

139 FERC ¶ 61,198  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

California Independent System Operator  
Corporation

Docket No. EL12-40-000

ORDER GRANTING COMPLAINT AND DIRECTING A COMPLIANCE FILING

(Issued June 8, 2012)

1. On February 29, 2012, the California Independent System Operator Corporation (CAISO) filed a complaint to modify the Transmission Control Agreement (TCA)<sup>1</sup> under which the CAISO assumes operational control of the transmission facilities and entitlements that constitute the ISO-controlled grid, because it argues the TCA would be unjust and unreasonable without the revisions proposed.<sup>2</sup> In particular, the CAISO requests, among other modifications, that the standards for liability and indemnity in TCA sections 22.1 (Liability for Damages) and 22.4 (Participating TOs Indemnity) be revised from an ordinary negligence standard to a gross negligence standard. CAISO's request notes that the Commission has already accepted this same revision to similar provisions in the CAISO open access transmission tariff.<sup>3</sup> This order grants the

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<sup>1</sup> The TCA is the agreement among the CAISO and Participating Transmission Owners that establishes the terms and conditions under which the transmission owners place certain transmission facilities and entitlements under the CAISO's operational control, thereby becoming PTOs.

<sup>2</sup> This complaint was submitted pursuant to sections 206, 306, and 309 of the Federal Power Act, 16 U.S.C. §§824e, 825e, and 825h (2006), and section 206 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206 (2011). The CAISO also explains that filing the proposed changes to the TCA is consistent with direction provided by the Commission in a previous proceeding to amend the TCA, and it cites as support *California Indep. Sys. Op. Corp.*, 109 FERC ¶ 61,153, at P 34 (2004).

<sup>3</sup> See CAISO's Open Access Transmission Tariff (OATT or Tariff) sections 14.4 and 14.5, respectively.

complaint. As a result, the order accepts the CAISO's proposed modifications to the TCA, and directs a compliance filing within thirty days of the date of this order.

### **I. CAISO's Complaint and Proposed Modifications**

2. In its complaint, as noted above, the CAISO proposes to modify the TCA because the agreement would be unjust and unreasonable and unduly discriminatory without the revisions. Specifically, CAISO indicates that the proposed modifications would: (1) revise the standard for determining liability or indemnity from an ordinary negligence standard to a gross negligence standard in TCA sections 22.1 and 22.4;<sup>4</sup> (2) add Citizens Sunrise Transmission, LLC (Citizens Sunrise) as a new Participating Transmission Owner (PTO); and (3) modify the TCA to update outdated information, including various revisions to the lists of each PTO's entitlements and encumbrances. The proposed modification to section 22.1 would change the standard for liability for both the CAISO and the PTOs to gross negligence. The CAISO's proposed change to section 22.4 would require PTOs to indemnify the CAISO against third party claims arising out of actions by a PTO unless the PTO's actions are attributable to gross negligence or intentional wrongdoing by the CAISO. Currently, section 22.1 of the TCA makes parties to the TCA liable to one another for certain direct and consequential damages resulting from the performance or non-performance of their duties to the extent that the damages result from

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<sup>4</sup> The proposed amendments to 22.1 and 22.4 are as follows: **22.1. Liability for Damages.** Except as provided for in section 13.3.14 of the CAISO Tariff and subject to section 22.4, no Party to this Agreement shall be liable to any other Party for any losses, damages, claims, liability, costs, or expenses (including legal expenses) arising from the performance or non-performance of its obligations under this Agreement except to the extent that its **grossly** negligent performance of this Agreement (including intentional breach) results directly in physical damage to property owned, operated by, or under the operational control of any of the other Parties or in the death or injury of any person....

**22.4. Participating TOs Indemnity.** Each Participating TO shall indemnify the CAISO and hold it harmless against all losses, damages, claims, liability, costs, or expenses (including legal expenses) arising from third party claims due to any act or omission of that Participating TO except to the extent that they result from **intentional wrongdoing or gross negligence** on the part of the CAISO or of its officers, directors, or employees. The CAISO shall give written notice of any third party claims against which it is entitled to be indemnified under this section to the Participating TOs concerned promptly after becoming aware of them. The Participating TOs who have acknowledged their obligation to provide a full indemnity shall be entitled to control any litigation in relation to such third party claims (including settlement and other negotiations) and the CAISO shall, subject to its right to be indemnified against any resulting costs, cooperate fully with the Participating TOs in defense of such claims.

negligence or intentional wrongdoing. TCA section 22.4 makes each PTO indemnify the CAISO against damages arising from third party claims resulting from PTO acts or omissions except in the case of the ISO's negligence or intentional wrongdoing.

3. The CAISO notes that the Commission has supported a gross negligence standard with other Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs),<sup>5</sup> including the CAISO tariff,<sup>6</sup> based upon concerns that excessive damage awards can lead to higher insurance premiums and a higher cost of capital, costs that customers would ultimately bear, along with excessive damage awards. Therefore, the CAISO proposes a gross negligence standard for both liability and indemnity in the TCA as well.

4. CAISO explains that it is proposing these revisions in a section 206 filing because, after negotiating with stakeholders for several months regarding these proposed revisions, the negotiations are at an impasse.<sup>7</sup> Specifically, some PTOs are dissatisfied with the proposed revision to the indemnification provisions in section 22.4.<sup>8</sup> Because the revision to section 22.4 is still in dispute, CAISO alleges that other parties to the TCA have not signed it. Thus, according to the CAISO, the current TCA terms and conditions are, unjust, unreasonable and unduly discriminatory because they fail to establish a gross negligence standard for liability and indemnity. CAISO acknowledges that other elements of its proposed TCA revisions have been agreed to by its stakeholders.

5. In addition to proposing revisions to the liability and indemnity, the CAISO also seeks a number of changes to the TCA to enhance its consistency with corresponding provisions in the CAISO tariff. CAISO also proposes to update outdated information, including entitlement and encumbrances of the participating transmission owners, in TCA sections 4.6, 5.1, and 5.3 and Appendices A, B, and E. In addition, CAISO proposes to remove TCA Appendix F and to revise TCA section 26.1 to specify that the parties are to advise the CAISO of their contacts for notices, and that the CAISO will post these notices on its website, but that they will no longer be incorporated directly into

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<sup>5</sup> CAISO Filing at 9 (citing *PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,264, at PP 9-10 (2005); *Southwest Power Pool, Inc.*, 110 FERC ¶ 61,164, at PP 36-44 (2005); *Midwest Indep. Transmission Sys. Operator Corp.*, 110 FERC ¶ 61,164, at P 29 (2005); and *ISO New England, Inc.*, 106 FERC ¶ 61,280, at PP 220-231 (2004)).

<sup>6</sup> *Id.* (citing *California Indep. Sys. Op. Corp.*, 123 FERC ¶ 61,285, at P 241 (2008)).

<sup>7</sup> *Id.* at 2.

<sup>8</sup> See Six Cities Protest *infra*.

the TCA. CAISO proposes to add new TCA Appendices A and B to reflect Citizens Sunrise's proposed Transmission interest in the Sunrise Powerlink transmission project and its relationship to the interests of SDG&E in that same project. CAISO also proposes to add new TCA section 4.4.6, specifying limitations on the ability of Citizens Sunrise to convert the subject transmission rights to merchant operation not subject to Commission jurisdiction. CAISO also proposes changes to section 10 of the TCA to reflect the CAISO's role with respect to interconnection requests. CAISO also proposes a number of ministerial changes.<sup>9</sup> Finally, the CAISO has requested an effective date of July 1, 2012, or any later date on which the CAISO may accept operational control of the interest of Citizens Sunrise in the Sunrise Powerlink project. CAISO states that this is necessary to ensure that the transmission interest of Citizens Sunrise Transmission is subject to the ISO's operational control on the date that the project achieves commercial operation and the ISO assumes operational control of it.

## **II. Motions to Intervene, Comments, and Protests**

6. Notice of the CAISO's Filing was published in *Federal Register*, 77 FR 13589 (Mar. 7, 2012) with interventions and protests due on or before March 21, 2012. Timely motions to intervene without comments were filed by Atlantic Path 15, LLC, NRG Companies, City of Santa Clara and the M-S-R Public Power Agency, Trans Bay Cable LLC, Startrans IO, LLC, the Western Area Power Administration, and the Metropolitan Water District of Southern California. Timely motions to intervene and comments in support of the filing were filed by Citizens Sunrise, California Department of Water Resources State Water Project, SDG&E. Timely motions to intervene with supporting comments, but also suggested changes, were filed by Modesto Irrigation District (Modesto) and Pacific Gas & Electric Company (PG&E). The Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (Six Cities) filed a timely motion to intervene and protest. The CAISO filed an answer to the motions to intervene and comments, motion to file an answer, and answer to the protest on March 28, 2012. SDG&E filed supplemental comments on May 18, 2012, requesting that the Commission file an order before June 5, 2012, because the company expects to transfer operational control of the Sunrise Powerlink the date the Border-East Line goes into service which SDG&E anticipates to occur between June 5, 2012 and June 12, 2012.

7. Modesto proposes modifications to the TCA to implement a portion of the Modesto Irrigation District Interconnection Agreement (MID IA) settlement agreement

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<sup>9</sup> Specifically, these are: changing the TCA's signature page to reflect the CAISO's agreement to the TCA changes contained in Attachment A to the present filing; a new TCA signature page executed by Citizens Sunrise; and a revised Table of Contents reflecting all these changes.

consistent with Docket No. ER09-625-000.<sup>10</sup> Modesto proposes to remove the MID IA, Rate Schedule No. 116, as an encumbrance from the TCA. PG&E generally supports CAISO's Filing but states that CAISO must file a compliance filing to include revisions to PG&E's Appendix A2,<sup>11</sup> which sets forth PG&E's entitlements placed under CAISO's operational control.

8. Southern California Edison (SCE) filed late comments on CAISO's proposed revision to TCA section 16.2 (include title). SCE states that it generally supports the proposed revisions but SCE recommends further revisions to clarify and require that the CAISO make refunds without the Commission having to issue a separate instruction for the CAISO to do so through a final order.

9. Six Cities state that they do not object to the CAISO's proposed change of liability standard in section 22.1, and that they agree the change will have the salutary effects of reducing litigation and protecting all market participants from excessive damage awards. However, Six Cities object to CAISO's proposed change to section 22.4 of the TCA. Six Cities argue the proposed changes to the indemnity provision would undercut the liability standard proposed for PTOs in section 22.1, and that it could lead to more, not less, litigation and exposure of transmission customers to the costs of excessive damage awards. Six Cities state that expanding the indemnification provisions under section 22.4 could encourage more claims against the CAISO and PTOs jointly, particularly claims by entities that do not pay Transmission Access Charges or Wheeling Access Charges, thereby creating the potential for transmission customers to bear an increased burden of indemnification payments.<sup>12</sup> Six Cities explain that, under CAISO's proposal, PTOs that are called upon to indemnify the CAISO for negligent actions by the CAISO would likely seek recovery of their indemnification costs through their transmission revenue requirements.<sup>13</sup> In turn, if such recovery were permitted, the CAISO's transmission customers would eventually bear the indemnification burden.<sup>14</sup> Six Cities asserts that this potential for transmission customers to bear the burden of indemnification payments under the proposed TCA revision is what distinguishes the proposed revision from the indemnification provision in CAISO Tariff section 14.4 (Market Participants

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<sup>10</sup> *Pacific Gas and Electric Co.*, 130 FERC ¶ 61,008 (2010).

<sup>11</sup> PG&E's Motion to Intervene and Comments at 2-3.

<sup>12</sup> Six Cities Protest at 6. *See also* CAISO Tariff, Transmission Rates and Charges, section 26.

<sup>13</sup> Six Cities Protest at 6-7.

<sup>14</sup> *Id.* at 7.

Indemnity).<sup>15</sup> Accordingly, because there is a potential likelihood that CAISO's transmission customers would end up bearing this indemnification burden, Six Cities argue that the Commission should reject CAISO's proposed revision to section 22.4.

10. In its Answer, CAISO states that, with regard to the tariff, the Commission previously determined that a gross negligence standard is just and reasonable, and the proposed changes to the TCA in this proceeding are identical to the changes that the Commission approved to the tariff.<sup>16</sup> The CAISO explains that the instant proposal merely aligns the TCA indemnity provision with similar provisions elsewhere in the tariff. CAISO challenges Six Cities claim that the revision to the indemnity provision in section 22.4 of the TCA is inconsistent with the Commission's prior decision approving sections 14.4 and 14.5 of the CAISO tariff. According to the CAISO, rejecting the proposed change to the indemnity provision would achieve the opposite result: it could result in two different indemnification responsibilities applicable to the same entity. In addition to being an "irrational" result, the CAISO asserts that this would increase the risk of litigation between the CAISO and a participating transmission owner over which indemnity provision should apply.<sup>17</sup> CAISO states that this argument mirrors the argument made by Six Cities and rejected by the Commission in the order approving the gross negligence standard for indemnity in the CAISO tariff in section 14.4. The CAISO urges the Commission to reject it again.<sup>18</sup>

11. CAISO also agrees with PG&E's request that the Commission require it to make a compliance filing. The CAISO notes that it inadvertently failed to include in its proposed TCA a change requested by PG&E to PG&E's Appendix B, which sets forth the list of PG&E entitlements placed under CAISO's operational control. PG&E's comments pointed out that no party objected to the change in the TCA negotiations preceding the CAISO Filing. In its Answer, the CAISO concurs with this requested change, and confirms that it only applies to PG&E's Appendix B.<sup>19</sup>

12. In its Answer, CAISO asks the Commission to reject SCE's clarification to TCA section 16.2 that requested further revisions to require that CAISO make refunds without

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<sup>15</sup> *Id.*

<sup>16</sup> *California Indep. Sys. Op. Corp.*, 123 FERC ¶ 61,285, at P 241 (2008).

<sup>17</sup> CAISO Answer at 4.

<sup>18</sup> *California. Indep. Sys. Op. Corp.*, 123 FERC ¶ 61,285, at PP 240-241.

<sup>19</sup> CAISO Answer at 4-5. CAISO mistakenly referred to PG&E's Appendix A2 as PG&E's Appendix B. See PG&E Motion to Intervene and Comments at 2-3.

the Commission having to issue a subsequent order instructing CAISO to do so, because it was not discussed during the TCA negotiations. After reviewing SCE's comments, the CAISO believes that SCE's proposed clarification should be discussed by all parties. CAISO asserts that SCE's concerns should be addressed later in the year at the next opportunity for review of the TCA.<sup>20</sup>

13. Finally, on May 18, 2012, both SDG&E and Citizens Sunrise filed supplemental comments requesting a Commission order before June 5, 2012 because they expected the CAISO to take operational control of the line between June 5th to June 12th, thus bringing forward the effective date for this order. Citizens Sunrise also noted that an order issued before the CAISO took operational control would give needed advance assurance to their financial backers.

### **III. Discussion**

#### **A. Procedural Matters**

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the notice of intervention and the timely, unopposed motions to intervene serve to make those entities who filed them parties to this proceeding.

15. SCE filed an out of-time, unopposed motion to intervene. Given SCE's interest, the early stage of the proceeding, and the absence of undue prejudice or delay, the Commission will grant this late-filed motion to intervene.<sup>21</sup>

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest 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. Commission Determination**

17. The Commission agrees the proposed liability and indemnity standards of gross negligence for sections 22.1 and 22.4 of the TCA, respectively, are consistent with Commission-approved language found in CAISO Tariff sections 14.4 and 14.5, which in turn is consistent with liability and indemnity provisions approved for other RTOs and ISOs.<sup>22</sup> We also agree with CAISO that, absent these proposed revisions, CAISO could

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<sup>20</sup> *Id.* at 5.

<sup>21</sup> 18 C.F.R. § 385.214(d) (2011).

<sup>22</sup> See, e.g., *California Indep. Sys. Op. Corp.*, 123 FERC ¶ 61,285, at P 241 (2008); *Midwest Indep. Transmission Sys. Operator, Inc.*, 110 FERC ¶ 61,164, at P 31 (2005).

be faced with significant uncertainty and risk of litigation due to conflicting standards where the provisions of either the CAISO tariff or the TCA could apply. Because the CAISO's system is complex and includes a number of agreements to become a participant in the California market, we find CAISO's proposal to match the TCA's indemnity and liability standards to those in the Tariff appropriate and consistent with our precedent in both this and other markets. For these reasons, we will grant CAISO's complaint and allow its proposed revisions to the TCA to become effective the date the Sunrise Project is energized, which the CAISO anticipates to be between June 5, 2012 and June 12, 2012. Additionally, the CAISO is directed to submit a compliance filing reflecting the actual effective date of the revised TCA within 30 days of the date it assumes operational control of the Sunrise Project.

18. We also direct the CAISO to incorporate PG&E's Appendix B and remove the MID IA, Rate Schedule No. 116, as an encumbrance from the TCA. We find the removal of this agreement is necessary in order to implement a portion of the MID settlement agreement consistent with Docket No. ER09-625-000. Additionally, we will deny without prejudice SCE's requested clarification given that the CAISO has committed in its Answer to raise the issue during the next TCA review.

The Commission orders:

(A) The CAISO's complaint is hereby granted as discussed in the body of this order.

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

(C) SCE's requested clarification is hereby denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.



Document Content(s)

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