

142 FERC ¶ 61,180
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

California Independent System
Operator Corporation

Docket No. ER12-2539-001

ORDER DENYING REHEARING

(Issued March 8, 2013)

1. In this order, we deny requests for rehearing of the Commission's October 26, 2012 order¹ that accepted CAISO's proposal to mitigate certain exceptional dispatches and the settlement of residual imbalance energy.

I. Background

2. Exceptional dispatch is a mechanism that enables CAISO to manually commit and/or dispatch resources that are not cleared through market software in order to maintain reliable grid operations under unusual or infrequent circumstances, including contingencies, such as load uncertainty, loss of excessive amounts of generation, and potential outages of major interties. In most instances, CAISO pays a resource the higher of the resource's bid price, the locational marginal price, or the resource's default energy bid² price for the energy acquired through the exceptional dispatch.³

3. The Commission has accepted proposals to mitigate the payment for exceptional dispatches in circumstances where the Commission found that CAISO demonstrated the potential for market participants to exercise market power. Prior to the October 26, 2012

¹ *Cal. Indep. Sys. Operator Corp.*, 141 FERC ¶ 61,069 (2012) (October 26, 2012 Order).

² The default energy bid is a resource-specific amount on file with CAISO that is designed to cover a resource's variable costs, calculated pursuant to one of the methodologies specified in section 39 of the CAISO tariff.

³ CAISO Tariff, §§ 11.5.6.1, 11.5.6.2, 11.5.6.3.

Order, the Commission approved proposals to mitigate exceptional dispatches where the dispatch was made (1) to address reliability requirements related to non-competitive constraints, (2) to ramp ancillary services awards or residual unit commitment capacity to a dispatch level that ensures their availability in real-time, and (3) to address environmental constraints in the Sacramento Delta region known as “Delta Dispatch.”⁴ For these exceptional dispatches, CAISO pays the resource the higher of the locational marginal price or its default energy bid.⁵

4. Pursuant to the Commission’s directives,⁶ CAISO submits regular reports to the Commission detailing its use of exceptional dispatch. These reports provide information on the frequency, volume, costs, causes, and degree of mitigation of exceptional dispatches. The reports are intended to ensure transparency for stakeholders and the Commission regarding CAISO’s use of exceptional dispatch and also to discourage CAISO from developing an overreliance on exceptional dispatch.⁷

5. Residual imbalance energy is the energy attributable to a unit ramping up to a dispatch at the beginning of an upcoming hour or ramping down after completing a dispatch, including an exceptional dispatch, in the previous hour. Residual imbalance energy does not coincide with any energy that is due to an economic dispatch by CAISO in the dispatch interval.⁸ Prior to the October 26, 2012 Order, all residual imbalance energy was settled at a resource’s energy bid price for the dispatch interval that resulted in the residual imbalance energy, even when the residual imbalance energy was the result of a mitigated exceptional dispatch.⁹

6. On August 28, 2012, CAISO proposed tariff revisions to expand its mitigation authority to include exceptional dispatches to position units at their minimum dispatchable levels.¹⁰ In the October 26, 2012 Order, the Commission accepted CAISO’s

⁴ CAISO Tariff, § 39.10. In the October 26, 2012 Order, the Commission accepted CAISO’s proposal to add a fourth category of exceptional dispatch mitigation. October 26, 2012 Order, 141 FERC ¶ 61,069.

⁵ CAISO Tariff, §§ 39.10.1, 11.5.6.7.

⁶ *Cal. Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,150, at PP 34, 263 (2009) (Exceptional Dispatch Order).

⁷ *Id.*

⁸ October 26, 2012 Order, 141 FERC ¶ 61,069 at P 4.

⁹ CAISO August 28, 2012 Filing at 5.

¹⁰ The minimum dispatchable level is the range in which a resource is capable of ramping at its highest ramp rate.

proposal, finding that CAISO had demonstrated the potential for market participants to exercise market power where resources are exceptionally dispatched from minimum load to minimum dispatchable levels. In that order, the Commission also accepted CAISO's proposal to mitigate payments for residual imbalance energy.¹¹

7. The Commission noted that, although CAISO's proposal was reasonable under the circumstances, CAISO may be using exceptional dispatch more extensively than originally anticipated. To address this concern, the Commission encouraged CAISO to continue to evaluate new market products that may reduce its reliance on exceptional dispatch and to develop a long-term solution to the settlement of residual imbalance energy through its stakeholder process. The Commission also directed CAISO to submit a comprehensive report describing in detail the steps it has taken to reduce its reliance on exceptional dispatch within 12 months following the date of the order, as well as to provide information on the frequency of exceptional dispatch and mitigation over the most recent 12-month period for which data is available.¹²

8. J.P. Morgan Ventures Energy Corp. (JP Morgan), the NRG Companies (NRG),¹³ and Calpine Corporation (Calpine), filed timely requests for rehearing of the October 26, 2012 Order.

II. Rehearing Requests

9. JP Morgan argues that the Commission erred in accepting CAISO's mitigation proposal without sufficient evidence of the potential to exercise market power. JP Morgan contends that the Commission violated the relevant precedent by finding that CAISO could establish the existence of market power without a market analysis or evaluation of competitive alternatives. JP Morgan emphasizes that the Commission previously rejected a proposal by CAISO to mitigate exceptional dispatches for the purpose of ramping resources to minimum dispatchable levels due to a lack of objective market power tests or evaluations of alternatives.¹⁴ JP Morgan asserts that CAISO's request for additional mitigation authority in this proceeding suffers from the same

¹¹ October 26, 2012 Order, 141 FERC ¶ 61,069 at PP 38-42.

¹² *Id.* PP 43-45.

¹³ For purposes of the rehearing request, NRG consists of NRG Power Marketing LLC, Cabrillo Power I LLC, Cabrillo Power II, LLC, El Segundo Power, LLC, Long Beach Generation LLC, NRG Solar Blythe LLC and Avenal Solar Holdings LLC.

¹⁴ JP Morgan November 26, 2012 Rehearing Request at 7 (citing Exceptional Dispatch Order, 126 FERC ¶ 61,150 at PP 73, 76) (JP Morgan Rehearing Request).

defects as its previous request. JP Morgan argues that the Commission failed to explain why it departed from its earlier holding in the Exceptional Dispatch Order that a market and competitive analysis is essential to demonstrating market power.¹⁵

10. JP Morgan also argues that the Commission defined market power in the October 26, 2012 Order as “a seller’s ability to significantly influence the price in the market by withholding service and excluding competitors for a significant period of time.”¹⁶ JP Morgan claims that this definition, in itself, makes clear that CAISO must consider available competitive alternatives as part of a market power showing. However, JP Morgan repeats its prior arguments that CAISO has not presented any such analysis. Thus, JP Morgan argues that the Commission’s acceptance of CAISO’s mitigation proposal in the October 26, 2012 Order, without any analysis of competitive alternatives, is unreasonable and not the result of reasoned decision-making. JP Morgan contends that courts have reversed the Commission for finding the existence of market power without adequately considering the question of available competitive alternatives in its analysis.¹⁷

11. JP Morgan challenges the Commission’s assertion that its decision is consistent with the precedent established in its order accepting CAISO’s proposal to implement the capacity procurement mechanism (CPM).¹⁸ JP Morgan argues that the Commission’s finding regarding the burden to show market power in the CPM Order was not intended to reverse or modify the legal standards set forth in the Exceptional Dispatch Order. Rather, JP Morgan asserts that the CPM Order repeatedly cites to the Exceptional Dispatch Order to clarify what type of evidence CAISO would need to support its request for mitigation authority. JP Morgan contends that the CPM Order stands for the proposition that CAISO can only use alternative forms of evidence to demonstrate the plausible potential for market power if data and evidence on the lack of competitive alternatives is not available.¹⁹

12. JP Morgan argues that, even if CAISO were permitted to establish market power without providing any market analysis, the record does not support the Commission’s

¹⁵ *Id.* at 6-8.

¹⁶ *Id.* at 10 (citing October 26, 2012 Order, 141 FERC ¶ 61,069 at P 39 n.53 (internal quotes omitted)).

¹⁷ *Id.* at 11 (citing *Mobil Pipe Line Co. v. FERC*, 676 F.3d 1098, 1100 (D.C. Cir. 2012)).

¹⁸ *Id.* at 9 (citing *Cal. Indep. Sys. Operator Corp.*, 134 FERC ¶ 61,211, at PP 72-73 (2011) (CPM Order)).

¹⁹ *Id.* at 9-10.

finding that resources can at any time predict the need for exceptional dispatches to position these resources at their minimum dispatchable level with a high degree of certainty. JP Morgan claims that CAISO's evidence establishing that, in 2012, ten resources received 95 percent of the exceptional dispatches to their minimum dispatchable level does not address the issue of predictability because it does not establish the frequency of exceptional dispatches or for what period of time they occurred. Further, JP Morgan contends that CAISO's evidence that these ten resources received, on average, two exceptional dispatches per week between June 2012 and mid-August 2012 is deficient because CAISO has only evaluated a limited time period. JP Morgan claims that the frequency of exceptional dispatches over a period of less than three months is statistically insignificant and, therefore, does not support the Commission's finding that a resource can predict with a high degree of certainty that it will receive an exceptional dispatch up to its minimum dispatchable level.²⁰

13. JP Morgan contends that, because CAISO did not adequately support its market power claims with regard to exceptional dispatch mitigation, the Commission also erred in relying on those claims to accept CAISO's proposal to mitigate residual imbalance energy payments. JP Morgan maintains that CAISO presented nothing more than speculation about the possibility that market participants could inflate residual imbalance energy payments. Thus, JP Morgan argues that the Commission's acceptance of these tariff revisions was not the result of reasoned decision-making.²¹ Moreover, JP Morgan argues that the Commission could not have engaged in reasoned decision-making based on the record because this proceeding involves disputed issues of material fact, such as the availability of competitive alternatives, that cannot be resolved on the existing record. JP Morgan insists that the Commission can only address these factual issues through an evidentiary hearing.²²

14. JP Morgan argues that the Commission also erred in granting CAISO's request for waiver of the 60-day notice requirement so that the new mitigation authority could be effective as of August 29, 2012. JP Morgan contends that CAISO's assertion that certain bidding activities could lead to inflated payments for exceptional dispatch and residual imbalance energy did not establish good cause for the waiver. Moreover, JP Morgan asserts that it presented expert testimony showing that the bidding activities were neither improper nor anti-competitive, and that the Commission failed to rebut this testimony.²³

²⁰ *Id.* at 11-13.

²¹ *Id.* at 14-15.

²² *Id.* at 15-16.

²³ *Id.* at 18.

15. JP Morgan, NRG, and Calpine question the Commission's decision to direct CAISO to file a report on its efforts to reduce reliance on exceptional dispatch. JP Morgan and NRG contend that the Commission's previously-ordered reporting requirements have not resulted in a decrease in CAISO's use of exceptional dispatch. Thus, JP Morgan and NRG assert that the report required by the October 26, 2012 Order may document CAISO's continued reliance on exceptional dispatch, but will do little to remedy the problem.²⁴ JP Morgan argues that, under these circumstances, the Commission erred by not initiating a review of CAISO's use of exceptional dispatch under section 206 of the Federal Power Act (FPA).²⁵

16. NRG asserts that the Commission should require CAISO to submit an FPA section 205²⁶ filing proposing a just and reasonable solution to remedy its increased use of exceptional dispatch, such as improved modeling of constraints or new market products. Alternatively, NRG requests that the Commission require CAISO to file the informational report described in the October 26, 2012 Order within six months, instead of 12 months, in an effort to more promptly remedy the market problems related to exceptional dispatch. Additionally, NRG requests that the Commission require CAISO to include the data from the 14-month period of August 2012 through September 2013 in its report, noting that CAISO's use of exceptional dispatch quadrupled during August 2012.²⁷

17. Calpine argues that, if the Commission continues to accept the new category of exceptional dispatch mitigation on rehearing, the Commission should take more forceful action to curtail CAISO's reliance on exceptional dispatch. Calpine notes that the Commission has consistently emphasized that it expects CAISO to use exceptional dispatch only on rare occurrences and for genuine emergencies.²⁸ Calpine contends that additional mitigation authority will likely expand CAISO's use of exceptional dispatch, which will interfere with market outcomes and suppress market prices. Thus, Calpine asserts that the Commission's acceptance of CAISO's proposal is inconsistent with the previously-articulated "rare occurrence" policy. Calpine notes that the United States

²⁴ JP Morgan Rehearing Request at 16-18; NRG Rehearing Request at 2-4.

²⁵ 16 U.S.C. § 824e (2006).

²⁶ *Id.* § 824d.

²⁷ NRG Rehearing Request at 4-5.

²⁸ Calpine November 26, 2012 Rehearing Request at 1-2 (citing October 26, 2012 Order, 141 FERC ¶ 61,069 at P 44; Exceptional Dispatch Order, 126 FERC ¶ 61,150 at P 18; *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274, at P 267 (2006) (MRTU Order)) (Calpine Rehearing Request).

Court of Appeals for the District of Columbia struck down the Commission's approval of a market mitigation scheme proposed by the New York Independent System Operator due to similar internal inconsistencies regarding weighing the competing effects of curbing market power and suppressing market prices.²⁹

18. Calpine recommends that the Commission take the following steps to curb CAISO's reliance on exceptional dispatch and ameliorate the resulting suppression of market prices: (1) sunset the mitigation provisions after 12 months; (2) require CAISO to present a transparent analysis of the price suppression effects of exceptional dispatch, including a comparison to the costs of alternative means by which CAISO might obtain capacity and flexibility attributes that underlie the use of exceptional dispatch; (3) direct CAISO to implement a pricing mechanism that accounts for the costs of exceptional dispatch and other out-of-market measures in the locational marginal price; (4) withdraw its requirement for CAISO to submit an informational report; and instead (5) direct CAISO to submit a publicly-noticed compliance filing that documents concrete and binding steps that it will take to reduce its reliance on exceptional dispatch, reduce the incidence of price suppression, and develop and implement new market solutions to procure the flexibility attributes needed by CAISO to manage its system more reliably.³⁰

III. Discussion

19. We deny rehearing. We find that JP Morgan's interpretation of the applicable legal standards in this matter is incorrect. JP Morgan fails to account for the unique circumstances presented by the question of whether the potential to exercise market power exists within the context of exceptional dispatch. In the Exceptional Dispatch Order, the Commission expressly recognized that "the mitigation of resources that receive [e]xceptional [d]ispatch instructions differs from other mitigation measures that the Commission has approved."³¹ Due to the nature of exceptional dispatch, a resource that would not otherwise be deemed to have market power may, in fact, be able to command a non-competitive price for its exceptionally dispatched energy by way of bidding strategies in the day-ahead market and real-time market. Similarly, the same resource may have market power with respect to a particular instance of exceptional dispatch but not for others, depending on the precise market conditions at the time of the exceptional dispatch. Thus, traditional market power analyses and static evaluations of

²⁹ *Id.* at 5 (citing *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964 (D.C. Cir. 2005) (reversing the Commission's acceptance of a market mitigation scheme that had the effect of suppressing scarcity prices, despite prior Commission rulings acknowledging the potential adverse effects of price suppression)).

³⁰ *Id.* at 7-9.

³¹ Exceptional Dispatch Order, 126 FERC ¶ 61,150 at P 73.

competitive alternatives may not be reliable indicators of the potential for exceptionally dispatched resources to exercise market power.

20. In the CPM Order, the Commission recognized that traditional, objective market power analyses may not always be feasible in the case of exceptional dispatch and, therefore, provided guidance for a theoretical showing including, for instance, a detailed description of scenarios under which resources could exercise market power. Specifically, the Commission stated that if data is not available, CAISO could support its request for continued exceptional dispatch mitigation authority by presenting “detailed and specific scenarios that establish a plausible potential to exercise market power”³² The Commission did not, as JP Morgan suggests, establish a requirement that CAISO must first make a showing that data is not available. Rather, the CPM Order builds upon the legal standards set forth in the Exceptional Dispatch Order by confirming that CAISO has options for how to demonstrate the potential to exercise market power. The Commission has recognized that one such option is a showing that resources can predict with a high degree of certainty that they will be exceptionally dispatched.³³

21. In the October 26, 2012 Order, the Commission found that CAISO had presented detailed and specific scenarios in which a resource exceptionally dispatched from its minimum load to its minimum dispatchable level could bid in ways to command a non-competitive price. The Commission found, based on the frequency with which a select group of resources had been exceptionally dispatched to their minimum dispatchable level, that the “pattern suggests a frequent and regular use of exceptional dispatch that could be predictable, and therefore create a plausible potential to exercise market power under the current bidding rules.”³⁴ The Commission also found, based on CAISO’s description of its software limitations that “resources that have minimum dispatchable levels above minimum load, and have been committed at minimum load, can submit high bids for peak periods in real-time and be relatively certain that CAISO will need to exceptionally dispatch them up to minimum dispatchable level.”³⁵ The Commission found that these scenarios, and others presented by CAISO in its filing, also applied to the potential for resources to earn excessive payments for residual imbalance energy.³⁶ Thus, we continue to find, consistent with the Exceptional Dispatch Order and CPM

³² CPM Order, 134 FERC ¶ 61,211 at P 77.

³³ Exceptional Dispatch Order, 126 FERC ¶ 61,150 at PP 73, 75; CPM Order, 134 FERC ¶ 61,211 at PP 72-75, 78.

³⁴ October 26, 2012 Order, 141 FERC ¶ 61,069 at P 40.

³⁵ *Id.*

³⁶ *Id.* P 42.

Order, that CAISO has justified its request for the authority to mitigate exceptional dispatches to a resource's minimum dispatchable level and payments for residual imbalance energy.

22. As identified by JP Morgan, we recognize that, in the Exceptional Dispatch Order, the Commission rejected CAISO's request to mitigate exceptional dispatches for the purpose of ramping resources to minimum dispatchable levels. This case is distinguishable from the previous rejection. In this proceeding, CAISO filed market data, and new information detailing scenarios where market power could be exercised, which the Commission relied upon in accepting CAISO's proposal. Thus, we find that the record in this proceeding contains relevant information that CAISO did not include in the record underlying the Exceptional Dispatch Order.³⁷

23. As noted above, a portion of that relevant information demonstrates that certain resources may, in fact, be able to predict with a high degree of certainty that they will be exceptionally dispatched to the minimum dispatchable level. The Commission has not set a particular threshold for predictability, but has attempted to ascertain whether a pattern or other unique circumstances are present that would enable resources to profitably submit non-competitive high bids with the expectation of being exceptionally dispatched.³⁸ Here, CAISO demonstrated that a select group of resources regularly received exceptional dispatches to the minimum dispatchable level during the summer of 2012 such that these resources were able to command non-competitive prices for the exceptional dispatches.³⁹ Thus, we find no merit in JP Morgan's assertion that the Commission's finding regarding predictability in the October 26, 2012 Order is not supported by the record.

24. We find no merit in JP Morgan's assertion that an evidentiary hearing is necessary to resolve disputed issues of material fact in this proceeding. As discussed above, the Commission found that CAISO adequately demonstrated the potential for market participants to exercise market power through a detailed description of the circumstances that enable resources to earn inflated payments for exceptional dispatches to the minimum dispatchable level and residual imbalance energy. Moreover, the Commission found that CAISO provided market data to demonstrate that resources had actually

³⁷ See CAISO November 24, 2008 and December 9, 2008 Filings in Docket No. EL08-88-000.

³⁸ See Exceptional Dispatch Order, 126 FERC ¶ 61,150 at P 75 (finding that a certain resource could predict exceptional dispatches in relation to the Delta Dispatch because CAISO historically dispatched certain combinations of resources in a particular order during the same period of every year).

³⁹ October 26, 2012 Order, 141 FERC ¶ 61,069 at PP 8, 40.

received the inflated exceptional dispatch and residual imbalance energy payments.⁴⁰ Thus, we find that no dispute of material fact exists. JP Morgan's continued disagreement with the Commission's findings does not constitute a dispute with regard to material facts in this case and, therefore, does not necessitate an evidentiary hearing.

25. We also continue to find that waiver of the 60-day notice requirement is appropriate. The Commission did not need to refute JP Morgan's testimony in order to find, based on the data presented by CAISO showing that absent the requested mitigation authority, the use of exceptional dispatch to position certain resources at minimum dispatchable levels could lead to inflated payments for the exceptional dispatch energy and associated residual imbalance energy. Thus, the Commission found that CAISO had shown good cause to implement the revisions at the earliest possible date, i.e. August 29, 2012. To grant waiver, the Commission did not need to make a finding that the described bidding practices were improper or anticompetitive. Thus, we find that JP Morgan's testimony regarding the propriety of the described bidding practices is inapposite as to CAISO's request for waiver of the prior notice requirement.

26. We reject Calpine's argument that the October 26, 2012 Order is inconsistent with the Commission's so-called "rare occurrence" policy. While the Commission has repeatedly reminded CAISO that exceptional dispatch was intended to be "rare and infrequent" and reserved for "genuine emergencies,"⁴¹ we find that the October 26, 2012 Order does not say anything different. While the October 26, 2012 Order found that the proposed mitigation measures were necessary to protect against inflated exceptional dispatch payments, the Commission's findings do not diminish our expectation that CAISO will continue to develop market-based solutions to manage its system more reliably. Thus, we find no internal inconsistency between the Commission's acceptance of CAISO's proposed tariff revisions and our expectation that CAISO will take the steps necessary to reduce its reliance on exceptional dispatch.

27. We find that the question of whether the Commission can or should take additional steps to curb CAISO's reliance on exceptional dispatch is not relevant to the issue of whether the tariff revisions accepted in the October 26, 2012 Order are just and reasonable. As the Commission explained in the October 26, 2012 Order, further procedures, such as a technical conference, an evidentiary hearing, or FPA section 206 investigation, were not necessary because the Commission was able to determine on the

⁴⁰ CAISO August 28, 2012 Filing, Ex. No. ISO-2 at 17-18 (averring that certain bidding strategies had resulted in \$2.8 million in excessive gains through exceptional dispatch and \$5.9 million in excessive residual imbalance energy payments).

⁴¹ See, e.g., October 26, 2012 Order, 141 FERC ¶ 61,069 at P 43; CPM Order, 134 FERC ¶ 61,211 at P 74; Exceptional Dispatch Order, 126 FERC ¶ 61,150 at P 33; MRTU Order, 116 FERC ¶ 61,274 at P 267.

basis of the record that the proposed tariff revisions were just, reasonable, and not unduly discriminatory.⁴² The informational report required by the October 26, 2012 Order will provide the Commission and stakeholders with detailed information regarding the extent to which CAISO continues to rely on exceptional dispatch and the steps it is taking to reduce that use. Such information will be useful to the Commission and stakeholders in determining whether any further action is appropriate.

The Commission orders:

The requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴² October 26, 2012 Order, 141 FERC ¶ 61,069 at P 38.