

135 FERC ¶ 61,031  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Critical Path Transmission, LLC and  
Clear Power, LLC

Docket No. EL11-11-000

v.

California Independent System  
Operator Corporation

ORDER DENYING COMPLAINT

(April 14, 2011)

1. On December 14, 2010, pursuant to sections 206 and 306 of the Federal Power Act (FPA),<sup>1</sup> Critical Path Transmission, LLC (Critical Path) and Clear Power, LLC (Clear Power) (collectively, Transmission Developers) filed a complaint alleging that California Independent System Operator Corporation (CAISO) violated its tariff and the filed rate doctrine by failing to adhere to the transmission planning process (TPP) in effect in the CAISO Open Access Transmission Tariff (CAISO Tariff or tariff) at the time when Transmission Developers submitted proposed economic transmission projects for consideration.<sup>2</sup> For the reasons discussed below, we deny the complaint.

**I. Background**

**A. CAISO's Transmission Planning Process**

2. When Transmission Developers submitted for CAISO's evaluation the proposed projects that form the basis of this complaint, CAISO's TPP was governed by section 24

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<sup>1</sup> 16 U.S.C. §§ 824e and 825e (2006).

<sup>2</sup> Transmission Developers, Complaint, Docket No. EL11-11-000 (filed Dec. 14, 2010) (Complaint).

(Transmission Expansion) of the previous CAISO Tariff<sup>3</sup> and the relevant Business Practices Manual for the TPP. The TPP consisted of overlapping transmission planning cycles in 2008-2009 and 2009-2010, each with three stages.<sup>4</sup> Stage 1 of the TPP involved the development of the study plan and planning assumptions used in the TPP. During Stage 2 of the TPP, CAISO and/or third parties performed technical studies to identify system needs, pursuant to which participating transmission owners and market participants proposed economic planning studies and reliability transmission upgrades or additions, or other resources during the “request window” period. Stage 3 of the TPP involved CAISO evaluating the solutions submitted via the request window that met certain project screening criteria, and development of the CAISO Transmission Plan for presentation to the CAISO Governing Board for approval.

3. Subsequent to the filing of the complaint in this proceeding, the Commission issued an order conditionally accepting CAISO’s proposed Revised Transmission Planning Process (RTPP).<sup>5</sup> The RTPP Order modified the CAISO Tariff provisions related to the TPP. Among other things, the RTPP eliminated the request window for economic transmission project proposals and replaced it with an open solicitation process for economic proposals that meet identified needs. The RTPP also provided a priority for 2008 and 2009 pending economic transmission projects in the 2010/2011 planning cycle, as discussed below.

4. Also pertinent to this proceeding, on August 10, 2010, CAISO sought a waiver for the 2010/2011 planning cycle of previous CAISO Tariff section 24.2.3(a), which provides for the submission of proposals for economic transmission upgrades or additions through a transmission planning request window.<sup>6</sup> The Commission granted the requested temporary waiver of the previous tariff section until the earlier of Commission action on the RTPP or January 3, 2011.<sup>7</sup> In the RTPP Order, the Commission clarified that the waiver of tariff section 24.2.3(a) continued until December 20, 2010, at which

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<sup>3</sup> As used herein, “previous CAISO Tariff” or “previous tariff” refers to the version of CAISO’s tariff that was in effect at the time Transmission Developers’ projects were proposed, and particularly to the applicable TPP provisions.

<sup>4</sup> Each cycle begins with a request window, which opens between August 15 and November 30 of each year.

<sup>5</sup> *Cal. Indep. Sys. Operator Corp.*, 133 FERC ¶ 61,224 (2010) (RTPP Order).

<sup>6</sup> *Cal. Indep. Sys. Operator Corp.*, 133 FERC ¶ 61,020, at P 1, 4, 10 (2010) (Temporary Waiver Order).

<sup>7</sup> *Id.* P 10.

point the RTPP became effective, eliminating the need for any economic request window.<sup>8</sup>

## **B. Transmission Developers' Projects**

5. Critical Path and Clear Power are independent transmission developers that submitted several economic transmission projects for CAISO's evaluation in the 2009 request window under the previous tariff. Critical Path explains that its project is the Clearview Project, an "innovative" two-circuit 345 kV line to be built underground along the county road right-of-way under the jurisdictions of Los Angeles County, the City of Lancaster, the City of Palmdale, and Edwards Air Force Base. Clear Power states that it proposed three projects: (1) the Los Banos – Westley line, an approximately 35-mile 230 kV line from Pacific Gas and Electric Company's Los Banos Substation to Modesto Irrigation District/Turlock Irrigation District's Westley substation; (2) the Metro Renewable Express, an approximately 62-mile, 300 kV underground direct current (DC) line from Southern California Edison Company's (SoCal Edison) Devers Substation to SoCal Edison's Mira Loma Substation; and (3) the Pony Express Project, approximately 250 miles of 500 kV alternating current (AC) or DC line from El Dorado Valley to Devers, California.

## **II. Complaint**

6. Transmission Developers state that they submitted their transmission upgrade proposals as economic projects during the 2009 request window for consideration in CAISO's 2010 transmission plan. However, in late 2009, CAISO announced a stakeholder process to reform its TPP in light of California's 33 percent renewable energy mandate. Transmission Developers quote an excerpt from a CAISO straw proposal concluding that a planning process separate from and parallel to the current TPP was needed to address the much shorter timeframe required by the policy-driven infrastructure needs of the state's 33 percent renewable portfolio standard.<sup>9</sup> Transmission Developers argue that the "parallel" process was akin to a suspension of CAISO's consideration of any economic projects submitted in the 2008 and 2009 request

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<sup>8</sup> RTPP Order, 133 FERC ¶ 61,224 at P 299.

<sup>9</sup> Complaint at 10 & n.5 (quoting California ISO, ISO Renewable Energy Transmission Planning Process (RETTP): Second Revised Straw Proposal (Dec. 2, 2009) (Straw Proposal)).

windows.<sup>10</sup> Transmission Developers contend that the improper implementation of this parallel process for economic projects submitted in the 2008 and 2009 request windows was a violation of section 24.2 (Transmission Planning Process and Coordination of Technical Studies) of the previous CAISO Tariff.

7. Transmission Developers allege that CAISO violated its tariff provisions and the filed rate doctrine, and acted in an unduly discriminatory manner when it failed to evaluate pending economic transmission project proposals under the tariff effective at the time the proposals were submitted. Transmission Developers contend that they relied on rules in effect when they set out to undertake their ambitious and innovative projects, and that they have been harmed by CAISO's refusal to consider their projects in accordance with those rules and are, therefore, in danger of losing their investment. Transmission Developers also argue that CAISO's inaction on the proposed projects could lead to the inappropriate allocation of hundreds of millions of dollars to build transmission projects that are not the best solution to California's needs.

8. Transmission Developers request that the Commission direct CAISO to evaluate projects submitted in the 2009 request window in accordance with section 24.2 of the previous CAISO Tariff, and not under the procedures established in the RTPP Order.<sup>11</sup> Transmission Developers argue that CAISO must not be permitted to avoid the filed rate at the expense of 2008-2009 request window customers merely because the previous tariff's terms are now considered inconvenient or impractical in light of California's renewable energy objectives. Transmission Developers also state that when CAISO decided to suspend consideration of economic projects, it should have filed a waiver of its tariff provisions with the Commission.<sup>12</sup>

9. Transmission Developers contend that CAISO's refusal to honor section 24.2 of the previous tariff and evaluate economic projects on the merits is unduly discriminatory

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<sup>10</sup> *Id.* (quoting Straw Proposal at n.3: "The ISO envisions that for 2010 the RETPP described here would be conducted in addition to, not in place of, the TPP. The latter would continue on its existing timeline and in accordance with modified tariff provisions, to consider reliability, but not economic, transmission upgrades that do not require justification of need based on delivering energy from renewable supply resources. *Evaluation of economic transmission projects in the TPP will not proceed* while the ISO evaluates the impact of the renewable transmission build-out and tries to resolve other operational and planning uncertainties relevant to economic assessment" (emphasis added in pleading)).

<sup>11</sup> *Id.* at 5.

<sup>12</sup> *Id.* at 16-18.

and unduly preferential.<sup>13</sup> Transmission Developers state that while CAISO suspended consideration of economic projects, it continued to process Large Generator Interconnection Procedures (LGIP) projects and proposals submitted by incumbent transmission owners for reliability-based upgrades. Transmission Developers argue that an economic project left “on the shelf” long enough will eventually become a reliability project, for which only incumbent owners hold a right of first refusal. Transmission Developers allege that if the Commission determines that the previous CAISO Tariff permits CAISO to put all independent economic projects on indefinite hold while continuing to evaluate reliability and LGIP projects submitted by incumbent transmission owners, then the previous tariff is unjust, unreasonable, unduly discriminatory, and unduly preferential.<sup>14</sup> Transmission Developers note, however, that the current tariff, including the approved RTPP provisions, is not the subject of their complaint.<sup>15</sup>

10. Transmission Developers state that, in contrast to CAISO, other Regional Transmission Organizations have sought to implement new planning approaches to new projects only, with clear lines of demarcation between past and going-forward approaches.<sup>16</sup> Transmission Developers state that when the Midwest Independent Transmission System Operator, Inc. (MISO) proposed its Regional Expansion Criteria Benefits (RECB) approach, it used an “Exclude List” that contained earlier vintage proposed transmission projects that would be excluded from the new RECB planning and cost allocation rules. In addition, Transmission Developers state that when the Southwest Power Pool (SPP) moved from a balanced portfolio approach to a new “highway-byway” methodology, it established a clear line of demarcation between projects developed under the old methodologies and the new approach.

11. Finally, Transmission Developers request that the Commission establish a refund effective date of December 14, 2010, the date the instant complaint was filed, to ensure the Commission will have the legal authority to order a remedy and that CAISO does not discriminate in favor of generator interconnection and reliability projects over economic projects. Transmission Developers also request that if the Commission does not summarily find in favor of Transmission Developers, the complaint be set for hearing and expedited settlement procedures, and consolidated with the CAISO’s RTPP proceeding in Docket No. ER10-1401-000.

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<sup>13</sup> *Id.* at 18-19.

<sup>14</sup> *Id.* at 3, 24.

<sup>15</sup> *Id.* at 18.

<sup>16</sup> *Id.* at 20-21 (citing *Midwest Independent Transmission System Operator, Inc.*, 114 FERC ¶ 61,106, at P 108-110 (2006) and *Southwest Power Pool*, 131 FERC ¶ 61,252, at P 11 (2010)).

### **III. Notice of Filing and Responsive Pleadings**

12. Notice of the complaint was published in the *Federal Register*, 75 Fed. Reg. 81,264 (2010), with interventions, comments and protests due on or before January 3, 2011. On December 15, 2010, CAISO filed a motion for extension of time, until January 21, 2011, to file an answer. On December 17, 2010, the Commission issued a notice of extension of time for filing answers to and including January 11, 2011.

13. Timely motions to intervene were filed by California Department of Water Resources State Water Project, and Pacific Gas and Electric Company. Motions to intervene out of time were filed by California Municipal Utilities Association; the City of Santa Clara, California and the M-S-R Public Power Agency; Modesto Irrigation District; Northern California Power Agency; and SoCal Edison. San Diego Gas & Electric Company (SDG&E) filed a motion to intervene and comments out of time. The Cities of Anaheim, Azusa, Banning, Colton, Pasadena and Riverside, California (Six Cities) filed a motion to intervene and a protest out of time.

14. On January 11, 2011, CAISO filed an answer to the complaint. On January 25, 2011, Transmission Developers filed an answer to CAISO's answer. On February 9, 2011, CAISO filed an additional answer to Transmission Developers' answer.

15. On March 7, 2011, Critical Path filed a Motion to Lodge in this and other proceedings comments publicly filed by certain stakeholders in CAISO's transmission planning process. On March 22, 2011, CAISO filed an answer to Critical Path's motion to lodge.

#### **A. CAISO's January 11, 2011 Answer**

16. CAISO objects to Transmission Developers' arguments that it had no authority to defer consideration of their project proposals absent a waiver of its tariff.<sup>17</sup> CAISO contends that it was within its discretion to determine in which planning cycle it would evaluate project proposals submitted in the 2008 and 2009 request windows, as long as it did not act discriminatorily or arbitrarily. CAISO cites section 24.2.3.1 of the previous tariff as providing CAISO with "broad discretion in determining whether to include a proposed project in the study plan."<sup>18</sup> CAISO contends that although the TPP was on an

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<sup>17</sup> CAISO January 11, 2011 Answer at 8-12.

<sup>18</sup> *Id.* at 9 (citing section 24.2.3.1 (CAISO Assessment of Request Window Proposals) of the previous CAISO Tariff, which states that "[f]ollowing the submittal of a proposal for a transmission addition or upgrade, Demand response program, or generation project during the Request Window in accordance with Section 24.2.3, the CAISO will determine whether the proposal will be included in the Unified Planning Assumptions or Study Plan *as appropriate*" (emphasis added in pleading)).

annual cycle, there was no requirement in the previous tariff that CAISO complete its evaluation of a specific proposal within a year, and that the evaluation process could span multiple planning cycles.

17. CAISO argues that its decision to defer consideration of Transmission Developers' projects was made in a reasonable and nondiscriminatory manner.<sup>19</sup> CAISO states that all economic project proposals submitted in the 2008 and 2009 request windows were deferred for further study, not just those of Transmission Developers. In addition, CAISO contends that it did not act discriminatorily when it continued to process reliability and LGIP projects. CAISO argues that those projects are distinct from economic projects and are evaluated under a separate set of criteria, and that deferral of such projects is simply not within its authority.

18. CAISO also contends that it did not defer consideration of the projects in an arbitrary manner, but had compelling reasons to do so.<sup>20</sup> CAISO states that by the time it received the 2009 request window projects, it had begun the process of determining how to integrate the necessary resources to achieve California's 33 percent renewable portfolio standard. CAISO states that in the 2008 and 2009 planning cycles, it received more than 30 transmission project proposals. CAISO states it believed that economic project proposals had to be studied further in the context of the new requirements, and that the previous CAISO Tariff specifically contemplated consideration of such matters in the development of the study plan

19. CAISO contends that the filed rate doctrine and rule against retroactive ratemaking do not prohibit the evaluation of 2009 request window projects under the RTPP.<sup>21</sup> CAISO states that it exercised its right under the FPA to propose the RTPP, and the Commission approved the RTPP effective December 20, 2010. CAISO states that it had not completed its evaluation of Transmission Developers' project proposals at that time, and that the RTPP will therefore be the filed rate at the time CAISO completes that evaluation.

20. Further, CAISO adds that Transmission Developers were on notice that their projects might be considered under the RTPP.<sup>22</sup> CAISO states that on September 15, 2009, two months before Transmission Developers submitted their proposals, CAISO

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<sup>19</sup> *Id.* at 12-14.

<sup>20</sup> *Id.* at 14-17.

<sup>21</sup> *Id.* at 18-23.

<sup>22</sup> *Id.* at 23-25.

presented its first issue paper and straw proposal on California's 33 percent renewables initiative, which would eventually lead to the RTPP. CAISO states that the document laid out a plan under which projects for accessing renewable resources would be submitted during the 2009 request window and considered under the new planning process.

21. CAISO also argues that Transmission Developers' references to the decisions of MISO and SPP to exclude certain transmission expansion projects from revisions to their transmission planning processes do not support Transmission Developers' arguments. CAISO states that MISO and SPP excluded only a subset of pending project proposals, which would not have been possible if the exclusion of pending project proposals was compelled by the filed rate doctrine. CAISO argues that the fact that the exclusions were specified in the tariff amendment implies that absent the specific tariff exclusion, the new process would apply to all pending projects.

22. Finally, CAISO argues that the Commission should reject the complaint as a collateral attack on the RTPP Order.<sup>23</sup> CAISO states that in the RTPP Order, the Commission specifically rejected arguments that the 2008 and 2009 request window projects should be evaluated under the previous TPP.

#### **B. Transmission Developers' Answer**

23. Transmission Developers argue that CAISO's theory of its discretion in the timing of the evaluation of economically-driven projects is unsupported by any reasonable interpretation of the previous CAISO Tariff. Transmission Developers argue that the words "as appropriate" in section 24.2.3.1 of the previous tariff do not grant CAISO broad or explicit discretion to suspend consideration of economic projects in the 2008 and 2009 request windows. In fact, Transmission Developers argue, CAISO itself has applied inconsistent discretion under this tariff provision by asking the Commission to waive section 24.2.3(a) of the previous tariff for the submission of economic projects in the 2010 request window,<sup>24</sup> but not requesting a similar waiver to suspend consideration of the projects submitted in the 2008 and 2009 request windows.<sup>25</sup> Transmission Developers argue that CAISO's former TPP had clear dates and milestones and was presented as an annual process.<sup>26</sup>

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<sup>23</sup> *Id.* at 25-27.

<sup>24</sup> Transmission Developers Answer at 6 n.9 (citing CAISO, Petition for Waiver of Tariff Provision, Docket No. ER10-2191 (filed Aug. 10, 2010)).

<sup>25</sup> *Id.* at 2, 5-8.

<sup>26</sup> *Id.* at 11-15.

24. Transmission Developers state that CAISO's refusal to consider independent developers' economic projects until it has already filled its transmission plan with LGIP-related upgrades could cost California thousands of megawatts of solar capacity, and is a piecemeal approach which will be detrimental to California ratepayers.<sup>27</sup> Transmission Developers argue that CAISO's reliance on the LGIP process for the consideration of new transmission projects will result in solar and wind project developers interconnecting their projects only to existing, and potentially over-subscribed, transmission lines.<sup>28</sup> These projects, Transmission Developers argue, could be connected to Critical Path's Clearview Project instead. Transmission Developers contend that CAISO's approach will eliminate all competition for transmission infrastructure for a two-year period due to the suspension of economic projects submitted in the 2008 and 2009 request windows.

25. Finally, Transmission Developers object to CAISO's argument that the complaint constitutes a collateral attack on the RTPP Order. Transmission Developers point to the date they filed the complaint, December 14, 2010, to support their argument that the complaint could not collaterally attack an order that had not yet issued. Transmission Developers further cite CAISO's statements in the RTPP proceeding that the treatment of specific projects under the previous tariff was beyond the scope of the RTPP proceeding. Transmission Developers state that their claims were not heard in the RTPP proceedings, so the instant proceeding is the proper venue.<sup>29</sup>

### **C. CAISO's February 9, 2011 Answer**

26. In its February 9, 2011 answer to Transmission Developers' answer, CAISO objects to Transmission Developers' characterization of CAISO's discretion to determine in which planning cycle it would evaluate project proposals submitted in the 2008 and 2009 request windows. CAISO argues that previous tariff section 24.2.3(a), the subject of the Commission-approved waiver referenced by Transmission Developers, provides CAISO no discretion for avoiding a request window for economically-driven projects without a waiver. CAISO explains that, instead, its discretion is derived from previous tariff section 24.2.3.1, which addresses the assessment of request window proposals. CAISO points out that its assessment of proposals under this section differs from the provisions that govern the actual submission of economic projects under section 24.2.3(a).

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<sup>27</sup> *Id.* at 3-4, 18-19.

<sup>28</sup> *Id.* at 3-4, Ex. A.

<sup>29</sup> *Id.* at 18.

**D. Comments**

27. SDG&E states that the basis of the complaint is that Transmission Developers believe that they are entitled to have their projects studied in a specific planning cycle (i.e., the 2009-2010 planning cycle). SDG&E objects, stating that Transmission Developers ignore that section 24.2.4(c) of the previous CAISO Tariff provided that large projects “will be subject to a separate study and public participation process” that “may encompass more than one Transmission Planning Process Cycle.”<sup>30</sup> SDG&E argues that CAISO’s deferral of the projects, therefore, did not constitute a violation of the previous tariff or CAISO business practices, and that the complaint should be dismissed.

28. Six Cities contend that Transmission Developers’ requested relief is inconsistent with the RTPP Order and should be denied. Six Cities argue that the Commission already rejected the relief requested by Transmission Developers by accepting CAISO’s proposal to evaluate projects submitted in the 2008 and 2009 request windows under the RTPP, rather than under the previous CAISO Tariff.<sup>31</sup> Accordingly, Six Cities state that the complaint should be denied.

29. SDG&E and Six Cities also argue that Transmission Developers’ request for a refund effective date bears no relation to the alleged tariff violation. SDG&E and Six Cities further point out that Transmission Developers have not identified any costs they incurred for which they could claim reimbursement.

**E. Motion to Lodge**

30. On March 7, 2011, Critical Path filed a motion to lodge comments filed with CAISO by the Public Utilities Commission of California and other stakeholders in CAISO’s transmission planning process. Critical Path asserts that the stakeholder comments demonstrate serious concerns with the implementation of the RTPP and illustrate the harm to Critical Path at issue in this proceeding.

31. On March 22, 2011, CAISO filed an answer to Critical Path’s motion to lodge, stating that the documents Critical Path was seeking to lodge have no relevance to the issues in the Commission proceedings referenced in the motion. CAISO also notes that the comments Critical Path submitted are on the revised conceptual statewide plan, which is only one input into the development of CAISO’s comprehensive transmission plan, and therefore do not contain conclusions about the studies and analyses that will be included in the comprehensive transmission plan.

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<sup>30</sup> SDG&E Comments at 6 (citing section 24.2.4(c) (Development and Approval of Transmission Plan) of the previous CAISO Tariff).

<sup>31</sup> Six Cities Protest at 4-5 (citing RTPP Order, 133 FERC ¶ 61,224 at P 267).

#### IV. Discussion

##### A. Procedural Matters

32. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

33. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2010), the Commission will accept the out-of-time motions to intervene and comment or protest, given the early stage of this proceeding, the filing parties' interest in the proceeding, and the absence of undue prejudice or delay.

34. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept CAISO's and Transmission Developers' answers because they have provided information that assisted us in our decision-making process.

35. Motions to lodge pleadings from other fora may be appropriate in some instances to supplement the Commission's record. However, we find the pleadings Critical Path seeks to lodge, which concern the implementation of the RTPP, to be irrelevant to Transmission Developers' claims of harm and allegations that CAISO did not follow its previous tariff. Consequently, in this instance, we find that the pleadings Transmission Developers seek to lodge do not assist us in our decision-making, and thus we deny the motion to lodge.<sup>32</sup>

##### B. Substantive Matters

36. As explained below, the Commission denies the complaint, finding that Transmission Developers have not demonstrated that the previous CAISO Tariff required CAISO to act within a certain timeframe when considering economic transmission project proposals. Consequently, we find that CAISO did not violate its tariff or the filed rate doctrine; nor did CAISO run afoul of the principle of non-discriminatory transmission planning set forth in Order No. 890,<sup>33</sup> or the prohibition against undue

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<sup>32</sup> *BHE Holdings, Inc.*, 133 FERC ¶ 61,231, at P 15 & n.8 (2010) (citing *El Paso Electric Co. v. Tucson Electric Power Co.*, 132 FERC ¶ 61,017, at P 45 (2010)).

<sup>33</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on reh'g*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

discrimination contained in the FPA.<sup>34</sup> Thus, while CAISO was not obligated to consider Transmission Developers' proposals within a specific timeframe, we also note that the RTPP Order requires CAISO to give first priority in the 2010/2011 RTPP planning cycle to projects pending from its 2008 and 2009 request windows. We continue to find that this approach strikes a reasonable balance between, on the one hand, recognizing projects that were submitted prior to RTPP implementation and, on the other hand, preserving the comprehensive transmission planning benefits featured in the RTPP.<sup>35</sup>

### **1. Filed Rate Doctrine**

37. The filed rate doctrine prohibits a regulated utility from charging rates for its services that are different from the rates that are properly on file with the Commission.<sup>36</sup> Transmission Developers contend that CAISO violated the filed rate doctrine and the previous CAISO Tariff by evaluating their proposals under the RTPP. Transmission Developers insist that to remedy this violation, the Commission should order CAISO to evaluate Transmission Developers' projects in accordance with CAISO's previous tariff. We disagree. The previous tariff contained no language mandating CAISO to consider these projects within a certain timeframe or guaranteeing their consideration if the previous tariff were superseded by an amendment, such as the RTPP. Specifically, previous CAISO Tariff section 24.1 (Determination of Need for Proposed Transmission Projects) established the process for determining the need for proposed transmission projects, but did not obligate CAISO to assess and act on economic transmission project proposals as part of the transmission plan in the year immediately following their submission, or by any definite deadline. This is further supported by section 24.2.3.1 of the previous tariff, which grants CAISO discretion to determine whether to include a proposed project in the study plan.<sup>37</sup> Section 24.2.4(c) of the previous tariff, which

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<sup>34</sup> 16 U.S.C. § 824e (2006).

<sup>35</sup> See RTPP Order, 133 FERC ¶ 61,224 at P 268.

<sup>36</sup> See, e.g., *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1991) (explaining that the filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority."). The doctrine has evolved over time, but is based on the notion that utility filings with the Commission prevail over unfiled contracts or other claims seeking rates or terms differing from those reflected in the filings. See *Town of Norwood v. FERC*, 217 F.3d 24, 28 (1<sup>st</sup> Cir. 2000), cert. denied, 532 U.S. 993 (2001).

<sup>37</sup> See *supra* n.18.

provides that large projects<sup>38</sup> will be subject to a separate study that “may encompass more than one Transmission Planning Process Cycle,” further supports our finding that CAISO had discretion regarding its timeline for acting on projects submitted in the economic request window. Consequently, we find the discretion in the previous tariff is sufficient to allow CAISO to defer consideration of economic projects submitted during the 2008 and 2009 request windows.

38. In addition, we reject Transmission Developers’ argument that CAISO should have requested a waiver to suspend consideration of the 2008 and 2009 request window projects, as it did for holding of the 2010/2011 request window. Subsection 24.2.3(a) of the previous tariff requires CAISO to hold an annual request window for the submission of economic projects, and affords no discretion in this regard. In stark contrast to this lack of discretion over whether to hold an annual request window for economic projects, the previous tariff grants CAISO discretion in the timing of when it chooses to evaluate and act on economic transmission project proposals, as demonstrated above. We therefore determine that while CAISO was required to request a Commission waiver of section 24.2.3(a) to postpone its obligation to hold a request window for economic transmission projects for the 2010/2011 planning cycle, it was not required to request a waiver in order to defer consideration of economic projects submitted during the 2008 and 2009 request windows.

## **2. Lack of Undue Discrimination**

### **a. Order No. 890**

39. We also reject Transmission Developers’ arguments that CAISO’s actions were unduly discriminatory and violated Order No. 890. In Order No. 890, to remedy the potential for undue discrimination in planning activities, the Commission directed all transmission providers to develop a transmission planning process that satisfies nine planning principles and describe that process in a new attachment to their open access transmission tariffs.<sup>39</sup> As explained above, prior to the RTPP, CAISO followed its Order

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<sup>38</sup> A “Large Project” is a transmission upgrade or addition that exceeds \$200 million in capital costs and consists of a proposed transmission line or substation facilities capable of operating at voltage levels greater than 200 kV. CAISO Tariff Appendix A (Definitions).

<sup>39</sup> RTPP Order, 133 FERC ¶ 61,224 at P 294-295 & nn.199, 200 (citing Order No. 890 and Order No. 890-A, in which the Commission clarified that the comparability principle requires each transmission provider to identify, as part of its Attachment K planning process, how it will treat resources on a comparable basis and, therefore, how it will determine comparability for purposes of transmission planning. Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 216.).

No. 890-compliant tariff, exercising discretion where appropriate and seeking waiver where the previous tariff did not provide CAISO with discretion. To accommodate California's ambitious renewable energy goals, CAISO exercised its FPA section 205<sup>40</sup> prerogative to propose to replace the TPP in the previous tariff with the RTPP, which the Commission found, as modified, to be just, reasonable, not unduly discriminatory, and in continued compliance with Order No. 890.<sup>41</sup> Consistent with the objectives of Order No. 890, the RTPP is designed to make CAISO's TPP more comprehensive and collaborative.<sup>42</sup> Furthermore, in the RTPP Order, the Commission required CAISO to give 2008 and 2009 project sponsors, which include Transmission Developers, priority for the 2010/2011 planning cycle, because this recognizes the transition between the TPP in the previous tariff and the RTPP.<sup>43</sup> Thus, we find no violation of the nondiscriminatory transmission planning principles set forth in Order No. 890.

**b. Other Categories of Projects**

40. Additionally, we find that while CAISO's previous tariff was in effect, CAISO did not act in an unduly discriminatory manner toward economic projects. Transmission Developers contend that CAISO gave preference to reliability-driven and LGIP projects over economic projects. However, under the previous (and current) CAISO Tariff, each of these categories of projects is distinct, and each type of project is evaluated under a separate set of criteria. First, reliability-driven projects are defined as upgrades or additions necessary to meet reliability criteria, including North American Electric Reliability Corporation standards.<sup>44</sup> CAISO has an ongoing obligation under the tariff to consider and act upon reliability projects promptly to ensure the reliability of its transmission grid.<sup>45</sup> Second, LGIP projects are interconnection projects, initiated at the generator's request and specifically provided for by the LGIP provisions of the tariff,<sup>46</sup>

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<sup>40</sup> 16 U.S.C. § 824d (2006).

<sup>41</sup> RTPP Order, 133 FERC ¶ 61,224 at P 3, 27.

<sup>42</sup> *Id.* P 29.

<sup>43</sup> *Id.* P 267.

<sup>44</sup> *See, e.g.*, previous CAISO Tariff § 24.1.2 (Reliability Driven Projects) and definition of "Applicable Reliability Criteria" in CAISO Tariff Appendix A (Definitions).

<sup>45</sup> *Id.*

<sup>46</sup> *See* CAISO Tariff Appendix U (Large Generator Interconnection Procedures).

consistent with Order No. 2003.<sup>47</sup> CAISO has specific obligations under Order No. 2003 and its tariff to assist in enhancing the ability of resources to connect to the grid. Consequently, because these categories of transmission projects are distinct, and CAISO's responsibilities in regard to these categories are distinct, as reflected in the tariff, disparate treatment of each category of project is not unduly discriminatory. Therefore it was not unduly discriminatory for CAISO to suspend its evaluation of economic projects submitted through the 2008 and 2009 request windows and to continue, as required, to process reliability and LGIP projects responsively.

41. CAISO is required to comply with its tariff, where separate provisions for reliability-driven, LGIP, and economic projects have been approved. CAISO's tariff did not require it to act on economic transmission project proposals within a certain timeframe. CAISO complied with the FPA requirement that it not act in an unduly discriminatory manner by treating all economic projects submitted through the 2008 and 2009 request windows in the same manner – i.e., CAISO deferred action on all economic projects. In addition, CAISO proposed to offer these projects priority consideration in the 2010/2011 planning cycle under the RTPP. CAISO acted upon the other categories of projects, e.g., reliability-driven and LGIP, also in accordance with provisions of the previous tariff, and in compliance with the filed rate doctrine and the FPA.

42. Moreover, CAISO issued a market notice simultaneously notifying all market participants of its intent to postpone action on pending economic project proposals. In accordance with this notice, CAISO did not act on any of the pending economic proposals, whether they were submitted by an incumbent participating transmission owner or an independent transmission developer. Consequently, we conclude that CAISO did not act in an unduly discriminatory manner or favor certain categories or projects over others.

43. In addition, Transmission Developers argue that they are disadvantaged by the delay and that an economic project left “on the shelf” long enough will eventually become a reliability project.<sup>48</sup> They point out that incumbent transmission providers currently hold a right of first refusal for reliability projects. We find the argument that delayed evaluation of proposed economic projects would enable these projects to become

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<sup>47</sup> *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), cert. denied, 552 U.S. 1230 (2008).

<sup>48</sup> Complaint at 19.

reliability projects is speculative. Nevertheless, we note that the Commission is considering whether provisions of Commission-jurisdictional tariffs and agreements that establish a right of first refusal for reliability projects for incumbent transmission providers are unjust, unreasonable, or unduly discriminatory.<sup>49</sup>

### 3. Prior Precedent

44. The MISO and SPP precedents Transmission Developers cite do not support their position. Transitioning to a new transmission planning process, MISO and SPP respectively proposed to grandfather selected pending projects under their respective prior planning processes, which the Commission approved as just and reasonable and not unduly discriminatory ways to handle such projects.<sup>50</sup> Rather than grandfather proposed economic transmission projects pending in the 2008 and 2009 request windows, however, CAISO proposed to grant them a priority for the 2010/2011 RTPP planning cycle, ahead of any new submissions, if the pending projects were to meet CAISO's economic transmission needs.<sup>51</sup> In the RTPP Order, the Commission conditionally accepted this proposal, adding a "first-in-time" priority for 2008 request window submissions before those submitted in 2009.<sup>52</sup> As courts have declared on numerous occasions, there is not only one just and reasonable rate, term or condition, which the Commission must accept.<sup>53</sup> Accordingly, CAISO was free to propose a method of handling the pending projects that was tailored to the design of the RTPP, and the Commission was not required to impose on CAISO the exact same treatment of pending projects used by MISO or SPP, particularly where the designs of the underlying transmission planning

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<sup>49</sup> See *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Notice of Proposed Rulemaking, 75 Fed. Reg. 37,884 (June 30, 2010), FERC Stats. & Regs. ¶ 32,660, at P 93 (2010) (Transmission NOPR). Because the Commission's action today precedes any final rule on the Transmission NOPR, CAISO, like all jurisdictional entities, will be subject to any future rulemaking.

<sup>50</sup> Complaint at 20-21.

<sup>51</sup> RTPP Order, 133 FERC ¶ 61,224 at P 256.

<sup>52</sup> *Id.* P 268.

<sup>53</sup> See, e.g., *In re Permian Basin*, 390 U.S. 747, 796-98 (1968) (explaining that there is not one reasonable rate but rather a "zone of reasonableness"); *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (noting that "the Commission was not bound to the use of any single formula or combination of formulae in determining rates"); *Me. Pub. Utils.*, 520 F.3d 464, 471 (D.C. Cir. 2008) ("The Supreme Court has disavowed the notion that rates must depend on historical costs and has held that rates may be determined by a variety of formulae.").

processes differed. In the RTPP Order, the Commission reasonably concluded that CAISO's proposal regarding pending economic projects that were submitted under the previous tariff was just and reasonable, while preserving the RTPP's comprehensive planning benefits.

#### **4. Remedy**

45. In the RTPP Order, we explicitly denied the requests of protestors, including Critical Path, to require CAISO to evaluate 2008 and 2009 request window proposals under the previous tariff and exempt those project sponsors from meeting the RTPP requirements.<sup>54</sup> We rejected such requests because we found that "such a requirement would undermine the goals of RTPP, which include development of a comprehensive transmission plan, rather than a project-by-project analysis, as under the existing tariff."<sup>55</sup> Instead, we found appropriate CAISO's plan to evaluate 2008 and 2009 request windows proposals during the RTPP and subsequently assign the original project sponsor the right to build its proposal if it fits an identified need for the 2010/2011 planning cycle. We therefore deny Critical Path the remedy it requests in the instant proceeding, and decline to order CAISO to evaluate Transmission Developers' projects in accordance with the previous CAISO Tariff. However, we invite Transmission Developers to take full advantage of the rights preserved in the RTPP for proponents of projects pending since the 2008 and 2009 request windows.

#### **5. Miscellaneous Matters**

46. We decline Transmission Developers' request to consolidate the instant complaint proceeding with the RTPP proceeding in Docket No. ER10-1401-000 because, while the proceedings involve related issues, the request is untimely. The complaint was filed more than six months after CAISO filed the RTPP proposal, which provided notice of CAISO's proposed treatment of 2008 and 2009 economic request window projects. In the interim, the Commission issued an order accepting and suspending the proposed RTPP and establishing a technical conference. Notice of the agenda of the technical conference issued prior to the conference, and indicated that the treatment of 2008 and 2009 economic request window projects would be discussed at the conference.<sup>56</sup> The treatment of 2008 and 2009 request window projects was discussed at the webcast

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<sup>54</sup> RTPP Order, 133 FERC ¶ 61,224 at P 267.

<sup>55</sup> *Id.*

<sup>56</sup> Notice of Technical Conference, Docket Nos. ER10-1401-000 and EL10-76-000 at 2 (Aug. 3, 2010).

technical conference held on August 24, 2010. Following the conference, two rounds of post-technical comments were filed, which also included discussion of this issue. Moreover, Critical Path is a party to the RTPP proceeding, and, therefore, had ample opportunity during that proceeding to raise the arguments in this complaint that are also pertinent to the RTPP.

47. However, we also disagree with CAISO's allegation that Transmission Developers' complaint is a collateral attack on the RTPP Order. The U.S. Court of Appeals for the District of Columbia Circuit has held that the clock for timely challenges to orders "starts running 'only when the agency has decided a question in a manner that reasonably puts aggrieved parties on notice of the rule's content.'"<sup>57</sup> In the instant case, no Commission decision had issued at the time Transmission Developers filed their complaint. Thus, while Critical Path, as a party to the RTPP proceeding, had notice of the issues raised therein, including the treatment of 2008 and 2009 request window projects, it did not have notice of the Commission's final disposition of those issues. Therefore, we must address the substance of the instant complaint, as we have above.

48. We decline Transmission Developers' request to set the matters raised in the complaint for settlement or hearing because there are no genuine issues of material fact that cannot be resolved on the basis of the written record.<sup>58</sup> Further, because we deny Transmission Developers' allegations that CAISO violated its tariff or the filed rate doctrine, any refund consideration is moot.

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<sup>57</sup> *Dynegy Midwest Generation, Inc. v. FERC*, No. 09-1306, slip op. at 6 (D.C. Cir. Feb. 11, 2011) (quoting *Southern Company Services, Inc. v. FERC*, 416 F.3d 39, 44-45 (D.C. Cir. 2005) (citation omitted)). See also *Connecticut Light & Power Co. v. FPC*, 557 F.2d 349, 353 (2d Cir. 1977) ("the [collateral estoppel] doctrine is operative only as to facts that were actually litigated and decided").

<sup>58</sup> See *Blumenthal v. FERC*, 613 F.3d 1142, 1145 (D.C. Cir. 2010); *Ark. Elec. Energy Consumers v. FERC*, 290 F.3d 362, 369-70 (D.C. Cir. 2002); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993).

The Commission orders:

The complaint of Critical Path and Clear Power is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.