

184 FERC ¶ 61,009
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

California Independent System Operator Corporation Docket No. ER23-1699-000

ORDER DENYING WAIVER REQUEST

(Issued July 13, 2023)

1. On April 24, 2023, the California Independent System Operator Corporation (CAISO) submitted a request for waiver of sections 37.5.2, 37.9.4, and 37.11 of its Open Access Transmission Tariff (Tariff) in order to: (1) excuse CAISO from assessing pending or future financial penalties for inaccurate meter data submissions; and (2) treat entities subject to the waiver as ineligible market participants under Tariff section 37.9.4 for purposes of distributing penalty proceeds. As discussed below, we deny CAISO's waiver request.

I. Background

2. Under Tariff section 37.5.2,¹ CAISO requires Settlement Quality Meter Data² in order to financially settle its markets through an iterative process between CAISO and scheduling coordinators that begins with an initial settlement statement nine business days after the trading day, followed by a series of deadlines for CAISO to issue recalculation settlement statements and for scheduling coordinators to submit new or revised meter data for CAISO to use in the recalculation settlement statements. A scheduling coordinator's failure to submit actual meter data by the 52nd day after the trading date (T+52B) is considered a late meter data submission (Late Submission).³

¹ CAISO, CAISO eTariff, § 37.5.2 (Accurate and Timely Actual SQMD) (7.0.0).

² Capitalized terms used but not otherwise defined in this order have the meanings ascribed to them in the Tariff.

³ Waiver Request at 2.

3. Tariff section 37.11⁴ not only includes the method for calculating penalties for failure to submit data pursuant to section 37.5.2, but also penalties for inaccurate data. Failure to submit revised meter data by the 214th day after the trading date (T+214B) for the resettlement statement that CAISO issues at the 11th month after the trading day (T+11M) is considered an inaccurate meter data submission (Inaccurate Submission). Regardless of whether the submission is a Late Submission or an Inaccurate Submission, a violation subjects the scheduling coordinator to a penalty of \$1,000 for each trading day after the deadline has been missed. A scheduling coordinator that fails to submit data for the T+11M settlement statement faces an additional penalty of \$3,000 per trading day (totaling \$4,000 for every trading day with missing meter data).⁵

4. CAISO states that Tariff section 37.9.4 requires CAISO to place all of the penalties collected under Tariff section 37 into a trust account and those proceeds are allocated to scheduling coordinators representing eligible market participants after the end of the year. CAISO states that Tariff section 37.9.4 provides that eligible market participants “shall be those Market Participants that were not assessed a financial penalty pursuant to this Section 37 during the calendar year.”⁶ CAISO explains that the eligible market participant requirement ensures an entity is not rebated part of its penalty and creates additional incentives for compliance.⁷

5. CAISO explains that its meter data penalties are part of its rules of conduct, which it administers through a process defined in Tariff section 37. If CAISO believes that a market participant may have committed a Tariff violation subject to CAISO penalties, it conducts an investigation, providing notice and an opportunity for the market participant to present relevant information. CAISO explains that, where it determines a penalty is warranted, the market participant may obtain immediate review of CAISO’s determination by directly appealing to the Commission, in which case the penalty will be tolled until the Commission renders its decision on appeal.⁸

⁴ CAISO, CAISO eTariff, § 37.11 (Method of Calculating Penalties) (0.0.0).

⁵ Waiver Request at 2-3.

⁶ CAISO, CAISO eTariff, § 37.9.4 (Disposition of Proceeds) (1.0.0).

⁷ Waiver Request at 5.

⁸ CAISO, CAISO eTariff, § 37.8.10 (Review of Determination) (6.0.0); Waiver Request at 4-5.

II. Waiver Request

6. CAISO states that it expects to begin a stakeholder initiative that will consider refinements to the relevant financial penalty provisions in 2023, but there are 16 pending Inaccurate Submission penalty issues that will not be remedied by this upcoming stakeholder process. CAISO asserts that the instant waiver request involves a similar situation as in a prior waiver request that CAISO filed on behalf of NV Energy, Inc. (NV Energy), which the Commission granted.⁹ Specifically, CAISO states that six scheduling coordinators are in some stage of the rules of conduct process for correcting relatively small, but long-lasting meter data errors. CAISO states that three of these scheduling coordinators are in the final stages of the process and, absent waiver, will face penalties of \$639,000, \$365,000, and \$122,000, respectively.¹⁰ CAISO asserts that these errors were triggered by errors or misunderstandings regarding CAISO's meter data reporting expectations and have been largely, if not fully, corrected. CAISO states that the total penalty exposure among the six scheduling coordinators is approximately \$2.4 million.¹¹

7. CAISO states that, in addition to these six entities, there are 10 other pending inaccurate meter data cases covering nine entities with penalties ranging from \$1,000 to \$39,000. CAISO asserts that it would be inappropriate to ask the Commission to excuse several million dollars of penalties for entities with longer-lasting violations, but enforce these small penalties. Thus, CAISO seeks to excuse these 10 penalty cases totaling \$102,000.¹²

8. CAISO also states that it is concerned about the potential for new Inaccurate Submission issues to arise before it can revise its Tariff rules. CAISO states that it would be inappropriate to continue enforcing the Inaccurate Submission penalties as constructed when they can lead to unjust and unreasonable outcomes. CAISO acknowledges that future Inaccurate Submissions may not follow the fact pattern presented in *NV Energy* (i.e., relatively small errors that persist over a long period of time), which motivated the

⁹ Waiver Request at 8, 9; see *Cal. Indep. Sys. Operator Corp.*, 175 FERC ¶ 61,043 (2021) (*NV Energy*) (granting request for waiver of Tariff sections 37.5.2, 37.11, and 37.9 to excuse CAISO from assessing penalties of \$685,000 for meter data errors on approximately 1,400 trading days against NV Energy).

¹⁰ CAISO notes that the other three scheduling coordinators are still in the initial stages of the process, so CAISO does not have precise penalty figures available for those entities. CAISO estimates that all of the scheduling coordinators face penalties ranging from several hundred thousand dollars up to almost \$800,000. Waiver Request at 9.

¹¹ *Id.* at 9-10.

¹² *Id.* at 10-11.

instant filing, but argues that excusing long-standing violations while enforcing penalties for Inaccurate Submissions that are quickly addressed would unduly punish scheduling coordinators who report data errors promptly, while rewarding those who delay. CAISO contends that a blanket waiver that excuses penalties for all Inaccurate Submissions aligns with the objective of incentivizing prompt reporting of data errors. Accordingly, CAISO requests waiver to excuse it from assessing financial penalties for Inaccurate Submission until the earlier of the effective date of future revisions to the meter data penalties outlined in Tariff section 37.11 or May 1, 2024.¹³

9. CAISO recognizes that new Inaccurate Submissions arising during the waiver period might not all result from good faith errors but asserts that CAISO's established market monitoring procedures will ensure that waiving the meter data penalties for a short period will not undermine the ability to penalize meter data submission issues that pose the greatest risk to the CAISO market. CAISO states that if CAISO or its Department of Market Monitoring suspects that an entity submitted incorrect meter data deliberately or recklessly in violation of the Commission's duty of candor¹⁴ or in violation of the Commission's market manipulation rules,¹⁵ then such conduct can be reviewed and remedied by the Commission's Office of Enforcement.¹⁶

10. Further, CAISO requests waiver of the associated penalty proceed allocation provisions in Tariff section 37.9.4 to ensure that an entity whose penalties are excused as a result of this waiver request does not become eligible for the annual distribution of penalty proceeds. According to CAISO, ensuring that all parties whose penalties are excused are treated as ineligible market participants would recognize that the violations occurred and would promote greater equity for parties without violations.¹⁷

11. CAISO argues that its waiver request satisfies the Commission's criteria for granting waiver. First, CAISO argues that it has acted in good faith because it is bringing this waiver request to the Commission's attention as soon as feasible after concluding that a temporary blanket waiver of the meter data penalties is necessary to avoid undesirable consequences. CAISO adds that meter data penalties are generally the result of self-reported meter data corrections. CAISO states that it believes that the meter data

¹³ *Id.* at 9-10.

¹⁴ 18 C.F.R. § 35.41(b) (2022).

¹⁵ 18 C.F.R. § 1c.2 (2022).

¹⁶ Waiver Request at 12-13.

¹⁷ *Id.* at 13-14.

submission errors were made in good faith and that the underlying problems leading to the initially incorrect meter values have been addressed.¹⁸

12. Second, CAISO asserts that its waiver request is limited in scope because waiver would be in effect until no later than May 1, 2024, and applies only to one of the two types of meter data penalties (Inaccurate Submission, as opposed to Late Submission, penalties).¹⁹

13. Third, CAISO contends that its waiver request addresses three concrete problems. CAISO states that waiver from Tariff sections 37.5.2 and 37.11 addresses the problem that penalties for Inaccurate Submissions can far exceed the amount needed to support the objectives of the penalties and can be misaligned with the severity of the violation. CAISO also states that waiver of these sections will address the problem that CAISO will not have sufficient time to consider revisions to its rules of conduct in the upcoming stakeholder process without the distraction of further significant penalties continuing to accrue. CAISO states that waiver of Tariff section 37.9.4 addresses the problem that would arise if scheduling coordinators whose penalties are excused by way of this waiver request could be eligible receive an allocation of other scheduling coordinators' penalties for Tariff violations.²⁰

14. Fourth, CAISO argues that its waiver request avoids the undesirable consequences of imposing unreasonable and excessive penalties on CAISO market participants and permitting entities with Tariff violations to receive a portion of penalty proceeds as a result of this waiver request. CAISO acknowledges that the waiver of Tariff sections 37.5.2 and 37.11 will reduce the overall pool of penalty funds available to distribute to entities without a violation. However, CAISO states that it does not view this as an undesirable consequence that should prevent the Commission from granting this request because no market participant is guaranteed eligibility for an allocation of these funds until the year is over.²¹

15. CAISO contends that it is not requesting an impermissible retroactive waiver. CAISO explains that Tariff section 37.8.10 provides that, if CAISO determines a penalty is warranted, the market participant “may obtain immediate review of the CAISO’s determination by directly appealing to FERC.” CAISO contends that this portion of CAISO’s filed rate directly enables the Commission to perform its own after-the-fact

¹⁸ *Id.* at 16.

¹⁹ *Id.*

²⁰ *Id.* at 16-17.

²¹ *Id.* at 17-18.

review of penalties and provides notice at the outset that the rates being promulgated are provisional only and subject to later revision.²²

III. Notice and Responsive Pleadings

16. Notice of CAISO's filing was published in the *Federal Register*, 88 Fed. Reg. 26,295 (Apr. 28, 2023), with interventions and protests due on or before May 15, 2023. Timely motions to intervene were filed by: the City of Santa Clara, California; Tucson Electric Power Company; Modesto Irrigation District; NRG Power Marketing LLC; and Northern California Power Agency. Idaho Power Company (Idaho Power) filed a timely motion to intervene and comments in support of CAISO's filing, and an alternative request for waiver and appeal of CAISO's sanction.

17. Idaho Power states that it is one of the six entities that has been assessed a large financial penalty for relatively small, but long-lasting meter data errors. Idaho Power states that the metering equipment at the generator at issue was configured differently than other generators. Idaho Power explains that this resulted a penalty in the amount of \$639,000.²³

18. Idaho Power states that it agrees with CAISO that the waiver request satisfies the Commission's waiver criteria. Idaho Power argues that the waiver would broadly benefit Western Energy Imbalance Market (WEIM) participants by ensuring that fair penalties are assessed and that those penalty proceeds are appropriately distributed. On the other hand, Idaho Power asserts that denying CAISO's waiver request would amount to unfair and preferential treatment of one WEIM participant at the detriment of other participants.²⁴

19. Idaho Power states that, in the event that the Commission denies CAISO's waiver request, it submits its own limited waiver request seeking the relief requested in CAISO's waiver request as applied to Idaho Power pursuant to Tariff section 37.8.10.²⁵ Idaho Power also asserts that the penalty associated with the waiver request should be tolled until the Commission renders a decision. Idaho Power asserts that, like CAISO's waiver

²² *Id.* at 18-19 (citing *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 797 (D.C. Cir. 1990)).

²³ Idaho Power Comments at 3-4.

²⁴ *Id.* at 4-6.

²⁵ *Id.* at 2.

request, its alternative waiver request satisfies the Commission's criteria for granting waiver.

IV. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2022), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Substantive Matters

21. As discussed below, we deny CAISO's waiver request. 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.²⁶ We find that the circumstances of CAISO's waiver request do not satisfy these criteria.

22. Specifically, we find that CAISO's request for a temporary blanket waiver of pending and future penalties for the inaccurate submission of meter data is not limited in scope. Unlike the waiver granted in *NV Energy*, which concerned a single entity that inadvertently submitted inaccurate meter data due to a configuration error at a single generating facility, CAISO's instant waiver request involves 16 pending cases with an accrued penalty amount that CAISO estimates as approximately \$2.4 million. Therefore, both in terms of the number of entities covered by the waiver and the dollar amount at stake, the waiver request here far exceeds the scope of the waiver in *NV Energy*, even when considering only the pending penalty investigations. Further, although CAISO states that it believes that the errors that led to these inaccurate submissions have been addressed, CAISO has not provided adequate detailed information regarding the circumstances of these Inaccurate Submissions, other than to generally reference errors and misunderstandings regarding the meter data submission requirements. Given the ambiguity surrounding the causes of the violations and resulting penalties, we are not persuaded that the scope of the waiver is limited to avoiding overly punitive results that are out of line with the purposes those penalties should serve.

23. Further, the broad scope of CAISO's request is illustrated by consideration of possible future penalties. For example, CAISO states that, if the Commission grants waiver of existing penalties, CAISO would ensure that all entities whose penalties are excused would be treated as ineligible market participants, but CAISO provides no

²⁶ 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).

mechanism for limiting the scope of the waiver request as it pertains to future cases. Indeed, the universe of beneficiaries of this waiver request, if granted, would extend to all CAISO market participants. Similarly, there is effectively no upper limit on the potential dollar amount of future penalties excused by the waiver, even though the waiver would be in place no longer than through May 1, 2024. In addition, CAISO acknowledges that the waiver could excuse future penalties for significant meter data errors or even errors made in bad faith.

24. With respect to Idaho Power's alternative waiver request pursuant to Tariff section 37.8.10, that section permits a market participant to seek review of a CAISO penalty by appealing to the Commission "in accordance with the FERC's rules and procedures."²⁷ The Commission has interpreted that language in CAISO's Tariff as a reference to Rule 206 and Rule 218.²⁸ Because Idaho Power's alternative waiver request is not pursuant to those provisions, it is denied.

The Commission orders:

CAISO's waiver request is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Danly is concurring with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

²⁷ CAISO, CAISO eTariff, § 37.8.10 (Review of Determination) (6.0.0).

²⁸ *Hanwha Q-CELLS USA Corp.*, 174 FERC ¶ 61,013, at PP 9-10 (2021); *Mission Solar LLC*, 174 FERC ¶ 61,014, at PP 10-11 (2021).

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California Independent System Operator Corporation

Docket No. ER23-1699-000

(Issued July 13, 2023)

DANLY, Commissioner, *concurring*:

1. I concur with this order rejecting the California Independent System Operator Corporation's (CAISO's) request to waive pending or future financial penalties for inaccurate meter data submissions and related tariff provisions about how penalty funds will be distributed. The Commission appropriately denies CAISO's waiver request.
2. I add to the majority's analysis that CAISO's requested waiver—like many of its prior requested waivers—also violates the filed rate doctrine and rule against retroactive ratemaking.¹ CAISO asserts that the elimination of metering penalties currently in the tariff with retroactive effect is not retroactive because

Tariff section 37.8.10 provides that, if CAISO determines a penalty is warranted, the market participant “may obtain immediate review of the CAISO's determination by directly appealing to FERC.” CAISO contends that this portion of CAISO's filed rate directly enables the Commission to perform its own after-the-fact review of penalties and provides notice at the outset that the rates being promulgated are provisional only and subject to later revision.²

3. CAISO's contention is wrong. A tariff provision stating that market participants may seek Commission review of metering penalties does not provide sufficient notice that CAISO may freely disregard the entire metering penalty regime in the tariff with retroactive effect. Otherwise, any tariff would become “provisional” and subject to

¹ See, e.g., *Cal. Indep. Sys. Operator Corp.*, 176 FERC ¶ 61,159 (2021) (Danly, Comm'r, dissenting) (explaining the filed rate doctrine and rule against retroactive ratemaking and CAISO's unlawful efforts to retroactively rewrite its filed tariff).

² *Cal. Indep. Sys. Operator Corp.*, 184 FERC ¶ 61,009, at P 15 (2023) (citing Waiver Request at 18-19 (citing *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 797 (D.C. Cir. 1990))). CAISO made the same argument in a prior waiver request that the Commission granted over my dissent. See *Cal. Indep. Sys. Operator Corp.*, 175 FERC ¶ 61,043, at P 18 (2021); see also *id.* (Danly, Comm'r, dissenting).

retroactive revision by—for example—simply including in the tariff a statement that parties have section 206 rights to file for Commission review of any tariff provision.³

4. To the contrary, the rule is that “no violation of the filed rate doctrine occurs when ‘buyers are on adequate [advance] notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.’”⁴ “Adequate” notice that all metering penalty rules are “provisional” requires greater specificity than stating a market participant’s individual review rights.

5. The majority opinion correctly denies CAISO’s waiver but also should squarely reject CAISO’s attempted filed rate violation. The Commission has no authority to grant permission to public utilities to retroactively rewrite their tariffs on the fly.

For these reasons, I respectfully concur.

James P. Danly
Commissioner

³ 16 U.S.C. § 824e.

⁴ *Old Dominion Elec. Coop., Inc. v. FERC*, 892 F.3d 1223, 1231 (D.C. Cir. 2018) (quoting *Nat. Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992)).