

155 FERC ¶ 61,149  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

ETRACOM LLC and Michael Rosenberg

Docket No. IN16-2-000

ORDER DENYING MOTION

(Issued May 6, 2016)

1. On March 4, 2016, ETRACOM LLC (ETRACOM) and Michael Rosenberg (collectively, Respondents) filed a Motion to Require Disclosure of Certain Materials and Information or, in the Alternative, for Issuance of Subpoena (Motion). The Motion requests that the Federal Energy Regulatory Commission (Commission) require production of data from the California Independent System Operator Corp. (CAISO) to Respondents. For the reasons discussed below, we deny the Motion.

**I. Background**

2. On December 16, 2015, the Commission issued an Order to Show Cause and Notice of Proposed Penalty in this proceeding.<sup>1</sup> The Order to Show Cause required Respondents to show cause why they should not be found to have violated section 222 of the Federal Power Act (FPA)<sup>2</sup> and section 1c.2 of the Commission's regulations<sup>3</sup> by submitting virtual supply transactions in order to affect power prices and benefit ETRACOM's Congestion Revenue Rights. Consistent with our practice in similar proceedings, the Commission required Respondents to file an answer no later than 30 days following the Order to Show Cause.<sup>4</sup> In addition, the Order to Show Cause stated that Respondents had the option of electing, within 30 days, a penalty assessment

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<sup>1</sup> *ETRACOM LLC*, 153 FERC ¶ 61,314 (2015) (Order to Show Cause).

<sup>2</sup> 16 U.S.C. § 824v (2012).

<sup>3</sup> 18 C.F.R. § 1c.2 (2015).

<sup>4</sup> Order to Show Cause at ordering para. (A).

proceeding under FPA section 31(d)(3)<sup>5</sup> instead of the default administrative law judge hearing process described in FPA section 31(d)(2).<sup>6</sup>

3. On December 22, 2015, Respondents filed an unopposed motion for an extension of time to answer the Order to Show Cause, noting that they had executed an agreement with Office of Enforcement staff (OE Staff) to toll any applicable statute of limitations related to the allegations for the extension period plus 21 days. As justification for the request, Respondents cited the volume of material submitted with the OE Staff Report attached to the Order to Show Cause and the Respondents' obligation under our regulations to detail all of their defenses in their answer.<sup>7</sup> OE Staff did not oppose the request. The Commission granted Respondents an extension of time to file an answer through February 16, 2016.<sup>8</sup> On January 14, 2016, Respondents filed a joint election under FPA section 31(d)(3) for a penalty assessment should the Commission determine that a civil penalty is appropriate. With this election, the Respondents chose to forgo a hearing at the Commission before an administrative law judge, in which all parties typically have the ability to conduct relevant discovery pursuant to the Commission's Rules of Practice and Procedure.<sup>9</sup> On February 16, 2016, Respondents filed a joint answer to the Order to Show Cause (Joint Answer). On March 17, 2016, OE Staff filed its reply to the Respondents' Joint Answer.

## **II. The Motion and Responsive Submissions**

4. The Motion requests that the Commission, pursuant to FPA section 307,<sup>10</sup> require CAISO to disclose to Respondents information and materials related to "relevant market design flaws and software pricing/modelling errors," or, in the alternative, to issue a

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<sup>5</sup> 16 U.S.C. § 823b(d)(3) (2012).

<sup>6</sup> 16 U.S.C. § 823b(d)(2); Order to Show Cause at ordering para. (D).

<sup>7</sup> Respondents' December 22, 2015 Unopposed Motion for Extension of Time at 2-3 ("Additional time will enable respondents to draft an Answer to the OSC which will foster development of a complete record and meet our obligation to comprehensively address and rebut each allegation of the OE Staff Report."); *see also* Order to Show Cause at P 4 & n.8 (citing 18 C.F.R. § 385.213(c) & (e)(2) (2015)).

<sup>8</sup> *ETRACOM LLC*, Notice of Extension of Time, Docket No. IN16-2-000 (Dec. 31, 2015) (unpublished notice).

<sup>9</sup> *See* 18 C.F.R. §§ 385.401–385.411 (2015).

<sup>10</sup> 16 U.S.C. § 825f (2012).

subpoena to CAISO.<sup>11</sup> Respondents contend that “CAISO’s flaws and errors, which were undisclosed and unknowable to market participants during the relevant time period at issue, raise material issues about the basis of [OE] Staff’s allegation that [Respondents] engaged in market manipulation by interfering with or obstructing a ‘well-functioning market.’”<sup>12</sup> The Motion states that Respondents have been afforded no discovery rights in this matter and that prior requests for information from CAISO and OE Staff on these topics were unsuccessful.<sup>13</sup> Respondents request that the Commission require CAISO to file the requested information in this docket within 45 days and then permit Respondents an additional 30 days to file a new, responsive pleading.<sup>14</sup>

5. On March 21, 2016, OE Staff filed an answer to the Motion (Answer) arguing that the requested material is irrelevant, asserting that Respondents did not need a specific understanding of market design mechanics in order to engage in the alleged manipulation.<sup>15</sup> OE Staff alleges that Respondents knew ETRACOM’s offers influenced CAISO’s market price and that the artificial price benefitted ETRACOM’s Congestion Revenue Rights positions. OE Staff also argues that Respondents have sufficient information to argue that market design and software flaws provide a defense to OE Staff’s allegations.<sup>16</sup> Additionally, OE Staff points to the untimely nature of the Motion, arguing that the Respondents may be attempting to delay a possible penalty assessment to further a statute of limitations argument should this matter be reviewed by a district court.<sup>17</sup>

6. On March 17, 2016, CAISO filed comments on the Motion. CAISO acknowledges that Rule 214(a)(4) of the Commission’s Rules of Practice and Procedure generally prohibits interventions in enforcement proceedings, but nevertheless seeks to

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<sup>11</sup> Motion at 5-6.

<sup>12</sup> Motion at 2.

<sup>13</sup> Motion at 2.

<sup>14</sup> Motion at 5-6.

<sup>15</sup> Answer at 2-3.

<sup>16</sup> Answer at 4 (citing Respondents’ Joint Answer and accompanying expert economist affidavits, and two previous expert affidavits that Respondents submitted in response to OE Staff’s Preliminary Findings Letter and Staff’s 1b.19 Letter about CAISO market design and software flaws).

<sup>17</sup> Answer at 5 & n.10.

“ensure that the Commission has the benefit of CAISO’s perspective.”<sup>18</sup> We see no reason to depart from our practice of rejecting third-party comments and interventions in enforcement actions and therefore reject CAISO’s comments.<sup>19</sup>

7. On April 19, 2016, Respondents filed a “Response” to OE Staff’s Answer and CAISO’s comments. The filing is, in actuality, an unauthorized answer. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to an answer. The response is repetitive of arguments already made and, accordingly, we reject Respondents’ unauthorized response.

### **III. Discussion**

8. We deny the Motion, as described below. The Commission granted Respondents an extension of time to answer the Order to Show Cause in order to ensure they had ample opportunity to evaluate and present their arguments and defenses. Respondents’ Joint Answer is comprehensive, including almost 90 pages of argument and multiple affidavits and exhibits. Respondents’ arguments regarding the alleged existence and import of CAISO “market flaws” and software errors are discussed at length and in detail in the Joint Answer and in Respondents’ prior submissions during the investigation.<sup>20</sup> Indeed, in the Motion, Respondents assert that the Joint Answer “detailed CAISO’s multiple market design flaws and software pricing/modeling errors which caused the markets at issue in this proceeding to be dysfunctional and caused CAISO to violate its tariff” and “explained how these unknown flaws and errors led to an uncompetitive and dysfunctional market at New Melones that sent incorrect price signals and caused unforeseeable outcomes.”<sup>21</sup> Respondents provided these details and their explanations in the Joint Answer based on the record in this proceeding; thus, we find that Respondents have not demonstrated that their request for additional information from CAISO is necessary.

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<sup>18</sup> CAISO March 17, 2016 Comments on Motion to Require Disclosure at 2.

<sup>19</sup> *See, e.g., City Power Mktg., LLC, et. al*, 152 FERC ¶ 61,012, at 20 n.94 (2015) (denying comments filed by a regional transmission organization in an enforcement proceeding).

<sup>20</sup> The expert affidavits attached to the Joint Answer contain substantial discussion of CAISO’s operations. Respondents’ responses to OE Staff’s investigation inquiries also provide detailed argument on these points. *See* Respondents’ Sept. 30, 2014 Response to Preliminary Findings Letter and Ledgerwood Affidavit; Respondents’ Sept. 30, 2015 Response to 18 C.F.R. §1b.19 Notice and Affidavit (submitted as part of OE Staff’s Dec. 21, 2015 submission of Non-Public Investigative Material).

<sup>21</sup> Motion at 2.

9. Moreover, Respondents requested disclosures from OE Staff and CAISO's Department of Market Monitoring (DMM) regarding CAISO's alleged market flaws and software errors last year on September 8, 2015.<sup>22</sup> OE Staff denied Respondents' request on September 11, 2015, and DMM denied Respondents' request on October 30, 2015.<sup>23</sup> Yet Respondents did not file the Motion until more than four months after DMM denied their request, and more than two weeks after Respondents submitted their Joint Answer, which included detailed discussion of alleged CAISO market flaws and software errors. The Motion provides no explanation or rationale for the timing of the Motion at this point in the proceeding.

10. Also, we find that the Motion lacks merit because the Respondents have elected to forgo discovery in an administrative hearing at the Commission before an administrative law judge. Respondents instead have asked the Commission to evaluate their arguments under the procedures of FPA section 31(d)(3). Under section 31(d)(3), after reviewing the pleadings, if the Commission believes that a violation occurred and a civil penalty is appropriate, it may assess a civil penalty. That penalty assessment, if left unpaid, would be subject to review in district court. The default procedure under FPA section 31(d)(2), in contrast, allows the Commission to set matters for hearing before an administrative law judge. Such hearings typically include discovery rights for the parties under the Commission's well-established Rules of Practice and Procedure, 18 C.F.R. Part 385, including protections for potential third-party witnesses and document producers like CAISO.<sup>24</sup> Respondents cannot seek both the perceived benefits of section 31(d)(3) "penalty assessment" procedures and the discovery rights afforded to litigants in administrative proceedings at the Commission.

11. Although FPA section 307 states that the "Commission *may* investigate any facts, conditions, practices, or matters which it may find necessary or proper,"<sup>25</sup> we decline to exercise our discretion as requested here and deny the Motion, for the reasons discussed above. In particular, there is a substantial record in this matter provided through OE Staff's investigative materials, the pleadings of OE Staff and Respondents, and the

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<sup>22</sup> See Motion at Attachments 1, 3.

<sup>23</sup> See Motion at Attachments 2, 4.

<sup>24</sup> Pursuant to Rule 401(a) of the Commission's Rules of Practice and Procedure, discovery is available in matters set for hearing before an administrative law judge. 18 C.F.R. § 385.401(a). Our discovery rules provide for data requests, interrogatories, and production of documents, including by subpoena. *Id.* §§ 385.406 and 385.409.

<sup>25</sup> 16 U.S.C. § 825f(a) (2012) (emphasis added). We note that FPA section 307(b) gives officers designated by the Commission, including OE Staff, the ability to conduct its investigation through subpoenas, testimony, or other methods.

voluminous attachments to Respondents' pleadings. However, if Respondents believe that discovery is necessary to enable them to provide a defense to OE Staff's allegations, the Commission would entertain a request to revoke their election of the procedures of FPA section 31(d)(3) within seven days of this order.<sup>26</sup> Such a request would permit Respondents to seek a hearing before an administrative law judge under the procedures of section 31(d)(2), and seek to establish before the administrative law judge that the information and materials they seek from CAISO are relevant.

The Commission orders:

The Motion is hereby denied, as discussed in the body of this order.

By the Commission. Chairman Bay is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>26</sup> We note that OE Staff argues that the information sought from CAISO is irrelevant to the proceeding. Answer at 2-3. The Commission is not prejudging any arguments made by OE Staff or Respondents regarding the relevance of the information and the appropriateness or scope of discovery from CAISO in a hearing before an administrative law judge.