

127 FERC 61,004
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

California Independent System Operator Corporation Docket Nos. ER08-1203-000
EL08-85-000

ORDER ON PAPER HEARING

(Issued April 1, 2009)

1. On August 28, 2008, the Commission issued an order¹ accepting the California Independent System Operator Corporation (CAISO) Amendment No. 2 to the Participating Load Agreement (PLA) between the CAISO and the California Department of Water Resources State Water Project (SWP) to extend the term of the PLA. The August 2008 Order also instituted a paper hearing to investigate SWP's request for waiver of a 60-day Notification of Change Provision contained in the PLA. In this order, the Commission approves the waiver of notification requirement in the PLA.

Background

2. On July 1, 2008, the CAISO filed Amendment No. 2 to the PLA between the CAISO and SWP to extend the term of the PLA. The PLA sets forth the terms and conditions that govern the provision by load resources of ancillary services and supplemental energy, in a manner analogous to how the Participating Generator Agreement treats generating resources. Its purpose is to increase participation of load resources in the CAISO's markets. The purpose of Amendment No. 2 is to revise section 3.2 of the PLA to state that the PLA will terminate on September 10, 2011² or upon such earlier date as may be permitted pursuant to section 3.2.1 or 3.2.2, subject to Commission acceptance of a timely notice of termination.

¹ *Cal. Indep. Sys. Operator Corp.*, 124 FERC ¶ 61,205 (2008) (August 2008 Order).

² The prior version of section 3.2 of the PLA contains the same provisions, except that it states that the latest the PLA will terminate is September 10, 2008.

3. In the August 2008 Order, the Commission conditionally accepted the PLA Amendment No. 2. However, in this proceeding, the SWP requested a clarification to allow waiver of the PLA's Notification of Change Provision requiring SWP to provide the CAISO with 60-days notice prior to removing all or part of its pump load from Participating Load status, if water needs so require.³ Although the CAISO did not object to this clarification,⁴ the Commission explained that it could not accept a substantive revision to the CAISO's *pro forma* PLA without first establishing an investigation pursuant to section 206 of the Federal Power Act (FPA)⁵ to determine the justness and reasonableness of granting the waiver.⁶

Paper Hearing

4. On September 15, 2008 the SWP filed comments asserting that the Commission should follow the decision in *California Department of Water Resources v. FERC* that recognized that SWP is a water management agency, not an electric company subject to unlimited control by the CAISO and the Commission.⁷ As a consequence, SWP asserts that its water management mission should be protected while accommodating the CAISO grid needs. SWP also explains that on remand of *California Department of Water Resources v. FERC*, the CAISO and SWP settled on tariff language that provided SWP with the right to manage outage control in a way that preserves SWP's water management responsibilities while also working with the CAISO as much as those responsibilities permit.⁸ SWP explains that it is one of the largest water delivery systems

³ See SWP Motion to Intervene and Comment filed July 22, 2008 in response to the CAISO proposal (July 22 Comments).

⁴ CAISO Answer to SWP's July 22 Comments at 5.

⁵ 16 U.S.C. § 824e (2006).

⁶ August 2008 Order, 124 FERC ¶ 61,205 at P 21-22.

⁷ *Cal. Dep't of Water Resources v. FERC*, 341 F.3d 906, 910 (9th Cir. 2003) (*CDWR v. FERC*), *reh'g en banc denied*, 361 F.3d 517 (9th Cir. 2004).

⁸ *San Diego Gas & Electric Co. v. Sellers*, 112 FERC ¶ 61,024, at P 29 (2005) ("if DWR determines that an action of the Outage Coordination Office will result in a violation of any law affecting hydroelectric operations [such as minimum and maximum dam reservoir levels and in-stream flow levels] or compromise DWR's ability to deliver water to its customers, then the CAISO must first use every other option at its disposal to avoid a reliability problem before rejecting an outage request or requiring DWR to cancel any approved outage.").

in the world and recent developments have increased the urgency of SWP's need for reliable transmission service for its pump load, when that load is not bid into CAISO markets for reliability services. These recent developments include California's Governor declaring a state-wide drought emergency and newly imposed severe environmental restrictions at SWP's Harvey O. Banks pumps in the San Francisco Bay/Delta region, which serve as the water intake point for California's aqueduct system and, thus, are critically important to SWP's water management responsibilities.

5. SWP contends that the PLA imposes open-ended obligations under the CAISO tariff that expose SWP to legal obligations that were not anticipated when it executed the PLA and those obligations may change through unilateral changes by the CAISO or the Commission. Thus, as written, the PLA may expose SWP pump loads to potential new obligations to which SWP has not consented but which may jeopardize its ability to meet its primary responsibilities of water management. Further, SWP also asserts that termination of the PLA is not a feasible option because even if the agreement terminates by its own terms, the Commission has held that the agreement cannot terminate until "acceptance by FERC of a notice of termination."⁹ Accordingly, SWP asserts that its only viable legal protection is the right of immediate withdrawal of its pump load from Participating Load status. Moreover, because Participating Load status may be used as a basis to single out pump load for involuntary interruptions not applied to other loads on the CAISO grid, and these interruptions may occur without SWP's consent or knowledge, the right of immediate withdrawal of all or part of its pump loads is critically important for SWP to meet its primary water management responsibilities.¹⁰ SWP also asserts that new CAISO Business Practice Manuals, Operating Procedures, tariff provisions or Commission directives may adversely affect SWP's ability to use its Participating Loads for water management purposes.¹¹

6. SWP argues that the Commission should apply to SWP the same precedent that the CAISO and others have been granted to depart from *pro forma* CAISO agreements. SWP asserts that the Commission has frequently accepted deviations from *pro forma* CAISO agreements to allow expedited termination.¹²

⁹ *Cal. Indep. Sys. Operator Corp.*, Docket No. ER06-1045 (July 13, 2006) (unpublished letter order).

¹⁰ SWP Initial Paper Hearing Comments at 6-8.

¹¹ *Id.* at 9-10.

¹² Initial Paper Hearing Comments at 13, *citing Cal. Indep. Sys. Operator Corp.*, ER03-1090 (Sept. 16, 2003) (unpublished letter order) (The Commission accepted a

7. SWP also contends that the Commission should comply with Congressional and Commission policy to promote demand response. SWP explains that the August 2008 Order could result in SWP facing the choice between risking its essential water mission with a Participating Load Agreement, without the protection of an immediate withdrawal right or, alternatively, not providing demand response to the CAISO grid, an outcome that SWP describes as “utterly at odds with the Congressional and Commission policy regarding accommodation and demand response.”¹³ In support of its position, SWP observes that the Energy Policy Act of 2005 states unequivocally that demand response shall be encouraged and unnecessary barriers to demand response participation in energy, capacity, and ancillary service markets shall be eliminated.¹⁴ SWP also argues that Commission policy, as explained in *Wholesale Competition in Regions with Organized Electric Markets*¹⁵ supports its position:

[a] potential operating reserve provider that does not wish to be called upon frequently or for a prolonged period in the energy market may simply decide not to participate in a co-optimized market, and consequently not be a source for providing demand response resources as operating reserves. Market rules that do not allow a demand response provider to limit the frequency and duration of interruption may thereby create a disincentive for a demand response resource to bid into the operating reserves market.¹⁶

Participating Generator Agreement provision that allowed the CAISO to terminate that Agreement immediately if jurisdictional issues presented a potential legal burden); *see also Cal. Indep. Sys. Operator Corp.*, Docket No. ER06-333, (Dec. 15, 2005) (unpublished letter order); *Cal. Indep. Sys. Operator Corp.*, 114 FERC ¶ 61,077 (2006); *Cal. Indep. Sys. Operator Corp.*, Docket No. ER04-250 (Jan. 26, 2004) (unpublished letter order); *Cal. Indep. Sys. Operator Corp.*, 82 FERC ¶ 61,326 (1998); *Cal. Indep. Sys. Operator Corp.*, Docket No. ER06-1470, (Oct. 23, 2006) (unpublished letter order).

¹³ *Id.* at 14.

¹⁴ Energy Policy Act of 2005, Pub. L. No. 109-58 § 1252, 119 Stat. 594 (2005).

¹⁵ *Wholesale Competition in Regions with Organized Electric Markets*, 73 Fed. Reg. 12,576 (Mar. 7, 2008), FERC Stat. & Regs. ¶ 32,628 at P 38 (2008) (NOPR).

¹⁶ *Id.* P 41.

Therefore, SWP asserts that the proposed waiver is necessary to avoid the possible dilemma of SWP risking its essential water mission or providing no demand response to the CAISO grid at all under the Participating Load program.¹⁷ In conclusion, SWP argues that ample evidence, policy and precedent support granting it the right to withdraw all or part of its pump load from Participating Load status. SWP represents that the CAISO is also in agreement on this issue.¹⁸

Motion for Issuance of Order

8. On March 11, 2009, SWP submitted a Motion for Issuance of Order in Uncontested Matter (March 11 motion) requesting that the Commission issue an order in this uncontested matter no later than April 1, 2009, which is the start-up date for the CAISO Market Redesign and Technology Upgrade (MRTU). SWP states that the CAISO supports SWP's position and the only other party to the paper hearing, the Metropolitan Water District of Southern California, did not respond to SWP's initial comments in the paper hearing.¹⁹

Commission Determination

9. We grant SWP's request to waive the 60-day Notification of Change Provision, section 4.4, contained in the PLA. The CAISO agreed to this waiver in the underlying proceeding.²⁰ The Commission established the paper hearing pursuant to section 206 of the FPA to provide the opportunity for interested parties to comment on SWP's proposal, as Participating Load, to deviate from both the CAISO's *pro forma* PLA as well as the CAISO's PLA with SWP. In the paper hearing, no protests were submitted to the Commission and the only comments filed were submitted by SWP in support of its request.

10. This 60-day notification requirement waiver will allow SWP to fulfill its dual responsibilities as a water management agency, as well as participate as a provider of demand response as Participating Load in the CAISO grid. In the paper hearing, SWP explained that its water management responsibilities include responding to recent drought

¹⁷ SWP Initial Paper Hearing Comments at 15-16.

¹⁸ *Id.* at 17.

¹⁹ SWP March 11 motion at 4.

²⁰ CAISO Answer at 5.

conditions that have resulted in a state-wide drought emergency.²¹ These drought conditions and its water management responsibilities have increased its need to pump as much water as possible when environmental conditions allow. Accordingly, we find that in order for SWP to fulfill its water management responsibilities, it is appropriate that it have flexibility to respond to varying environmental conditions and water management demand and, therefore, it is reasonable that SWP be able to immediately remove part or all of its pump load from Participating Load status, as water needs so require. The current 60-day notification requirement of the CAISO's PLA with SWP has the potential of creating an impediment to SWP responding to its water management responsibilities in a timely manner.

11. Further, SWP's request is consistent with the demand response objectives of the Energy Policy Act of 2005²² and the Commission's subsequent final rule, the *Wholesale Competition in Regions with Organized Electric Market*, Order No. 719.²³ Among its goals, Order No. 719 provides regulations to improve the operation of demand response within organized electric markets, and specifically seeks to remove barriers to the participation of demand response. SWP's requested waiver is also in keeping with Commission precedent to consider waiving termination restrictions based upon a showing of good cause.²⁴ Waiver of the CAISO's 60-day notification requirement in its PLA offers SWP the flexibility it represents it needs to fulfill its primary obligations as a water management agency, and to allow it to operate as Participating Load in the CAISO grid.

12. The Commission notes, however, that in SWP's March 11 motion,²⁵ SWP suggests, for the first time, that the waiver it requests to enable it to withdraw Participating Load in order to execute its water management responsibilities should also include economic impacts of CAISO dispatch. The Commission already has addressed SWP's concerns with respect to economic impacts of its Participatory Load status in

²¹ SWP Initial Paper Hearing Comments at 3.

²² Energy Policy Act of 2005, Pub. L. No. 109-58, §1252, 119 Stat. 594 (2005) (EPAAct 2005).

²³ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), FERC Stat. & Regs. ¶ 31,281 (2008) (Order No. 719).

²⁴ See *supra* n.12.

²⁵ See SWP March 11 motion at 1,6,7.

other recent proceedings.²⁶ We find that there is no record evidence in this proceeding to expand the waiver of notification to include economic impacts, and decline to grant that aspect of SWP's March 11 motion.

13. Additionally, we will require SWP to provide the CAISO with written notice of its withdrawal of Participating Load due to water management responsibilities. This notice is to be provided within seven calendar days after a withdrawal and shall include a detailed description of the reasons for such withdrawal.

The Commission orders:

(A) SWP's request for waiver of the Notification of Change Provision, section 4.4 of the PLA is granted.

(B) CAISO is hereby directed to file revised tariff sheets within 30 days of issuance of this order to reflect the Commission's findings herein.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁶ See, e.g., *Cal. Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,147 (2009).