Attachment A, Letter from Sonja A. Anderson, Power Marketing Manager, Western Area Power Administration, to baseline resource customer (Jun. 2, 2012) (stating “[I]f a Central Valley Project customer, such as [NCPA], is acting as [a scheduling coordinator] and schedules [WAPA Base Resource] to its members in the CAISO, [WAPA] does not consider this initial transaction (and this initial transaction only) to its members a resale in violation of the [General Power Contract Provisions], even if the CAISO is a central counterparty to the schedules.”)

33. We reject as speculative SVP/M-S-R's argument regarding CAISO's assumption of responsibility for collecting the default amount in a bankruptcy proceeding. CAISO, as the counterparty, will be able to set off amounts that would otherwise be owed to the debtor; thus, we find that it is reasonable for CAISO to assume the role of collecting the default amount on behalf of other market participants, and then distribute any funds it collects, including filing any claims in the bankruptcy proceeding of the market participant. We also note that, while expressing general concern regarding its rights in a bankruptcy proceeding, SVP/M-S-R did not explain with any specificity its concern in its protest.

34. We agree with CAISO that SVP/M-S-R has not provided justification to require CAISO to provide market participants with resale certificates. No party has adequately explained the need for resale certificates, and, in light of CAISO's commitment to work with market participants to document CAISO's status as a reseller so that market participants do not unnecessarily incur state taxes, we will accept CAISO's tariff language as proposed.

35. Regarding Six Cities' request that CAISO revise proposed section 11.29 of its tariff to clarify that its status as the central counterparty is not intended to affect the tax-exempt status of transmission facilities or entitlements subject to its control, we accept the language CAISO proposed in its answer. We direct CAISO to fulfill its commitment to revise proposed tariff section 11.29(a)(iii) to reflect Six Cities' request within 30 days of the date of this order.

36. CAISO requests that the Commission confirm that it will not be subject to the regulations and requirements regarding market-based rate authorization and wholesale sale of electric energy, capacity, and ancillary services at market-based rates in its role as a counterparty. Based on CAISO's representations regarding its proposed activities as the central counterparty in its market-related transactions, we find that CAISO does not need market-based rate authority under Part 35, Subpart H of our regulations. We find that CAISO will have no discretion regarding which transactions clear in its markets or the prices at which they clear, pursuant to its tariff, and will not itself be a "market seller" with discretion to sell at market-based rates. We agree that CAISO, as the central counterparty will simply be a facilitating counterparty to the bids and offers of other market participants and will not itself be a market seller, and will not itself submit bids or make offers and, thus, will not affect which transactions clear in the markets or the prices at which they clear.³⁵

³⁵ See, e.g., *New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,110, at P 23 (2012).

37. Last, we will grant the requested waiver of the Electronic Quarterly Report reporting requirements regarding CAISO's sales to market participants that result from its presence as the central counterparty for all CAISO market-related transactions. Sellers are already required to file Electronic Quarterly Reports and, in practice, this means that all market participants selling into an RTO/ISO, including into CAISO, must already report. Further, CAISO will remain a party to the transmission contracts that are required to be reported in the Electronic Quarterly Report, and services under these contracts will be provided under CAISO's tariff.

The Commission orders:

(A) CAISO's tariff revisions are hereby conditionally accepted, effective September 1, 2012, subject to a compliance filing, as discussed in the body of this order.

(B) CAISO is hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of the order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.