

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

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and
Colette D. Honorable.

California Independent System
Operator Corporation

Docket No. ER15-817-001

ORDER ON REHEARING

(Issued April 5, 2016)

1. On July 29, 2015, the Commission issued an order granting the California Independent System Operator Corporation's (CAISO) December 31, 2014 petition for limited waiver of the pricing parameters in sections 27.4.3.2 and 27.4.3.4 of its tariff for the period from November 1, 2014 through November 13, 2014.¹ On August 27, 2015 and August 28, 2015, respectively, Powerex Corp. (Powerex) and Western Power Trading Forum (WPTF) submitted timely requests for rehearing of the July 29 Order. For the reasons discussed below, we deny the requests for rehearing.

I. Background

2. On November 13, 2014, CAISO filed in Docket No. ER15-402-000 a petition seeking limited waiver of the pricing parameters in sections 27.4.3.2 and 27.4.3.4 of its tariff for the 90-day period from November 14, 2014 to February 12, 2015 (Initial Waiver Petition).² In the Initial Waiver Petition, CAISO explained that transitional conditions in the Energy Imbalance Market (EIM) caused the transmission and system energy-balance constraints described in these tariff sections to bind more frequently than expected since the EIM began operation on November 1, 2014, resulting in high prices that were not

¹ *Cal. Indep. Sys. Operator Corp.*, 152 FERC ¶ 61,086 (2015) (July 29 Order).

² CAISO, *Petition for Limited Tariff Waiver and Request for Expedited Consideration*, Docket No. ER15-402-000 at 3, 11 (filed Nov. 13, 2014).

always indicative of actual physical conditions on the system.³ CAISO asserted that these high prices instead reflected challenges in providing timely and complete data to ensure system visibility under the new procedures, exacerbated by limitations on the resources available to PacifiCorp for use in the EIM and several forced outages of large EIM participating resources.⁴

3. On December 1, 2014, the Commission issued an order⁵ granting the limited waiver. The December 1 Order also directed CAISO to file detailed informational reports on the performance of the EIM at 30-day intervals during the 90-day waiver period.⁶ While PacifiCorp, Utah Associated Municipal Power Systems (UAMPS) and Deseret Generation & Transmission Co-Operative, Inc. (Deseret) filed comments arguing that the requested waiver should be made effective as of the commencement of the EIM, November 1, 2014,⁷ and CAISO filed a subsequent answer stating that it did not object to this request,⁸ the Commission made the waiver effective as of November 14, 2014, the date requested in the Initial Waiver Petition.⁹ The Commission stated that CAISO, as the applicant, was charged with proposing the effective date, and that the effective date requested in the Initial Waiver Petition ensured that all customers had sufficient notice of the proposed effective date.

4. On December 31, 2014, CAISO filed in the above-captioned docket a petition (Second Waiver Petition) seeking to apply the same waiver of the transmission constraint

³ Initial Waiver Petition at 3, 11.

⁴ *Id.* at 8-11.

⁵ *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,194 (2014) (December 1 Order), *reh'g dismissed*, 152 FERC ¶ 61,087 (2015).

⁶ *Id.* PP 25-26.

⁷ Motion to Intervene and Comments in Support of PacifiCorp, Docket No. ER15-402-000 at 7-11 (Nov. 17, 2014); Motion to Intervene and Comments of UAMPS, Docket No. ER15-402-000 at 5-6 (Nov. 17, 2014); Motion to Intervene and Answer of Deseret to Petition for Limited Waiver and Request for Expedited Consideration, Docket No. ER15-402-000 at 13-14 (Nov. 17, 2014).

⁸ Answer to Comments of CAISO, Docket No. ER15-402-000 at 3-4 (Nov. 19, 2014).

⁹ December 1 Order, 149 FERC ¶ 61,194 at P 24.

pricing parameters in sections 27.4.3.2 and 27.4.3.4 of CAISO's tariff, granted in the December 1 Order, to the period from November 1, 2014 through November 13, 2014 (i.e., the period between the commencement of the EIM and CAISO's filing of the Initial Waiver Petition).¹⁰ In its Second Waiver Petition, CAISO asserted that it did not know the full impact of the pricing anomalies at the time that it submitted the Initial Waiver Petition, but that after it completed adjusting prices for the first two weeks of EIM, the prices continued to remain high and not reflective of actual market and operational conditions.¹¹ CAISO argued that the waiver requested in the Second Waiver Petition was necessary to prevent undue harm to affected entities, particularly third-party transmission customers taking service under Schedules 4 and 9 of PacifiCorp's Open Access Transmission Tariff (OATT), who cannot decline imbalance service under these schedules and thus have no way to protect themselves from the impacts of the LMPs produced during the first weeks of EIM operation.¹² For example, CAISO estimated that one such customer, Deseret, incurred an extra \$610,000 in imbalance energy charges due to the abnormal prices experienced between November 1, 2014 and November 13, 2014.¹³

5. In the July 29 Order, the Commission granted CAISO's Second Waiver Petition for the period from November 1, 2014 through November 13, 2014.¹⁴ The Commission found that CAISO's requested waiver satisfied the criteria it has used previously in granting one-time waivers of tariff provisions in situations where: (1) the waiver is of limited scope; (2) a concrete problem needed to be remedied; and (3) the waiver did not have undesirable consequences, such as harming third parties.¹⁵ Specifically, the Commission found that CAISO's waiver request was limited, both in scope and application, would remedy the concrete problem of the pricing anomalies by allowing CAISO to price energy in the PacifiCorp Balancing Authority Areas in a manner that

¹⁰ CAISO Second Waiver Petition at 2, 8-9.

¹¹ *Id.* at 2, 9-10.

¹² *Id.* at 10-11.

¹³ *Id.* at 11-13.

¹⁴ July 29 Order, 152 FERC ¶ 61,086 at PP 24, 27, Ordering Para.

¹⁵ *Id.* PP 24-25 (citing December 1 Order, 149 FERC ¶ 61,194 at P 22; *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,078, at P 38 (2014); *Cal. Indep. Sys. Operator Corp.*, 146 FERC ¶ 61,218, at P 22 (2014)).

better reflected actual physical conditions,¹⁶ and would not lead to undesirable consequences because protesters had not demonstrated any harm to third parties would result from granting the waiver, the only resources participating in the EIM during this period were PacifiCorp resources, and PacifiCorp, which would be the only party responsible for refunds, supported the requested waiver. The Commission also noted that no intervenors had asserted that they would suffer harm from the waiver, and by contrast, customers such as Deseret would suffer concrete and significant financial harm if the waiver was not granted.¹⁷ Given that the waiver would result in a rate decrease for transmission customers, the Commission found it appropriate to waive the prior notice requirement to make the waiver effective November 1, 2014, as requested.¹⁸

II. Requests for Rehearing

6. On August 27, 2015 and August 28, 2015, respectively, Powerex and WPTF sought rehearing of the July 29 Order. On rehearing, Powerex and WPTF argue that the Commission acted arbitrarily and capriciously in granting CAISO's request for a retroactive effective date in the Second Waiver Petition. Powerex and WPTF assert¹⁹ that the July 29 Order violates the filed rate doctrine and its corollary, the rule against retroactive ratemaking.²⁰ According to Powerex and WPTF, the July 29 Order violates these doctrines by allowing CAISO to disregard the terms of its tariff and retroactively calculate prices solely on the basis that operation of the filed rate led to unjust and unreasonable results.²¹

¹⁶ *Id.* P 25.

¹⁷ *Id.* P 26.

¹⁸ *Id.* P 27.

¹⁹ Powerex Rehearing Request at 7-8; WPTF Rehearing Request at 3-4.

²⁰ The filed rate doctrine prohibits a regulated entity from charging rates for its services "other than those properly filed with the appropriate federal regulatory authority." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). The U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) has characterized the rule against retroactive ratemaking as a prohibition against "adjusting current rates to make up for a utility's over- or undercollection in prior periods." *Towns of Concord Norwood, and Wellesley, Mass. v. FERC*, 955 F.2d 67, 71 n.2 (D.C. Cir. 1992).

²¹ Powerex Rehearing Request at 8; WPTF Rehearing Request at 4.

7. Powerex and WPTF also assert that the July 29 Order did not include any discussion of a Commission finding that the circumstances here fall within one of the “exceptions” to the filed rate doctrine and the rule against retroactive ratemaking (i.e., when parties have notice of a potential retroactive change or when parties agree to make a rate effective retroactively).²² Furthermore, Powerex and WPTF argue that neither of these exceptions apply here.²³ According to Powerex, there is no basis for a finding that customers were on notice that rates between November 1 and November 13 were subject to revision,²⁴ or for a finding that all customers affected by CAISO’s waiver request have agreed to recalculate the relevant prices.²⁵ Powerex states that the July 29 Order ignores the fact that all transmission customers that took service on PacifiCorp’s system during the relevant period will be impacted by the Commission’s decision to grant waiver, and that at least some of these transmission customers will be adversely impacted.²⁶

8. Powerex and WPTF assert that the Commission’s authority to waive the 60-day prior notice requirement does not authorize it to grant retroactive relief.²⁷ According to Powerex and WPTF, a rate change that qualifies for waiver of the prior notice requirement does not necessarily survive scrutiny under the filed rate and retroactive ratemaking doctrines.²⁸ Rather, Powerex and WPTF state, retroactive relief is only permissible when one of the established exceptions to these doctrines applies.²⁹

²² Powerex Rehearing Request at 9 (citing *Ill. Power Mktg. Co.*, 149 FERC ¶ 61,072 n.62 (2014); *Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) (*ConEd*); *DTE Energy Trading, Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 113 FERC ¶ 61,214 (2005), *order on reh’g*, 119 FERC ¶ 61,109 (2007)); WPTF Rehearing Request at 4 (citing same).

²³ Powerex Rehearing Request at 9-11; WPTF Rehearing Request at 4.

²⁴ Powerex Rehearing Request at 9-10.

²⁵ *Id.* at 10-11.

²⁶ *Id.* at 10.

²⁷ Powerex Rehearing Request at 11-12 (citing *ConEd*, 347 F.3d at 969; *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 795-97 (D.C. Cir. 1990); *Ill. Power Mktg Co.*, 149 FERC ¶ 61,072 n.62)); WPTF Rehearing Request at 4 n.17 (citing same).

²⁸ Powerex Rehearing Request at 12 (citing *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800-01 (D.C. Cir. 2007)); WPTF Rehearing Request at 5 (citing same).

²⁹ Powerex Rehearing Request at 12; WPTF Rehearing Request at 5.

Powerex and WPTF assert that the Commission recently reaffirmed that it is required to follow the filed rate doctrine and the rule against retroactive ratemaking when it denied a request by Old Dominion Electric Cooperative (ODEC) for retroactive waiver of the PJM Interconnection, L.L.C. tariff.³⁰ According to Powerex, these doctrines prohibit the Commission from granting CAISO's request in this docket, just as they precluded granting ODEC's request.³¹

9. WPTF and Powerex also argue that the Commission's determinations that CAISO met the standards for granting waiver of a tariff provision and the standards for granting waiver of the 60-day prior notice requirement are arbitrary and capricious. WPTF and Powerex assert that these findings are both based on the same flawed assumption that PacifiCorp is the only entity that will be adversely impacted by granting the waiver request and that the waiver will result in a rate reduction for all customers. According to WPTF and Powerex, the Commission erred in finding that granting waiver of the tariff requirements would not harm third parties because it ignored record evidence that the July 29 Order will adversely impact certain PacifiCorp transmission customers by reducing the payments they will receive for imbalance service.³² Thus, argue Powerex and WPTF, while certain transmission customers will benefit from the waiver, others will be deprived of payments to which they would otherwise be entitled.³³ Powerex and WPTF also assert that the Commission erred in finding that CAISO's request qualified for waiver of the 60-day prior notice requirement on the basis that granting waiver would result in a rate decrease for transmission customers, because the Commission wrongly assumed that all transmission customers would benefit from the waiver. According to Powerex and WPTF, while some customers will pay less for imbalance service in certain intervals as a result of the waiver, others will see a reduction in the payments they would have received, in effect raising their rates.³⁴

III. Commission Determination

10. We deny Powerex's and WPTF's requests for rehearing.

³⁰ Powerex Rehearing Request at 13-14 (citing *Old Dominion Elec. Coop.*, 151 FERC ¶ 61,207 (2015)); WPTF Rehearing Request at 5 n.20 (citing same).

³¹ Powerex Rehearing Request at 14.

³² *Id.* at 15-16; WPTF Rehearing Request at 6.

³³ Powerex Rehearing Request at 17; WPTF Rehearing Request at 7.

³⁴ Powerex Rehearing Request at 18-19; WPTF Rehearing Request at 7-8.

11. As an initial matter, for the reasons stated in the July 29 Order, we continue to find that CAISO's waiver request satisfies the criteria the Commission has used in granting limited, one-time waivers of tariff provisions.³⁵ Specifically, as discussed in the July 29 Order, we continue to find that CAISO's waiver request is limited both in scope and application, will remedy the concrete problem of the pricing anomalies, and will not lead to undesirable consequences.

12. We also disagree with Powerex's and WPTF's assertions that the waiver granted in the July 29 Order is prohibited by the filed rate doctrine and the rule against retroactive ratemaking. As Powerex and WPTF note, courts have recognized limited exceptions to the filed rate doctrine and the rule against retroactive ratemaking. These exceptions include instances in which parties have notice that a rate may be changed retroactively, as well as those in which they have agreed to make a rate effective retroactively.³⁶ We find that the second of these exceptions is applicable in this case.

13. As the Commission explained in the July 29 Order, the only resources that participated in the EIM – and thus received the high imbalance energy prices – during the period of November 1, 2014 through November 13, 2014 were owned by PacifiCorp.³⁷ Accordingly, PacifiCorp is the only entity that is responsible for refunds as a result of the requested waiver. As noted in the July 29 Order, PacifiCorp supports CAISO's waiver

³⁵ See July 29 Order, 152 FERC ¶ 61,086 at P 24 (citing December 1 Order, 149 FERC ¶ 61,194 at P 22; *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,078 at P 38; *Cal. Indep. Sys. Operator Corp.*, 146 FERC ¶ 61,218 at P 22).

³⁶ *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 22 (D.C. Cir. 2014) (identifying two specific instances by which a party may be placed on notice of a retroactive rate change: when the tariff provides a formula for calculating rates, rather than a specific number; and when a court invalidates a Commission decision); *ConEd*, 347 F.3d at 969 (“Courts have recognized only two circumstances in which a rate adjustment may take effect prior to a section 205 filing: when parties have notice that a rate is tentative and may be later adjusted with retroactive effect, or when they have agreed to make a rate effective retroactively.”) (citing *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999); *Texas Eastern Transmission Corp. v. FERC*, 102 F.3d 174, 186 (5th Cir. 1996) (“cases make clear that the Commission must look for adequate notice from a variety of sources, including agreements with customers and Commission orders”); *City of Holyoke Gas & Elec. Dep't v. FERC*, 954 F.2d 740, 744 (D.C. Cir. 1992)).

³⁷ July 29 Order, 152 FERC ¶ 61,086 at P 26.

request, and explicitly agreed that the waiver should be made effective retroactively.³⁸ Moreover, while Powerex and WPTF argue that the waiver requested by CAISO will adversely impact certain PacifiCorp transmission customers by reducing the payments they will receive for imbalance service, no such customers have either been identified or protested CAISO's waiver request.³⁹ All of PacifiCorp's transmission customers, including those who may have received reduced imbalance payments as a result of the requested waiver, had notice of CAISO's Second Waiver Petition⁴⁰ and were provided an opportunity to object to CAISO's request through the public comment process. No such customers filed objections.

14. In fact, the only protests to CAISO's Second Waiver Petition were filed by WPTF and Powerex, neither of which assert that they, their customers, or their members would be adversely impacted by the Commission's granting of the waiver. Indeed, Powerex indicates that, most likely, granting the retroactive waiver would benefit it financially, even as it argues that the vehicle CAISO used in this case was flawed.⁴¹ Similarly, WPTF concedes that it has members who may have incurred losses from high imbalance prices during the relevant period,⁴² indicating they may not have incurred those losses

³⁸ *Id.* PP 26-27.

³⁹ In support of their assertions, Powerex and WPTF point to CAISO's Second Waiver Petition, which indicated that there may be transmission customers who would receive reduced payments as a result of the waiver request. Powerex Rehearing Request at 16 (citing CAISO Second Waiver Petition at 12); WPTF Rehearing Request at 7 n.24 (citing same). However, as discussed above, no such customers filed objections to CAISO's waiver request.

⁴⁰ Notice of CAISO's Second Waiver Petition was published in the *Federal Register*, 80 Fed. Reg. 1500 (2015).

⁴¹ *See* Motion of Powerex Corp. to Intervene and Protest, Docket No. ER15-817-000, at 9 (filed Jan. 21, 2015) ("While Powerex may benefit financially if CAISO were granted authority to change EIM prices for the November 1-13 time period, Powerex believes CAISO's request for waiver is the wrong procedural vehicle, as a matter of law, to sustain approval of what CAISO seeks.").

⁴² *See* Motion to Intervene and Protest of the Western Power Trading Forum, Docket No. ER15-817-000, at 3 (filed Jan. 21, 2015) ("WPTF recognizes that parties are affected by the fluctuating prices in the initial two weeks of EIM operations and in fact has members subject to the energy imbalance prices in PacifiCorp's service area who may have incurred losses from high imbalance prices during this period.").

with the waiver in place. As a result, like Powerex, some of its members might benefit from, rather than be harmed by, the waiver granted in the July 29 Order.

15. Therefore, based on the facts of this case, we find that CAISO's waiver request falls within one of the recognized exceptions to the filed rate doctrine and the rule against retroactive ratemaking. We emphasize that the circumstances in this case are unusual and are unlikely to be repeated in the future. Our finding here is tailored to the narrow facts of this proceeding.

The Commission orders:

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

By the Commission. Commissioner Clark is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.