

134 FERC ¶ 61,050
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

California Independent System Operator Corp.

Docket Nos. ER09-1048-002
ER06-615-059

ORDER ON COMPLIANCE

(Issued January 20, 2011)

1. On February 18, 2010, the California Independent System Operator Corporation (CAISO) submitted a filing in compliance with the Commission's November 19, 2009 Order in the captioned dockets.¹ The Initial Compliance Order accepted the revised tariff sheets subject to further compliance filing, to be effective April 28, 2009. CAISO's proposed revisions in compliance with the Initial Compliance Order are accepted, effective February 18, 2010, subject to further compliance, discussed below.

I. Background

2. Order No. 719² established reforms to improve the market monitoring structure of Independent System Operators (ISO) and Regional Transmission Organizations (RTO). The Commission did not mandate a specific structure for Market Monitoring Units (MMU), but required that each RTO and ISO, through its stakeholder process, decide its own MMU structure.³

¹ *Cal. Indep. Sys. Operator Corp.* 129 FERC ¶ 61,157 (2009) (Initial Compliance Order).

² *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008) (Order No. 719 or Final Rule), *order on reh'g*, Order No. 719-A, 74 Fed. Reg. 37776 (July 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009), *order on reh'g*, Order No. 719-B, 128 FERC ¶ 61,252 (2009).

³ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 326.

3. On April 28, 2009, CAISO proposed to revise its tariff to comply with the Commission's directives in Order No. 719. CAISO chose to maintain its market monitoring structure, consisting of an internal monitor, the Department of Market Monitoring (DMM), and an external advisor, the Market Surveillance Committee (MSC).⁴ In addition to maintaining its existing MMU structure, CAISO made several other modifications to its MMU structure and functions to comply with the Commission's directives.⁵

4. In its Initial Compliance Order on November 19, 2009, the Commission directed CAISO to, among other things, amend its tariff to address five market monitoring issues: (1) clarify CAISO's market monitoring structure to define the role of MSC as either providing consultative services or as carrying out a core market monitoring function; (2) conform CAISO's definition of the term "Market Violation" to match the definition in the Commission's regulations; (3) clarify the definitions of the terms "material affiliation" and "*de minimis*" in the ethics rules applicable to DMM and MSC personnel; (4) broaden the information sharing provisions in Section 8 of Appendix P to the utility commissions of all states, rather than limiting it to the California Public Utilities Commission (CPUC); and (5) review the tariff to clarify enforcement provisions and to ensure that only objectively identifiable conduct is subject to sanction by CAISO.⁶

5. On February 18, 2010, CAISO submitted its compliance filing addressing these market monitoring issues.

II. Notice and Responsive Pleadings

6. Notice of the compliance filing was published in the *Federal Register*, 75 Fed. Reg. 9889 (2010), with interventions and comments due on or before March 11, 2010. Motions to intervene and protests were filed by Southern California Edison Company (SoCal Edison) and the California Department of Water Resources State Water Project (SWP). Pacific Gas & Electric Company (PG&E) filed comments in support of the compliance filing. On March 26, 2010, CAISO filed a response to SWP's protest.

⁴ Initial Compliance Order, 129 FERC ¶ 61,157 at P 77.

⁵ CAISO April 28, 2009 Initial Compliance Filing.

⁶ Initial Compliance Order, 129 FERC ¶ 61,157 at P 76-136.

III. Discussion

A. Procedural Matters

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding

8. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), 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

9. We find that CAISO has generally complied with the Initial Compliance Order. As discussed below, with certain exceptions, we agree with the proposed modifications as they relate to: (1) CAISO's market monitoring structure; (2) CAISO's definition of the term "Market Violation;" (3) the definitions of the terms "material affiliation" and "*de minimis*" in the ethics rules applicable to DMM and MSC personnel; and (4) the broadening of the information sharing provisions regarding state utility commissions. However, CAISO has not complied with the Initial Compliance Order's directive to revise Section 37 and other portions of the CAISO tariff consistent with the Commission's requirements regarding enforcement and sanctioning by CAISO, and we will require a further compliance filing.

1. CAISO's Market Monitoring Structure

10. In its Initial Compliance Filing, CAISO stated that it has a hybrid market monitoring structure consisting of an internal monitor, the DMM, and an external monitor, the MSC.⁷ The Initial Compliance Order found that the tariff, as proposed, did not assign the MSC specific responsibility for any of the three core functions of a market monitoring unit and, therefore, CAISO is not a "hybrid" market monitoring structure.⁸ The Commission directed CAISO to either clarify that the MSC is not a market monitor but holds only a consultative role, or to amend the tariff to state that the MSC has a responsibility to carry out a core market monitoring responsibility.⁹

⁷ CAISO Filing in Docket No. ER09-1048-000 on April 28, 2009.

⁸ Initial Compliance Order, 129 FERC ¶ 61,157 at P 81.

⁹ *Id.* P 82.

11. CAISO's compliance filing clarifies that it has adopted a market monitoring structure with a single, internal market monitor, the DMM. CAISO proposes modifications to its tariff to limit MSC's role to a purely consultative function by modifying Section 1.1 of Appendix O to clarify that the MSC is an external market advisor, and by modifying the title of Section 5 of Appendix O from "Duties of the Market Monitor" to "Duties of the Market Surveillance Committee."¹⁰

a. Protests and Comments

12. SoCal Edison argues the MSC's authority, roles and responsibilities, identified in Appendix O, should not be impacted by the classification of the MSC as a market advisor. SoCal Edison asks that, if the Commission finds CAISO's proposed language as changing the MSC's current functions, they should be directed to make any necessary changes to ensure the MSC's role remains independent and effective.¹¹ Additionally, SoCal Edison requests that CAISO be directed to modify Section 1.1 of Appendix O to read, "There shall be established a Market Surveillance Committee (MSC) as a market advisor, whose role it shall be to provide independent external expertise on the CAISO market monitoring process and, in particular, provide independent expert advice and recommendations to the CAISO CEO and Governing Board." SoCal Edison argues that its proposed modification removes any ambiguity and complies with CAISO's proposal to classify the MSC as an independent market advisor.¹²

b. Commission Determination

13. We find that CAISO's proposal to clarify the purely advisory nature of the MSC is appropriate. CAISO has chosen to vest full responsibility for the three core functions of a market monitoring unit with DMM. Thus, CAISO does not have a hybrid market monitoring structure. CAISO has clarified this structure by modifying the title of Appendix O Section 5 from "Duties of the Market Monitor" to "Duties of the Market Surveillance Committee."

¹⁰ Compliance Filing at Page 3. Because CAISO has chosen to clarify that the MSC acts only as an advisor and will not perform any of the market monitoring unit core functions, we do not require the MSC to report to the Governing Board. *See* Initial Compliance Order at, 129 FERC ¶ 61,157 at P 90. Likewise, we do not require revisions to Appendix O to reflect the core functions to be performed by the MSC. *See* Initial Compliance Order, 129 FERC ¶ 61,157 at P 96.

¹¹ SoCal Edison Protest at 2.

¹² *Id.* at 3-4.

14. SoCal Edison's requested modification to Section 1.1 of Appendix O provides further clarity regarding the advisory role of the MSC and the Commission directs CAISO to modify this section in a compliance filing to include SoCal Edison's suggested language.

2. Definition of "Market Violation"

15. In its initial filing, CAISO defined the term Market Violation as "A violation of a market behavior rule promulgated by the Commission or a violation of a provision of this tariff other than those provisions that carry a sanction specifically enumerated under Section 7 of this Tariff." The Initial Compliance Order required CAISO to revise this definition to conform to the definition of Market Violation set forth in our regulations.¹³ The Commission noted that, as written, CAISO's tariff protocols for referring violations to the Commission used the term and, therefore, the term's meaning had to be identical to the meaning in our regulations.

16. CAISO has modified the definition of Market Violation consistent with the Commission's regulation.

a. Protests and Comments

17. No adverse comments were filed.

b. Commission Determination

18. CAISO's modification complies with the Initial Compliance Order and is accepted.

3. DMM and MSC Ethics Rules

19. In its Initial Compliance Filing, CAISO submitted revised ethics rules for the DMM and MSC in Appendices O and P of its tariff. The Initial Compliance Order generally approved CAISO's revisions, but required that CAISO define the terms "material affiliation" and "*de minimis*" as those terms were ambiguously used in Sections 9.1 and 9.6 of Appendix P.¹⁴

20. CAISO has modified Section 9.1 to state that MSC members and DMM employees "shall have no professional or commercial affiliation with a market participant where such affiliation would tend to affect, or give the appearance of affecting, their judgment in the performance of their duties." Further, it has modified Section 9.6 to no

¹³ 18 C.F.R. § 35.28(b)(8) (2010).

¹⁴ Initial Compliance Order, 129 FERC ¶ 61,157 at P 114.

longer use the phrase “*de minimis*,” but rather to prohibit MSC members and DMM employees from accepting anything from a Market Participant with a value in excess of \$25.

21. CAISO also proposes a number of conforming and minor revisions to Appendices O and P.

a. Comments and Protests

22. No adverse comments were filed.

b. Commission Determination

23. The Commission generally accepts CAISO’s modifications of Sections 9.1 and 9.6 of Appendix P and the minor conforming and typographical changes proposed. However, we note that Section 9.6 of Appendix O appears to include a typographical error, by stating “Members of the MSC shall not accept anything from a Market Participant any item with a value in excess of \$25,” where it should state “Members of the MSC shall not accept from a Market Participant any item with a value in excess of \$25.” CAISO should review and revise this section as necessary.

4. Information Sharing with State Commissions

24. In its Initial Compliance Filing, CAISO proposed information sharing provisions with the CPUC. The Initial Compliance Order accepted those provisions, subject to a subsequent filing to include information sharing with other state commissions.¹⁵

25. CAISO has modified its tariff to consider tailored requests for information from all state utility commissions, including the CPUC. However, CAISO states in its transmittal pleading that it reserves the right to prioritize requests from the CPUC over other state commissions. This claimed prioritization does not appear to be included in CAISO’s proposed revisions to Section 8 of Appendix P.

a. Comments and Protests

26. No adverse comments were filed.

b. Commission Determination

27. We accept CAISO’s tariff modification clarifying that state commissions may submit tailored requests for information from CAISO.

¹⁵ Initial Compliance Order, 129 FERC ¶ 61,157 at P 132.

5. Enforcement and Sanctioning by CAISO

28. In the Initial Compliance Order, the Commission noted that portions of CAISO's tariff did not meet the test set out by the Commission for activity that is subject to sanction by an ISO or RTO itself.¹⁶ While the Commission specifically noted deficiencies in a number of provisions in Section 37 of CAISO's tariff (which CAISO describes as its "Rules of Conduct"), it directed CAISO to "review Section 37 and make such adjustments as may be necessary to conform to the requirements for behavior subject to internal sanction."¹⁷

29. In its compliance filing, CAISO proposes modifications to particular provisions in that section consistent with the Commission's policies. Specifically, CAISO identifies five provisions that "could be viewed as involving behavior that is not objectively identifiable" and proposes modifications to these provisions, among others.¹⁸ In proposed Sections 37.2.1, 37.2.4, and 37.6.1, CAISO attempts to amend the tariff rules to cover only objectively identifiable behavior. Proposed revisions to Sections 37.2.3 and 37.5.1 describe the referral of suspected tariff violations by DMM to FERC for possible enforcement. According to CAISO, its proposed changes increase the objectivity of the provisions, but "there always may be exceptional cases in which the facts and circumstances preclude an objective determination as to whether or not a Rule of Conduct was violated."¹⁹ Additionally, CAISO proposed modifications to Section 37.8.2 as well as Section 11 of Appendix P to identify tariff sanctions subject to FERC enforcement.²⁰

a. Comments and Protests

30. SWP argues that CAISO's filing goes beyond the Commission's directives and amends tariff provisions concerning rules of conduct. SWP states that, among the proposed revised Rules of Conduct in Section 37 of the tariff, a market participant will be required to comply with CAISO operational instruction, even if that instruction is not feasible, unless CAISO rescinds that dispatch order. A market participant that denies an infeasible dispatch signal will be penalized by CAISO, unless CAISO rescinds its infeasible directive, and face penalties and additional Commission proceedings. SWP urges the Commission to ensure that, consistent with CAISO's commitment to dispatch

¹⁶ Initial Compliance Order, 129 FERC ¶ 61,157 at P 98.

¹⁷ *Id.* P 100.

¹⁸ Compliance Filing at 9. The provisions identified by CAISO are Sections 37.2.1, 37.2.3, 37.2.4, 37.5.1, and 37.6.1.

¹⁹ Compliance Filing at 9.

²⁰ *Id.*

SWP resources only on a voluntary basis, the Commission should require CAISO to clarify that notwithstanding the new rules proposed in this matter, CAISO will not penalize SWP for refusing infeasible dispatches.²¹

31. On March 26, 2010, CAISO answered SWP's comments. CAISO argues that SWP has not identified any specific objection to the substance of the revised provisions that refer Market Participants to the Commission for violations when they do not respond to operating orders. CAISO argues that the general obligation for market participants to comply with CAISO operational orders, coupled with a financial penalty for non-compliance, is a key component to its efficacy as a grid operator.²²

32. CAISO argues that it will not remove SWP's obligation to obey operational orders. CAISO states that there are numerous operational orders that CAISO can issue that are outside the scope of exceptional dispatch, including orders related to alleviating a system emergency. CAISO argues that SWP has not demonstrated that they should be exempt from such orders. CAISO argues that, although they are mindful of SWP's unique responsibilities in operating the State Water Project, they must maintain grid reliability and must maintain the ability to issue binding operating orders to all Market Participants.²³

b. Commission Determination

33. In the Initial Compliance Order, the Commission directed CAISO to conduct a full review of Section 37, to amend the section, and to make any conforming changes, to ensure that CAISO's tariff complies with the Commission's policies regarding imposition of sanctions by ISOs and RTOs.²⁴ Generally, the Commission finds that CAISO has not complied with the directive.

34. ISO and RTO MMUs must refer to the Commission any suspected Market Violation.²⁵ As discussed above, a Market Violation is a violation of a tariff, Commission order, rule or regulation, market manipulation, or inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies. The Commission has exempted from this referral requirement a suspected tariff violation of a minor, "traffic ticket," variety and the ISO or RTO has received prior Commission

²¹ SWP Protest at page 3-4.

²² CAISO Answer at 2-3.

²³ *Id.* at 4.

²⁴ Initial Compliance Order, 129 FERC ¶ 61,157 at P 99, 100.

²⁵ 18 C.F.R. § 35.28(g)(3)(ii)(C) (2010).

approval to impose a sanction for that type of violation. As the Commission stated in the Initial Compliance Order, for a suspected violation to be a “traffic ticket,” three qualifications must be met:

- (1) The activity must be expressly set forth in the tariff;
- (2) The activity must involve objectively identifiable behavior, and
- (3) The activity does not subject the actor to sanctions or consequences other than those expressly approved by the Commission and set forth in the tariff, with the right of appeal to the Commission.²⁶

35. ISOs and RTOs may only impose sanctions for traffic ticket violations – any other violations must be referred to the Commission under 18 C.F.R. § 35.28(g)(3)(ii)(C) (2010), and the ISO or RTO may not impose a sanction.²⁷ All tariff requirements must be clearly stated so as to place participants on notice regarding the prohibited activity. Lastly, the Commission has required ISOs and RTOs that seek to adopt a “traffic ticket” sanctioning regime to include within their tariffs a separate section that identifies all provisions of the tariff that contain obligations, the violation of which would result in an ISO or RTO sanction.²⁸ ISO and RTO MMUs should not refer violations of traffic ticket provisions to the Commission unless the wrongful behavior also constitutes a non-traffic ticket Market Violation.²⁹

36. Many of CAISO’s proposed revisions to Section 37 and Appendix P are inconsistent with these principles. The Commission directs CAISO to resubmit these

²⁶ Initial Compliance Order, 129 FERC ¶ 61,157 at P 98 (citing *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267, at P 5 (2005)).

²⁷ These requirements apply to participant-specific sanctions imposed by an ISO or RTO and should not be confused with market mitigation.

²⁸ CAISO has included this provision as Section 11.1.3 of Appendix P.

²⁹ The Commission emphasizes that only tariff violations may be traffic ticket violations. If the ISO or RTO suspects that an activity violates any Commission order, rule, or regulation, constitutes market manipulation, or is an inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies, then it must refer the matter to the Commission even if the activity also may be concurrently sanctioned as a “traffic ticket.” Thus, CAISO should always refer to the Commission any activity that involves market manipulation, fraud (including deliberate falsehoods to CAISO), or violation of other Commission regulations, among other Market Violations.

portions of its tariff, along with any other provisions requiring modification,³⁰ to conform to the Commission's policies. To assist CAISO's review, the Commission provides further guidance below regarding some of the provisions that are inconsistent with Commission policy. Based upon our review, further revisions must be made to Section 37 and conforming modifications are required in additional sections of CAISO's tariff.³¹

37. Regarding SWP's arguments, the Commission agrees that each of CAISO's enforcement provisions should be as objective and clear as possible, whether or not CAISO proposes to itself impose a penalty. While not all provisions can be completely objective, the Commission directs CAISO to review Section 37 of its tariff to ensure that all of its provisions are as clear and objective as possible. Also, SWP expresses concern that it may not be able to appeal sanction decisions to the Commission. Our policies provide that entities sanctioned by ISOs and RTOs may appeal the sanction to the Commission and the Commission will consider all relevant circumstances.³²

Compliance with Operating Orders

38. Section 37.2.1.1 requires Market Participants to comply with operating orders issued by CAISO. Operating orders are orders "directing a Market Participant to undertake, a single, clearly specified action . . . that is feasible and intended to resolve a specific operating condition." CAISO proposes to modify the section to provide that if limitations on the Market Participant render it unable to fulfill the required action "or if the action is otherwise infeasible," then the Market Participant must promptly communicate the nature of the "limitation or infeasibility" to CAISO.

39. Violations of Section 37.2.1.1 may be sanctioned under Section 37.2.1.2. Under that section, a violation is punishable by the greater of either: (1) a calculation based

³⁰ Some of the tariff provisions cited in revised Section 11.1.3 of Appendix P reference sections of the tariff outside of Section 37 to define the violation. To the extent that these referenced sections contain factors inconsistent with the Commission's sanction policies, those referenced sections must be modified. Likewise, to the extent that provisions exist outside Section 37 that independently purport to allow CAISO to impose sanctions for tariff violations, those sections must meet the traffic ticket requirements and be listed in Section 11.1.3 of Appendix P.

³¹ When submitting its compliance filing, CAISO should provide complete clean and redline copies of the entirety of Section 37, Appendix O, and Appendix P as well as clean and redline copies of any other tariff provisions that require modification.

³² See *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267 at P 5. To appeal a sanction, the sanctioned entity should file a complaint under section 206 of the Federal Power Act.

upon the Dispatch Interval Locational Marginal Price, or (2) a flat sanction of \$5,000 for a first violation and \$10,000 for each subsequent violation within a rolling 12-month period. Further, “if a quantity of Energy cannot be objectively determined, then the financial Sanctions specified above will apply.”

40. Section 37.2.1.1, as revised, is inconsistent with the Commission’s sanction requirements and is unjust and unreasonable. First, the proposed revision renders Section 37.2.1.1 internally inconsistent. An operating order is, by CAISO’s definition, “feasible.” Yet, a Market Participant must notify CAISO of an infeasible operating order and, under a strict wording of Sections 37.2.1.1 and 37.2.1.2, it may be punished for failing to abide by an “infeasible” operating order. An operating order is either feasible or infeasible; it cannot be both.

41. Further, it appears that CAISO is seeking to impose a sanction on behavior that is not fully and objectively identified in the tariff. If the feasibility or infeasibility of a directive by the ISO is relevant to the determination of whether a violation occurred, then a subjective element is present in the analysis and the violation cannot not be a “traffic ticket.”

42. Regarding compliance with CAISO operating orders, we direct CAISO to more clearly state the behavior that constitutes a violation of Section 37.2.1.1. Further, CAISO must determine whether it will impose a sanction for a violation or whether its MMU will refer the violation of the tariff as a Market Violation to the Commission. If CAISO chooses to retain authority to sanction non-compliance with its operating orders, the tariff provisions must comply with the traffic ticket policies discussed above (including the requirement that all aspects of the violation and sanction are objectively identifiable and described fully in the tariff).³³ If CAISO chooses not to retain authority to sanction non-compliance with its operating orders, its MMU should refer violations of its tariff requirements to the Commission. Depending upon how CAISO chooses to address these issues in Sections 37.2.1.1 and 37.2.1.2, additional modifications to Sections 37.2.2 through 37.2.6 may be necessary.

³³ The Commission is not directing CAISO to remove all tariff requirements that involve non-objective determinations. For example, it is permissible for the tariff to state that all Market Participants must comply with operational orders unless such orders are infeasible. While the concept of feasibility involves some subjective determination (and, therefore, cannot be part of a traffic ticket), the requirement is still valid. CAISO would refer to the Commission any behavior that it suspected violated the tariff requirement and the Commission would take appropriate action. Under this example, there would be no need for the tariff to include a sanction provision as no sanction by the ISO would be permissible.

43. While CAISO identified Section 37.2.3.1 (requiring operation and maintenance practices to avoid contributing to a major Outage) as containing non-objective criteria, it did not propose changes to this section. CAISO does not propose changes to the related provision in Section 37.2.3.2, which provides the sanction for a violation in Section 32.2.3.1. Moreover, CAISO states that the MMU will refer violations of this provision to the Commission. This is inconsistent with the Commission's policies. If behavior is not objectively identified in the tariff, it is not sanctionable by the ISO. CAISO must modify Section 37.2.3 to either remove the CAISO-imposed sanction or provide fully objective criteria to describe the circumscribed behavior. If CAISO decides to retain its authority to sanction a violation of 37.2.3.1, it may not also refer the violation to the Commission.³⁴

44. CAISO should review other portions of its tariff, as necessary, to ensure consistency with Section 37 and the Commission's sanctioning policies. For example, Section 37.2.3.1 requires Market Participants to undertake operation and maintenance practices necessary to avoid contributing to a major outage as indicated by Section 7.7.1.13.3. Section 7.7.1.13.3 expands upon Section 37.2.3.1 to explain that a violation occurs "if the CAISO finds that the operation and maintenance practices . . . prolonged the response time or contributed to the Outage" and that CAISO "may" impose sanctions for such violation. The provision states that CAISO will develop a schedule of sanctions,³⁵ submit the schedule to the Commission, and that disputes regarding whether a violation occurred shall be resolved through CAISO's ADR procedures. Sections 37.2.3.1 and 7.7.1.13.3 must be modified as, taken together, they permit CAISO to impose sanctions through consideration of discretionary factors.

Enhancement of Sanctions in Times of System Emergency

45. Section 37.2.5 provides that certain sanctions imposed by CAISO will be trebled if the underlying violation occurs during a time of declared System Emergency. If the trebled penalty exceeds \$10,000 per day, then the enhanced penalty "shall not be levied against a Market Participant until the CAISO proposes and the Commission approves such an enhancement." The provision states that a Market Participant itself may appeal a treble penalty to the Commission if it believes that mitigating circumstances exist.

46. No element of an ISO or RTO-imposed sanction may be subjective or undefined in the tariff. To the extent that the section provides that sanctions will be trebled if the

³⁴ The Commission notes that the behavior that violates a traffic ticket provision might include conduct that could also constitute a separate Market Violation, such as market manipulation, that must be referred to the Commission.

³⁵ Instead of a "schedule" of sanctions, CAISO appears to have determined that a single sanction amount of \$10,000 per occurrence is appropriate. See proposed Section 37.2.3.2.

violation occurs during a declared System Emergency, then the enhancement criteria is clearly objective and CAISO may impose the additional sanction as part of its assessment. However, the provision contemplates situations where the Commission, not CAISO, will determine the legitimacy of the violation. Further, the provision contemplates that unspecified “mitigating circumstance[s]” might limit or eliminate the sanction when reviewed by the Commission. Finally, the provision requires that the Market Participant “believe” that mitigating circumstances apply as a prerequisite to an appeal of the sanction to the Commission.

47. As discussed above, there is no joint ISO/Commission approval process for ISO sanctions as contemplated in the provision. Either CAISO itself applies an objective sanction in its tariff and the subject of the sanction has the absolute right to appeal the sanction to the Commission or CAISO’s MMU must refer the violation to the Commission in the first instance. CAISO must modify Section 37.2.5 accordingly.

48. The Commission notes that modifications to Section 37.2.5 might require conforming modifications in other sections.

Bidding Behavior

49. Section 37.3.1.1 provides that Market Participants must submit certain bids “from resources that are reasonably expected to be available and capable of performing at the levels specified in the Bid . . . [and to remain available] based on all information that is known to the Market Participant or should have been known.” Under Section 37.3.1.2, violations of Section 37.3.1.1 are punishable (as a “Consequence of Non-Performance”) by CAISO by rescinding a payment for services that were unavailable.³⁶ Section 37.3.2 provides an exception to Section 37.3.1 for bids that “cause or that CAISO expects to cause Congestion” if the bidder “fails to comply with an obligation . . . to modify its Bids as determined by the CAISO to mitigate such Congestion.”

50. Sections 37.3.1.1, 37.3.1.2, and 37.3.2 are, collectively, inconsistent with the Commission’s sanction policies. Section 37.3.1.1 specifies as a violation behavior that requires subjective determination. This tariff requirement is permissible, but CAISO may not sanction a market participant for a violation of the provision. Further, Section 37.3.2 provides, in part, an exception in some circumstances for bidders that submit a bid that “CAISO *expects to cause* Congestion” (emphasis added). We direct CAISO to either:

³⁶ Additionally, this section references Section 37.7 of the tariff (i.e., a section prohibiting Energy Market Manipulation). As discussed below, the Commission is directing the removal of Section 37.7.

(1) remove all subjective elements in Sections 37.3.1.1 and 37.3.2 (e.g., by replacing “reasonably expected” and “expects to cause” with objective criteria); or (2) modify or eliminate Section 37.3.1.2 to remove CAISO’s sanction.

Information Provided to CAISO

51. Section 37.6.1.1, as revised, provides that all information provided to CAISO must be submitted “in a complete and timely manner.” Further, Market Participants must comply with tariff-authorized requests for information by CAISO. Section 37.6.1.2 provides that, with exceptions, “a violation of this rule is subject to a penalty of \$500 for each day that the required information is late.”³⁷

52. These provisions are ambiguous and violate the Commission’s sanctioning policies. Specifically, the meaning of “timely” is not provided and may be read so as to permit arbitrary sanctioning by CAISO. CAISO should define “timely” or modify the provision to clarify the behavior that is impermissible.

53. If the clarified requirement retains any element that is not strictly objective, then CAISO may not sanction a Market Participant for a violation, but rather its MMU must refer the Market Participant’s behavior to the Commission. If the requisite standard is clarified to be wholly objective, then CAISO may retain the ability to sanction the behavior. However, the sanction itself must not be discretionary or subjective. That is, the sanction provision must state that a sanction *shall* be imposed if objective conditions are met, not merely that a Market Participant will “become subject to” sanction.

54. Similar issues arise in Sections 37.6.2.1 and 37.6.2.2 regarding sanctioning for failure to provide timely information to CAISO related to a tariff-authorized investigation by CAISO. CAISO must revise these provisions as part of its comprehensive review of Section 37.

Investigation and Enforcement Procedures

55. CAISO proposes modifications to Sections 37.8.2 and 37.8.7 regarding referral of violations to the Commission. These proposed revisions specify particular provisions of Section 37, the violation of which may result in a referral to the Commission. CAISO does not propose modifications to other portions of Section 37.8.

³⁷ In response to the Commission’s findings that this section did not meet the Commission’s objectivity requirements, the only modification to this section proposed by CAISO was the deletion of the word, “accurate” from the list of informational requirements.

56. CAISO's proposed revisions to Section 37.8 are inconsistent with the Commission's sanctioning and referral policies discussed above. For example, Section 37.8.2 provides for various enforcement actions by CAISO, including: (1) enforcement of tariff provisions by the Commission directly, although the Commission's potential sanctions would be limited to those identified in the CAISO tariff; (2) enforcement of most provisions by CAISO, though sanctions for the violation of such provisions may be referred to the Commission if CAISO believes that sanction modification is required by other sections of the tariff; and (3) referral to the Commission of any matter in which "circumstances preclude the objective determination that a Rules of Conduct violation did or did not occur."

57. CAISO's revisions to Section 37.8.2 are inconsistent with the Commission's sanctioning and enforcement policies. All suspected Market Violations must be referred to the Commission except for traffic ticket violations.³⁸ Traffic ticket violations are not to be referred, although CAISO's MMU must refer related aspects of the conduct that are suspected non-traffic ticket Market Violations. CAISO's tariff should not include provisions that have a defined CAISO sanction but also contemplate primary Commission enforcement of the sanction. CAISO should not refer sanction decisions to the Commission as contemplated in Section 37.8.2.

58. Additionally, CAISO proposes to modify Section 37.8.7 to state that, "The CAISO also shall specify whether it has recommended or intends to recommend to FERC that a Sanction for violation be modified . . . or excused." This statement is inconsistent with the Commission's policies and should be eliminated. CAISO should not recommend sanction amounts for violations that result in referrals.

Administration of Sanctions

59. Section 37.9 addresses how CAISO will administer sanctions. Section 37.9.1 provides that sanctions may be modified by the Commission "when it determines that such adjustment is just and reasonable" and that CAISO may recommend to the Commission that a tariff sanction be modified. Section 37.9.2 provides that sanctions will be excused if the Commission finds that circumstances identified in the subsections of 37.9.2 apply. These circumstances are: (1) uncontrollable force; (2) safety, licensing or other requirements; (3) emergency; (4) actions required by Commission order or CAISO operating order; (5) good faith efforts to comply with CAISO operating orders. Section 37.9.2.6 provides that CAISO may recommend to the Commission that a

³⁸ To the extent that Section 37.8 implies that CAISO should refer only violations of its Rules of Conduct, that implication is incorrect. CAISO should refer not only violations of Section 37, but all Market Violations (except traffic tickets), including violations of tariff provisions outside of Section 37.

violation be excused if any of the five described circumstances apply and that a Market Participant may apply to the Commission for review if it believes that its violation should be excused.

60. Much of section 37.9 is inconsistent with Commission policy, is unjust and unreasonable, and must be modified. Tariff limitations on the Commission's authority to modify a CAISO-imposed sanction are invalid. Any entity subject to a traffic ticket sanction by CAISO may request review by the Commission for any reason. The Commission is not limited to the five delineated "excuses," before modifying a sanction.

61. In addition to other modifications, CAISO must eliminate sections 37.9.2.1 through 37.9.2.5. The factors described in these sections may, of course, inform the Commission's decisions regarding the appropriateness of CAISO's sanctions in specific circumstances.

Provisions that Duplicate Commission Regulations

62. Section 37.7 declares, as a tariff violation, actions that purportedly constitute "manipulation of the electric energy market." However, it exempts actions explicitly contemplated in the CAISO tariff or undertaken at the direction of CAISO. It states that violations and potential violations will be referred to the Commission.

63. This provision, which partially tracks section 1c of the Commission's regulations, 18 C.F.R. § 1c (2010), is unnecessary and potentially confusing. The section is in conflict with the Commission's regulation as our regulation does not include a provision exempting actions taken at CAISO's behest or explicitly contemplated by a tariff. Of course, these facts, if present, would be relevant to the question of whether manipulation occurred. Further, there is no need for a provision to declare that behavior that is manipulative will be referred to the Commission as such referrals are already mandated by Commission regulation.

64. Further, Section 37.5.1.1 prohibits Market Participants from submitting false or misleading information to the Commission, ISOs, RTOs, market monitors, or transmission providers. This section essentially repeats section 35.41(b) of the Commission's regulations, 18 C.F.R. § 35.41(b) (2010), though it applies to "Market Participants" rather than "Sellers," as that term is used in the regulation. CAISO states that its MMU will refer violations of the tariff section to the Commission for sanctioning.

65. The Commission is concerned that provisions such as Section 37.7 and 37.5.1.1 that utilize the Commission's regulatory language, are redundant, confusing, and present the possibility of conflicting interpretation with Commission regulations. To the extent that CAISO believes that these sections, or similar provisions that mirror Commission

regulations, provide benefits to CAISO markets, CAISO should explain such benefits in its subsequent compliance filing. Otherwise, such tariff provisions are merely duplicative of Commission regulations, and should be removed.

List of Traffic Ticket Violations

66. Section 11.1.3 of Appendix P lists the violations for which CAISO may impose a sanction (i.e., traffic ticket offenses) and states that CAISO need not refer violations of these requirements to the Commission for action. As a consequence of revisions to Section 37 and other sections required by this order, the list of traffic ticket violations in Section 11.1.3 of Appendix P may require modification.

The Commission orders:

(A) CAISO's compliance filing is accepted subject to condition, effective, February 18, 2010, 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 this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

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