120 FERC ¶ 61,111
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

California Independent System Operator Corporation — Docket No. ER06-615-000

ORDER DENYING STAY

(Issued July 30, 2007)

1. In this order, the Commission denies the motion for stay filed by the Sacramento Municipal Utility District and the City and County of San Francisco (Movants). Movants seek a stay of those portions of the Commission's September 21, 2006 and April 20, 2007 Orders authorizing the California Independent System Operator Corporation (CAISO) to implement the use of marginal losses as part of its Market Redesign and Technology Upgrade (MRTU).[1] As explained below, we take this action because we find that, among other reasons, Movants have failed to demonstrate that they will be irreparably harmed in the absence of a stay.

Background

2. On February 9, 2006, the CAISO filed its MRTU Tariff for Commission approval. One significant component of the MRTU Tariff was the CAISO's adoption of locational marginal pricing (LMP) for managing congestion. As part of its filing, the CAISO proposed incorporating marginal losses into LMPs to assure least-cost dispatch and establish nodal prices that accurately reflect the cost of supplying the load at each node.[2]

3. On September 21, 2006, the Commission conditionally accepted the MRTU Tariff, including the CAISO's proposal to reflect marginal losses in its calculation of

[1] *Cal. Indep. Sys. Operator Corp.,* 116 FERC ¶ 61,274 (2006) (MRTU Order), *order denying reh'g,* 119 FERC ¶ 61,076 (2007) (MRTU Rehearing Order).

[2] MRTU Order, 116 FERC ¶ 61,274 at P 66. Marginal losses reflect the marginal cost of transmission losses associated with serving an increment of load. *Id.* at P 66 n.68.

LMP.[3] The Commission found that the use of marginal losses in the LMP calculation sends more accurate price signals and helps to assure least-cost dispatch.[4]

4. On rehearing, several parties argued that the Commission should have rejected the marginal loss proposal or withheld making a determination until the CAISO provided all relevant terms and conditions of the marginal loss calculation.[5] On April 20, 2007, the Commission issued an order that, *inter alia*, denied the parties' request that the Commission reverse its decision to allow the CAISO to reflect marginal losses in the calculation of LMP.[6]

Motion for Stay

5. On June 15, 2007, Movants filed an emergency motion requesting the Commission to stay those portions of the MRTU Order and MRTU Rehearing Order that authorize the CAISO to implement the use of marginal losses as part of its MRTU program. Movants claim that they are likely to succeed on the merits of their appeal.[7] According to Movants, they will establish that the CAISO failed to follow the Commission's directive to consult with stakeholders to determine whether the costs of implementing marginal losses would exceed the benefits[8] and that the Commission disregarded objections to this failure.[9]

6. Movants also argue that they will be irreparably harmed in the absence of a stay because the CAISO will continue to invest money in software that is designed to implement the new LMP calculation, which includes marginal losses. Movants explain that, because of the CAISO's non-profit status, even if Movants were to prevail on

[3] *Id.* at P 64.

[4] *Id.* at P 90-92.

[5] MRTU Rehearing Order, 119 FERC ¶ 61,076 (2007). *See Id*. at P 22-36 for a detailed rendition of the parties' objections.

[6] *Id.* at P 37-48.

[7] Movants filed their petition on June 15, 2007. *SMUD v. FERC,* No. 07-1208 (consolidated with Nos. 07-1216, 07-1217, 07-1219).

[8] Movants rely on language in an early MRTU order issued in 2004, *Cal. Indep. Sys. Operator Corp.*, 107 FERC ¶ 61,274 at P 147. (2004). *See* SMUD June 14, 2007 Motion, Docket No. ER06-615-000, at 3.

[9] We addressed this contention in the MRTU Rehearing Order, explaining that the Commission never expressly directed the CAISO to examine whether the efficiency gains of a marginal loss approach exceed the costs of implementation. MRTU Rehearing Order, 119 FERC ¶ 61,076 at P 46.

judicial review, they likely will still have to pay for the software changes. More specifically, Movants contend that the CAISO will continue to make expenditures to implement the recovery of marginal loss charges during the pendancy of Movants' appeal and that these expenditures, once made, will become "sunk" costs. Therefore, Movants will not be able to obtain a refund of these costs should they prevail on judicial review.

7. Movants also contend that no other parties will be harmed by the stay. According to Movants, parties will benefit if the status quo is maintained and the CAISO will not be harmed because it will still have full use of its money for other projects. Finally, Movants claim that the public interest is served by protecting CAISO participants from paying the "sunk" costs of implementing a marginal loss system that may be overturned on appeal.

Answers

8. On June 25, 2007, the CAISO filed its answer to the motion, objecting to the imposition of a stay. With regard to Movants' irreparable harm contentions, the CAISO states that it has already incurred the costs to develop the LMP software and that the calculation of marginal losses is part of that software package. Thus, the CAISO asserts that directing it not to implement the marginal losses functionality would not avoid these expenditures, and would actually impose additional costs to develop, test and implement an alternative software that uses average losses. Therefore, according to the CAISO, granting the stay would actually cause harm because all CAISO participants would incur additional expenses. The CAISO also contends that a stay is not in the public interest because a stay would delay implementation of MRTU and the Commission has stressed the importance of implementing MRTU as soon as possible. Finally, the CAISO disputes Movants' claim that they are likely to succeed on the merits.

9. On June 29, 2007, the Imperial Irrigation District filed an answer in support of the Movants' motion to stay. On July 2, 2007, Modesto Irrigation District also filed an answer in support of Movants' request.

Discussion

10. We deny the motion for stay because we find that Movants have failed to meet the standard for granting a stay. In evaluating requests for stay, the Commission applies the standards set forth in section 705 of Title 5 of the United States Code, and grants a stay when "justice so requires."[10] To determine whether justice requires a stay, the Commission considers: (1) whether the moving party will suffer irreparable harm without a stay; (2) whether the stay will substantially harm other parties; and (3) whether

[10] 5 U.S.C. § 705 (2006).

a stay is in the public interest.[11] The key element in the inquiry is irreparable harm to the moving party.[12] If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.[13]

11. We find that Movants have failed to demonstrate that they will suffer irreparable harm in the absence of a stay. To support their claim of irreparable harm, Movants assert that implementation of the system that incorporates marginal losses into the LMPs will cost millions of dollars and that these expenditures are "sunk" costs that cannot be refunded should the Movants prevail on appeal.[14] This assertion does not demonstrate irreparable harm. In determining whether an injury is irreparable, it is "well settled that economic loss does not, in and of itself, constitute irreparable harm."[15] Thus, Movants' claim of economic loss does not constitute irreparable harm.[16]

12. To the extent that Movants are impliedly objecting to the inclusion of marginal losses in the calculation of LMPs, the CAISO states that it could recalculate the LMPs

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[11] *See, e.g.*, *Application of Federal Power Act Section 215 to Qualifying Small Power Production and Cogeneration Facilities*, 119 FERC ¶ 61,320, at P 8 (2007); *CMS Midland, Inc*., 56 FERC ¶ 61,177, at 61,631 (1991), *aff'd sub. nom., Michigan Coop. Group v. FERC*, 990 F.2d 1377 (D.C.Cir.), *cert. denied*, 510 U.S. 990 (1993).

[12] *Id.* at 61,631.

[13] *Id.* The Commission's general policy is to refrain from granting a stay of its orders, to assure definiteness and finality in Commission proceedings. *Sea Robin Pipeline Co.,* 92 FERC ¶ 61,217 (2000).

[14] Movants June 14, 2007 Motion, Docket No. ER06-615-000, at 4.

[15] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir 1985). *See also Sampson v. Murray*, 415 U.S. 61, 90 (1974). The only exception to the general rule that economic loss does not constitute irreparable harm is where the potential economic loss is so great as to threaten the existence of the movant's business. *See, e.g., Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975); *Washington Area Transit Comm. v. Holiday Tours, Inc.,* 559 F.2d 841,843 n.2 (D.C.Cir.1977). Other than making bald assertions, Movants have only made a meager attempt to quantify the impact of CAISO's investment costs and do not claim that the existence of their business is threatened. Even Movants' bald assertions fail to rise to the level necessary to establish irreparable harm.

[16] *See, e.g., Wisconsin Gas,* 758 F.2d at 674.

and re-invoice market participants if Movants were to prevail on appeal. Thus, Movants will not be harmed with regard to the payment of LMP charges that include a marginal loss component, in the event that they are successful on appeal.[17]

13. Furthermore, and significantly, the CAISO states that it has already incurred the costs to develop software to implement the new LMP calculation, which includes marginal losses.[18] A stay would not protect Movants from potential exposure for expenditures that have already been made. Thus, since the stay will not afford Movants protection from the harm they claim, their request to stay the CAISO's investment to implement marginal losses must be viewed as moot.[19]

14. In addition, we emphasize that the requested stay has the potential to harm others. The CAISO explains that, if the stay is granted, it will need to expend funds to develop the software necessary to decouple the calculation of marginal losses from LMPs and substitute average losses.[20] Therefore, granting Movants' requested stay would actually have the perverse effect of causing the CAISO to incur additional costs, beyond what it has already invested to implement its marginal loss mechanism. These additional expenses would be passed on to Movants, as well as other market participants.

15. We further note that granting the requested stay would have detrimental consequences on the CAISO markets and, therefore, is not in the public interest. The Commission has stressed that it is important to implement MRTU as soon as possible to

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[17] We note that Movants also claim (in a footnote) an additional source of irreparable harm. Movants assert that customers "may, if feasible, elect less efficient self-supply options that do not use the CAISO transmission grid" to avoid the risk of marginal loss charges. Movants June 14, 2007 Motion, Docket No. ER06-615-000, at 5 n.7. Movants assert that, "[t]o the extent use of marginal losses is later held unreasonable, then by definition, customers who have taken this less efficient course will have been harmed[,] [b]ut because they did not take CAISO transmission service, they would be entitled to no refunds of marginal loss charges." *Id.*. We find these allegations too speculative to constitute irreparable harm. *See, e.g., Wisconsin Gas*, 758 F.2d at 674 ("bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur"). Moreover, to reiterate, a claim of economic loss does not in and of itself constitute irreparable harm.

[18] CAISO June 25, 2007 Answer, Docket No. ER06-615-000, at 6.

[19] *See, e.g., El Dorado Irrigation District,* 94 FERC ¶ 61,031 (2001) (finding motion for stay moot because the in-stream component of the proposed dam reconstruction work had already been completed).

[20] CAISO June 25, 2007 Answer, Docket No. ER06-615-000, at 7.

address the many widely recognized problems with the current market design.[21] As CAISO has pointed out, the delay created by any stay would make it more difficult for the CAISO to meet this objective,[22] potentially adversely affecting the entire market the CAISO serves.

16. Finally, Movants extensively argue that they are likely to succeed on the merits. While courts have traditionally examined this factor in their consideration of whether to grant a stay of an agency action, under section 705 of the APA , the Commission may consider a stay request without also attempting to predict how a court may rule on the merits of the underlying decision.[23] In any event, we find that Movants are not likely to succeed on the merits of an appeal challenging our marginal loss determinations. If the Commission believed otherwise, we would have reversed our determination on rehearing, rather than allow the case to proceed to court for review.[24]

The Commission orders:

Movants' motion for a stay is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[21] MRTU Order, 116 FERC ¶ 61,274 at P 1382 and 1402.

[22] CAISO June 25, 2007 Answer, Docket No. ER06-615-000, at 7.

[23] *City of Tacoma*, 89 FERC ¶ 61,273 at 61,795 & n.10 (1999). *See, also, Devon Power LLC,* 119 FERC ¶ 61,150 at P 27 (2007).

[24] *See*, *e.g.*, Mustang Fuel Corp., 37 FERC ¶ 61,027 (1986).