

126 FERC ¶ 61,060
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 No. ER08-1124-000

ORDER ON MOTION FOR CLARIFICATION OR PETITION FOR WAIVER

(Issued January 22, 2009)

1. On June 17, 2008, the California Independent System Operator Corporation (CAISO) filed in the above-captioned docket a motion for clarification or, in the alternative, a petition for waiver (CAISO Petition) requesting a determination that mistakenly revoking the waiver of a specific generator's must-offer obligation¹ does not result in a capacity resource designation for a minimum 30-day period, as required by the Commission's May 30, 2008 order.² In this order, we deny the motion for clarification and grant the petition for a one-time waiver of the minimum 30-day designation of capacity.

¹ In response to the California energy crisis, among other things, the Commission implemented a must-offer obligation pursuant to which most resources serving California markets are required to offer all of their capacity in real time during all hours if it is available and not already scheduled to run through bilateral agreements. *See Cal. Indep. Sys. Operator Corp.*, 121 FERC ¶ 61,193, at P 2 (2007) (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,418, at 62,551 (2001)). A generating unit may request waiver of its must offer obligation. If the CAISO denies a waiver request (must offer waiver denial), the resource is required to remain available, i.e., is "committed." *Cal. Indep. Sys. Operator Corp.*, 125 FERC ¶ 61,053, at P 2 (2008).

² *Cal. Indep. Sys. Operator Corp.*, 123 FERC ¶ 61,229 (2008) (May 30 Order), *rehearing pending*.

I. Background

A. TCPM

2. On March 28, 2008, the CAISO proposed revisions to its Tariff³ in Docket No. ER08-760-000 to implement a backstop capacity procurement mechanism called the Transitional Capacity Procurement Mechanism (TCPM). Like the Reliability Services Capacity Tariff it replaced, the TCPM enables the CAISO to acquire generating capacity to maintain grid reliability when load serving entities fail to meet resource adequacy requirements, procured resource adequacy resources are insufficient,⁴ or unexpected conditions create the need for additional capacity.⁵ The Commission's May 30 Order accepted the TCPM, subject to modification, effective on June 1, 2008.⁶ The TCPM will remain in effect until the implementation of the CAISO's Market Redesign and Technology Upgrade (MRTU).

3. The TCPM modified the previously effective backstop capacity mechanism in a number of ways. Most significantly for purposes of this order, the TCPM required that capacity resources procured under the TCPM are designated for a minimum 30-day term and that these resources are appropriately compensated for the duration of their capacity services.⁷ The Commission directed the CAISO to make this modification because it found that, as proposed, the TCPM lacked an objective benchmark to limit the CAISO's discretion to make (or avoid making) forward capacity designations. The Commission

³ CAISO's FERC Electric Tariff, Third Replacement Volume No. 1 (CAISO Tariff or Tariff).

⁴ A resource adequacy resource is a resource that has been procured by a load serving entity in response to resource adequacy requirements implemented by either the California Public Utilities Commission (CPUC) or other local regulatory authority. Resource adequacy resources operate under a capacity contract, which provides these generators with the opportunity to recover fixed costs, as opposed to non-resource adequacy resources, which lack these contracts.

⁵ May 30 Order, 123 FERC ¶ 61,229 at P 1.

⁶ *Id.* On July 28, 2008, a tolling order was issued in Docket No. ER08-760-001 granting rehearing for further consideration. In addition, the CAISO submitted tariff revisions to its TCPM proposal on June 30, 2008 in Docket No. ER08-760-002, to comply with the directives of the May 30 Order. The compliance filing is currently pending before the Commission.

⁷ May 30 Order, 123 FERC ¶ 61,229 at P 32.

found that this absence of an objective criterion from the proposal could result in unduly discriminatory treatment among classes of generators.⁸ As a result, the Commission directed the CAISO to modify its TCPM proposal to incorporate an objective criterion and provide units with a minimum 30-day capacity designation.⁹

B. CAISO's Motion/Petition

4. The CAISO explains that in accordance with its Tariff, it will use backstop capacity procured under the TCPM only when existing capacity resources are insufficient to meet reliability needs. To the extent possible, the CAISO relies on capacity from resource adequacy resources before procuring capacity from non-resource adequacy resources.¹⁰

5. On June 8, 2008, the CAISO committed El Segundo Unit No. 3 as a result of a transmission outage associated with work at the Lugo-Mira Loma No. 1 500 kV line, an outage at the San Onofre Nuclear Generating Station, and the expectation that real-time demand in the area was going to exceed the day-ahead forecast.¹¹ The CAISO states that it subsequently conducted a review of its decision to commit El Segundo Unit No. 3, which was not a resource adequacy resource. The CAISO also indicates that at the time of its operator's decision, El Segundo Unit No. 4 was available as a resource adequacy resource. The CAISO explains that El Segundo Units Nos. 3 and 4 each have a capacity of 335 MW, have NRG as the same owner, and are located at the same site. The CAISO asserts that its operator mistakenly committed El Segundo Unit No. 3 on June 9 and 10, 2008, instead of committing El Segundo Unit No. 4, which was not committed on either of those days.¹²

6. The CAISO requests the Commission clarify that mistakenly committing El Segundo Unit No. 3 does not result in a 30-day capacity designation, notwithstanding the language in the May 30 Order requiring the CAISO to provide units with a minimum 30-day capacity designation. If the Commission does not grant its request for clarification, the CAISO asks the Commission to grant it a one-time waiver of the 30-day minimum designation requirement.

⁸ *Id.* P 31.

⁹ *Id.* P 32.

¹⁰ CAISO Petition, Docket No. ER08-1124-000, at 2-3 (June 17, 2008) (citing sections 40.7.6 and 40.6A.6 of CAISO Tariff).

¹¹ CAISO Petition at 4.

¹² *Id.* at 4-5.

7. In addition, the CAISO indicates that it is concerned about ensuring the appropriate compensation to the owner of El Segundo Unit No. 3 for the service in connection with the operator error. The CAISO asks the Commission to confirm that it should take appropriate steps to address the compensation issue, noting that section 13.2 of the CAISO Tariff provides that it shall make good faith efforts to resolve any dispute prior to invoking alternative dispute resolution procedures.

II. Notice of Filing and Responsive Pleadings

8. Notice of the CAISO's filing was published in the *Federal Register*, 73 Fed. Reg. 36,312 (2008), with interventions, protests and comments due on July 8, 2008. The following parties filed timely interventions, and some filed comments or protests: Dynegy Morro Bay, LLC and Dynegy Moss Landing, LLC; the Alliance for Retail Energy Markets; Pacific Gas and Electric Company (PG&E); NRG Power Marketing LLC and El Segundo Power LLC (collectively NRG);¹³ Southern California Edison Company (So Cal Edison); and the California Department of Water Resources (Water Resources). The CPUC submitted a late-filed motion to intervene on July 10, 2008. The CAISO filed its answer on July 23, 2008.

III. Discussion

A. Procedural Matters

9. 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 those parties who filed them parties to this proceeding. Given its interest in this proceeding, the early stage of this proceeding, and the absence of any undue prejudice or delay, we will grant the late-filed intervention of the CPUC.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the CAISO's answer because it provided information that assisted us in our decision-making process.

B. Requested Relief

11. The CAISO's primary requested relief from the Commission is a request for clarification. The CAISO asserts that the commitment of El Segundo Unit No. 3 is

¹³ NRG Power Marketing LLC is a power marketer that participates in the California markets, and El Segundo Power LLC owns and operates gas-fired power generation units in California.

attributable to an error made by one of its operators.¹⁴ The CAISO asks the Commission to find that the May 30 Order's requirement to provide a resource a minimum 30-day designation for capacity procured under the TCPM does not apply where the capacity designation is made by mistake.¹⁵ We deny the CAISO's requested clarification because it is too broad and would give the CAISO too much flexibility to determine after-the-fact whether it has committed capacity by mistake or not. The CAISO has not offered an objective measure for the Commission to gauge the extent or nature of the circumstances to which its requested clarification might apply in the future.

12. Alternatively, the CAISO requests a waiver of the May 30 Order's 30-day designation requirement, so that the commitment of El Segundo Unit No. 3 does not result in a 30-day designation of capacity. The CAISO asserts that good cause exists to support its request for a waiver because a waiver will prevent the imposition of unnecessary costs on market participants as a result of operator error.¹⁶

13. The Commission historically has granted waiver requests where an emergency situation or an unintentional error was involved.¹⁷ Applying this precedent and based on the circumstances discussed more fully below, we grant the CAISO's request for a one-time waiver of the May 30 Order's 30-day designation requirement, and find that the CAISO's use of El Segundo Unit No. 3 does not result in a 30-day TCPM capacity designation.

IV. 30-Day Capacity Designation

A. Comments

14. Parties are generally supportive of the CAISO's request that its operator's error should not result in a 30-day capacity designation for El Segundo Unit No. 3 under the

¹⁴ CAISO Petition at 4-5.

¹⁵ May 30 Order, 123 FERC ¶ 61,229 at P 32.

¹⁶ CAISO Petition at 7.

¹⁷ See, e.g., *ISO New England Inc.*, 117 FERC ¶ 61,171, at P 21 (2006) (using reasoning typically applied to waivers to allow limited and temporary change to tariff to correct an error); *Great Lakes Transmission LP.*, 102 FERC ¶ 61,331, at P 16 (2003) (granting emergency waiver involving force majeure event for good cause shown); and *TransColorado Gas Transmission Co.*, 102 FERC ¶ 61,330, at P 5 (2003) (granting waiver for good cause shown to address calculation in variance adjustment).

TCPM, and do not advocate denying the CAISO's request for either clarification or waiver under the circumstances presented.

15. PG&E supports the CAISO's position, but expects that the CAISO will develop an action plan to minimize the likelihood that a similar error would occur in the future. SoCal Edison similarly supports the CAISO's request, but requests the Commission direct the CAISO to develop and implement a safeguard to prevent this type of error from occurring again. SoCal Edison also asks the Commission to eliminate from the TCPM the required minimum 30-day capacity designation.

B. Discussion

16. In the May 30 Order, the Commission expressed concern that the TCPM proposal lacked an objective benchmark that would require the CAISO to designate capacity resources when appropriate, which gave the CAISO excessive discretion over capacity designations.¹⁸ The Commission further determined that failure to designate capacity resources appropriately could result in undue discrimination among classes of generators.¹⁹ In order to remedy this potential undue discrimination, the Commission directed the CAISO to modify its TCPM proposal to incorporate an objective criterion for procuring backstop capacity services by providing units with a minimum 30-day capacity designation.²⁰ The erroneous capacity designation in this case occurred some nine days after issuance of the Commission's May 30 Order. Given the short time that had elapsed between issuance of the order and the commitment of a unit by mistake, and the limited experience that the CAISO had at that time in implementing the May 30 Order, we find it unnecessary to require the CAISO to develop a specific action plan to counteract mistakes separate from implementation of the TCPM.²¹ Further, TCPM is a transitional design feature that will sunset upon implementation of MRTU, which is scheduled to go live within a few months.

¹⁸ May 30 Order, 123 FERC ¶ 61,229 at P 31.

¹⁹ *Id.* (discussing the “two classes of resources that the CAISO would rely on to meet the same reliability needs: (1) resources that have secured contracts for forward capacity under resource adequacy or [Reliability-Must-Run] contracts; and (2) resources under the must-offer obligation that receive only daily payments when called upon”).

²⁰ *Id.* P 32.

²¹ We note that to the Commission's knowledge, no further mistaken designations have been made since the occurrence discussed herein.

17. For similar reasons, we find that a one-time mistaken capacity designation made due to human error, i.e., by confusion between two similarly-named generators, does not warrant revising our May 30 Order determination regarding compensation for non-resource adequacy resources. The issue SoCal Edison raises concerning elimination of the minimum 30-day designation requirement is essentially a collateral attack on the May 30 Order. The focus of this order is the CAISO's request for a waiver of the requirements of the May 30 Order, not the underlying requirements of the May 30 Order. The appropriate place for SoCal Edison to raise this issue is on rehearing of the May 30 Order. Indeed, as SoCal Edison acknowledges in its comments, it has raised this issue on rehearing of the May 30 Order,²² and we will address it there.²³

18. Accordingly, we find that, in this instance, granting a one-time waiver of the 30-day minimum capacity designation requirement in the TCPM provides an appropriate remedy, while nevertheless preserving rules for procuring backstop capacity services that are fair to all parties.

V. Compensation

A. Comments

19. PG&E opposes having the issue of compensation negotiated between the CAISO and NRG. Instead, PG&E suggests that the Commission should allow El Segundo Unit No. 3 to keep all energy payments, but direct the CAISO not to pay any added capacity compensation as a result of the capacity designation. PG&E notes that comparable capacity payments were made to El Segundo Unit No. 4 during the time that El Segundo Unit No. 3 was designated (i.e, via resource adequacy contract payments) and asserts that because NRG owns both units, it suffered no adverse financial impacts as a result of the capacity designation.²⁴

20. Water Resources also oppose the CAISO making any payment to El Segundo Unit No. 3 as a result of the capacity designation because of the common ownership of El

²² See SoCal Edison July 8, 2008 Comments, Docket Nos. ER08-1124 and ER08-760, at 3 and n.4; SoCal Edison June 30, 2008 Rehearing Request, Docket No. ER08-760, at 7.

²³ See, e.g., *Tennessee Gas Pipeline Co. v. FERC*, 972 F.2d 376, 381 (D.C. Cir. 1992) (“The agency is entitled to make reasonable decisions about when and in what type of proceeding it will deal with an actual problem.”).

²⁴ PG&E June 24, 2008 Answer, Docket No. ER08-1124, at 4.

Segundo Units Nos. 3 and 4.²⁵ Water Resources argue that authorization of capacity payments due to the capacity designation would create a perverse incentive whereby operators would not be inclined to report errors because of potential windfall profits.

21. NRG indicates that it has engaged in good faith negotiations and reached a settlement in principle with the CAISO to resolve the compensation issue for the capacity designation of El Segundo Unit No. 3, which it owns.²⁶ NRG states that the settlement is contingent on the Commission's confirmation that it is appropriate for the CAISO to utilize the good faith negotiation provisions of its tariff to resolve the dispute.

B. CAISO Answer

22. The CAISO asserts that it is required by section 13.2.1 of the CAISO Tariff to engage in good faith negotiations with the owner of El Segundo Unit No. 3 in an attempt to resolve the issue of how much compensation should be paid as a result of the capacity designation.²⁷ In the event that good faith negotiations fail to resolve the dispute, the CAISO asserts that section 13.1.1 of the CAISO Tariff requires the disputed compensation issue to be resolved in an alternative dispute resolution process.²⁸

23. The CAISO confirms that good faith negotiations have already occurred between the CAISO and NRG, and that those negotiations have reached a settlement in principle. The CAISO also states that the settlement in principle is contingent on the Commission confirming that it is appropriate for the CAISO to utilize the good faith negotiation process to resolve the dispute over compensation.

C. Discussion

24. The Commission agrees with the CAISO that the issue of compensation to El Segundo Unit No. 3 should be resolved through negotiations between the CAISO and NRG, as owner of El Segundo Unit No. 3. There is no evidence that the capacity designation resulted from anything other than human error on the part of the CAISO operator. Accordingly, since this unit was committed as a backstop capacity resource, the owner of the El Segundo Unit No. 3 is entitled to appropriate compensation for the backstop capacity services the unit provided.

²⁵ Water Resources July 8, 2008 Comments, Docket No. ER08-1124, at 2.

²⁶ NRG July 8, 2008 Answer, Docket No. ER08-1124, at 3.

²⁷ CAISO July 23, 2008 Answer, Docket No. ER08-1124, at 4-5.

²⁸ *Id.*

25. We disagree with the assertions by PG&E and Water Resources that the common ownership of El Segundo Units Nos. 3 and 4 should result in disallowance of capacity payments. The CAISO procured capacity services from El Segundo Unit No. 3. We find that the services rendered require compensation regardless of whether they were necessary at the time. The common ownership of similarly-named generators has no bearing on this matter. Therefore, we are not persuaded by PG&E that allowing NRG to simply keep the energy revenue associated with the operation of El Segundo Unit No. 3 would be compensatory, since such a payment fails to provide an explicit payment for capacity services.²⁹

The Commission orders:

For good cause shown, the CAISO's petition for a one-time waiver is granted, as discussed in the body of this order. The CAISO's motion for clarification is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁹ See *Independent Energy Producers Ass'n v. Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,069, at 61,408 (2006).