

153 FERC ¶ 61,307
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Shell Energy North America (US), L.P.

Docket No. EL15-94-000

v.

California Independent System Operator Corporation

ORDER DENYING COMPLAINT AND GRANTING WAIVER

(Issued December 17, 2015)

1. On August 24, 2015, Shell Energy North America (US), L.P. (Shell Energy) filed a complaint pursuant to sections 206 and 306 of the Federal Power Act (FPA)¹ against the California Independent System Operator Corporation (CAISO), requesting that the Commission require CAISO to correct Shell Energy's settlement statement for the August 2010 trade month and refund improper charges allegedly caused by CAISO's unilateral error. Alternately, Shell Energy requests that, if the Commission finds that CAISO cannot correct the settlement statement under the terms of the CAISO tariff, the Commission grant Shell Energy waiver of the tariff provisions. Finally, Shell Energy requests that the Commission revise section 11.29.8.4.6 of the CAISO tariff, which limits the time for raising invoice disputes. In this order, we deny the complaint to revise CAISO's tariff but grant Shell Energy's request for waiver, as discussed below.

I. Background

2. CAISO operates on a 36-month invoice and settlement cycle. CAISO publishes an Initial Statement on the third business day after the relevant trading day based on estimated data. This is followed by a series of Recalculation Settlement Statements, which act as a true-up to the Initial Statement and are published in five intervals between

¹ 16 U.S.C. §§ 824e, 825e (2012).

12 business days and 36 months after the relevant trading day.² The CAISO tariff imposes deadlines for filing disputes of each of these settlement statements. Of relevance to the instant filing, the Recalculation Settlement Statement published 35 months from the trading day (T+35M statement) is the last settlement that a market participant can dispute.³ In accordance with tariff section 11.29.8.4.6, disputes related to the T+35M statement must be submitted within five business days; or, according to the CAISO Business Practice Manual for Settlements and Billing, within seven calendar days (T+35M dispute deadline).

II. Complaint and Request for Waiver

3. Shell Energy states that, in July 2011, it received a statement for the August 2010 trade month that improperly assigned it \$307,500 in unavailability charges. Shell Energy explains that CAISO corrected this error upon request, and that the settlements proceeded without issue for the following two years.⁴ However, on August 5, 2013, CAISO published the T+35M statement for August 31, 2010 (August 2010 trade month),⁵ which reinstated the erroneous unavailability charge. Subsequently, on August 16, 2013, Shell Energy states that it contacted CAISO and disputed the invoice and settlement process. Shell Energy argues that, despite the fact that CAISO acknowledged the error appearing for the first time at the 35th month of the invoice cycle, CAISO denied Shell Energy's dispute, stating that while the dispute was substantively correct, the CAISO Tariff requires market participants to submit dispute items in the T+35M statement within five days of the settlement publication date, and Shell Energy's dispute was untimely filed by two days.

4. Shell Energy disagrees with CAISO's rejection of its dispute, and argues that the Commission did not intend to deprive market participants of a reasonable period to dispute invoice and settlement errors appearing for the first time in the 35th month of the invoice and settlement cycle. Shell Energy explains that CAISO's invoice and settlement system was updated in 2009, when CAISO revised its tariff to accelerate the process by

² The Commission accepted this timeline as part of CAISO's proposal to accelerate its settlement and payment timelines. *See Cal. Indep. Sys. Operator Corp.*, 128 FERC ¶ 61,265 (2009) (2009 Order).

³ Shell Energy Complaint at 3-5.

⁴ *Id.* at 5. The unavailability charges were a result of a technical error regarding resource identifiers.

⁵ *Id.* at 5-6. As August 31 was the last trading day of the month, the T+35M statement reflected incremental adjustments to the month-end charges.

which it invoices and settles market transactions, while also providing scheduling coordinators with ample opportunity to dispute invoice errors. Shell Energy asserts that in the 2009 Order, the Commission accepted CAISO's proposal to provide market participants seven calendar days to dispute incremental changes in the T+35M statement because at that point, the market participants and CAISO would have had 35 months to achieve an accurate settlement of market transactions.⁶ Shell Energy contends that, while this may be true in the majority of cases, it was not afforded a fair opportunity to review its T+35M statement in this instance.

5. Shell Energy contends that it is a maxim of utility regulation that a public utility may only charge customers the filed rate. Shell Energy states that while CAISO argues that it is barred by its tariff from correcting its error and charging the filed rate under these circumstances, Shell Energy notes that CAISO has previously articulated "that public utilities have the obligation to apply their filed rates and the authority to correct charges that do not reflect the filed rate."⁷ To that end, Shell Energy contends that CAISO should and could have corrected the error here.

6. Shell Energy requests that, pursuant to section 306 of the FPA, the Commission issue an order requiring CAISO to correct Shell Energy's T+35M statement for the August 2010 trade month, and refund improper charges caused by CAISO's unilateral error. In the alternative, should the Commission agree with CAISO that the tariff bars CAISO from correcting the invoice and settlement statement, Shell Energy requests that the Commission grant waiver of tariff section 11.29.8.4.6 to permit those corrections. Shell Energy states that requiring the correction of its invoice error will neither undermine the settlement process, nor create uncertainty in the finality of invoices, stating that this is an unusual and exceptional circumstance necessitated by CAISO's unilateral technical error.⁸

7. Shell Energy contends that CAISO's interpretation of the tariff as precluding a dispute of this type demonstrates the need for tariff revisions. Accordingly, Shell Energy requests that the Commission find that tariff section 11.29.8.4.6 is unjust and unreasonable because it does not afford a reasonable amount of time to identify errors that appear in the settlement cycle. Shell Energy suggests that where errors appear for

⁶ *Id.* at 9 (citing 2009 Order, 128 FERC ¶ 61,285 at PP 39-40).

⁷ *Id.* at 11-12 (citing California Independent System Operator Corporation Motion for Clarification, Docket No. ER11-3149, at 2-3 (July 3, 2011)).

⁸ *Id.* at 13.

the first time in the 35th month, parties should have at least 30 days, but not less than 10 business days.⁹

III. Notice, Interventions, and Responsive Pleadings

8. Notice of the complaint and alternate request for waiver was published in the *Federal Register*, 80 Fed. Reg. 53,146 (2015), with interventions, comments, and protests due on or before September 25, 2015. Timely motions to intervene were submitted by: Calpine Corporation; NRG Power Marketing LLC and GenOn Energy Management, LLC; City of Santa Clara, California; Pacific Gas and Electric Company; and Modesto Irrigation District. Timely motions to intervene and comments in support were filed by: the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (Six Cities); Western Power Trading Forum (WPTF); XO Energy CAL, LLC (XO Cal); Griffith Energy, LLC (Griffith); Electric Power Supply Association (EPSA); and the Alliance for Retail Energy Markets (AReM) (collectively, Intervenors).

9. On September 25, 2015, CAISO submitted an answer. On October 6, 2015, Shell Energy submitted a response to CAISO's answer. On October 26, 2015, CAISO submitted a response to Shell Energy's response and to Intervenors' comments. On November 2, 2015, Shell Energy submitted an answer to CAISO's response. On November 3, 2015, Griffith submitted a response to CAISO's answer.

A. CAISO's Answer

10. CAISO seeks denial of Shell Energy's complaint. CAISO disagrees with Shell Energy's assertion that it did not have a fair opportunity to review its settlement statement and its suggestion that it should expect any incremental changes on a T+35M statement. CAISO asserts that the dispute process set forth in the CAISO tariff specifically contemplates that errors may occur throughout the process, all the way through the T+35M statement. Moreover, CAISO argues that the erroneous charge on Shell Energy's T+35M statement was the only charge on the statement, and reviewing it should have been a "simple matter."¹⁰

11. CAISO also contends that Shell Energy's reliance upon the 2009 Order is misplaced. CAISO states that the 2009 Order demonstrates that while the Commission expected the iterative settlement process to reduce the *number* of disputes that might arise in the T+35M statement, it is unreasonable to conclude that the Commission expected

⁹ *Id.*

¹⁰ CAISO September 25 Answer at 8.

that there would be *no* disputes whatsoever – and thus no reason for a market participant to review its T+35M statement.¹¹

12. CAISO disagrees with Shell Energy’s reliance on the filed rate doctrine, and states that the doctrine compels denial of Shell Energy’s complaint because the deadline for submitting disputes is itself part of the filed rate. CAISO states that while the erroneous charge may initially have been contrary to the filed rate, it now is the filed rate as a result of Shell Energy’s failure to submit a timely dispute.¹²

13. CAISO opposes Shell Energy’s alternate request for a waiver, contending that it does not meet the Commission’s standards for a waiver. First, CAISO asserts that Shell Energy has not shown that it was unable to comply with the tariff provision at issue. CAISO states that Shell Energy has failed to justify why it not only missed the deadline for submitting a dispute for the T+35M statement, but also missed its opportunity to seek good faith negotiations under the dispute resolution process of section 13.1.4 of the CAISO tariff. Second, CAISO states that Shell has not shown that its request for waiver is of limited scope. CAISO argues that the purpose of the T+35M dispute deadline is to promote finality, and that the Commission should not undercut the stated purpose by establishing precedent that allows easy waiver of the deadline.

14. Finally, CAISO states that Shell Energy has failed to allege any changed circumstances that would justify a Commission finding that the previously approved section 11.29.8.4.6 is unjust or unreasonable. CAISO contends that section 206 of the FPA requires a party to demonstrate some change of circumstances or subsequent event that undermines the Commission’s previous finding that the rate provision is just and reasonable.¹³ CAISO states that Shell Energy has failed to make such a showing.

B. Supporting Comments

15. Intervenors support Shell Energy’s request for the Commission to require CAISO to correct the improper invoice and T+35M statement, and to refund the erroneous charge to Shell Energy. For example, WPTF explains that CAISO acknowledges its

¹¹ *Id.* at 9.

¹² *Id.* at 11.

¹³ *Id.* at 18 (citing *FirstEnergy Service Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014); *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F. 3d 944, 948-49 (D.C. Cir. 1999)).

fundamental obligation to issue accurate settlement statements – and has admitted its failure to do so here.¹⁴

16. Griffith states that it is also experiencing CAISO invoicing and settlement errors similar to Shell Energy’s situation. Griffith explains that in August 2014, it offered generation into the CAISO Day-Ahead market and was awarded a Day-Ahead schedule for 2,300 MWh. Upon fulfilling its Day-Ahead obligation by generating electricity and delivering it to CAISO, Griffith alleges it has not been compensated for the electricity it has sold, despite filing a formal dispute with CAISO.¹⁵

17. XO Cal argues that the volume of price corrections occurring in the CAISO market on a weekly basis compounds the complexity of determining whether a particular invoice or settlement statement is correct. XO Cal asserts that price corrections are often reflected on settlement statements issued significantly later, and likely well after the dispute window for a particular period has closed.¹⁶

18. EPSA asserts that the purpose of CAISO’s revisions to the dispute processes accepted in the 2009 Order was to enable “greatly expanded provisions on disputes and exceptions in new Section 11.29.8.4” as well incorporate a “detailed process and timeline for the CAISO to respond to disputes.”¹⁷ EPSA argues that the facts of Shell Energy’s complaint demonstrate that the dispute timelines for the T+35M statement are neither “expanded” nor “detailed,” and rather are overly restrictive in preventing the swift resolution of settlement disputes, even when those disputes are non-controversial and openly acknowledged by CAISO as a unilateral error.

19. Intervenors argue that the Commission’s rationale for accepting the T+35M dispute deadline in the 2009 Order is irrelevant in situations if the error arises, or is reintroduced, late in the process.¹⁸ Intervenors generally state that the current T+35M dispute deadline is unjust and unreasonable and does not provide an adequate opportunity to identify errors that may appear for the first time or reappear in the T+35M statement.

¹⁴ WPTF Comments at 4.

¹⁵ Griffith Comments at 5-6.

¹⁶ XO Cal Comments at 4.

¹⁷ EPSA Comments at 3 (citing Motion for Leave to File Answer and Answer to the Motions to Intervene, Comments and Protests of the California Independent System Operator Corporation, Docket No. ER09-1247-000 (July 10, 2009)).

¹⁸ EPSA Comments at 3; WPTF Comments at 5; Six Cities Comments at 3.

Therefore, Intervenors generally request that the Commission revise section 11.29.8.4.6 of the tariff to allow affected parties at least 30, but not less than 10, business days to file a dispute. In the alternative, WPTF recommends that CAISO provide the standard timeframe of 22 business days for filing a dispute.¹⁹

20. On the other hand, AReM states that, while there needs to be certainty as to when invoice matters are closed, it is important to carefully balance certainty against the need for invoices to be correct and completed in accordance with the filed rate doctrine. AReM argues that, to the extent that invoicing and settlement errors appear for the first time at the end of an invoicing cycle, parties should be afforded a longer window to initiate a dispute. AReM proposes a seven-step process that enables CAISO to evaluate the merits of a request for an invoice or settlement correction outside of the normal dispute timeframes and take corrective action, if necessary. According to AReM, this process would also provide the affected parties with additional rights to seek remedies in the event that CAISO does not take the corrective action as requested by the party.²⁰

C. Shell Energy's Response

21. On October 6, 2015, Shell Energy submitted a response to CAISO's answer. Shell Energy disputes CAISO's position that identifying, researching, and preparing a dispute for an error in five business days is a "relatively simple matter."²¹ Shell Energy contends that the erroneous monthly charge at issue in this proceeding, that appeared for the first time at T+35M, is the type of charge that is not expected, difficult to identify, and requires research, which in this case involved a review of nearly three-year-old data contained in a 9,405 page document. In this case, Shell Energy states that it only took two additional days for it to discover the issue, which does not reflect a lack of diligence.²²

¹⁹ WPTF Comments at 6; XO Cal Comments at 4; EPSA Comments at 6; Six Cities Comments at 6. Protestors additionally explain that the standard timeframe for submitting a dispute for all statements subsequent to the T+12 Business Day Recalculation Statement, except for the T+35M and T+36M statements, is 22 business days.

²⁰ AReM Comments at 4-5.

²¹ Shell Energy October 6 Response at 4 (citing CAISO September 25 Answer at 8).

²² *Id.* at 5-6.

22. Shell Energy refutes CAISO's position that its complaint should be denied on the basis that it did not identify the error by the dispute deadline. Shell Energy argues that CAISO has a responsibility to provide certain services to its members, including correcting errors. Shell Energy states that adherence to the filed rate should extend to more than merely the portion of the filed rate that limits customers' rights.²³ Furthermore, while CAISO avers that there were multiple vehicles Shell Energy could have used to alert CAISO to a potential error (e.g., file an incomplete dispute), Shell Energy argues that these are backward-looking, results-oriented arguments manufactured to attempt to deny Shell Energy relief.

D. CAISO's Response

23. On October 26, 2015, CAISO submitted a response to Shell Energy's October 6 response. CAISO acknowledges that some market participants find the existing T+35M statement dispute deadline overly stringent. To address these concerns, CAISO states that it will commence a stakeholder process to examine alternative dispute deadlines. CAISO notes that one such alternative that CAISO is considering would be to accelerate the penultimate settlement statement by issuing the statement 33 months after the trading day. CAISO asserts that this would add an additional two months between the penultimate and the final settlement statements, allowing for a longer dispute period.²⁴

E. Shell Energy's Response

24. On November 2, 2015, Shell Energy submitted a response to CAISO's October 26 Response. Shell Energy states that it appreciates CAISO's recognition of the need for a stakeholder process to examine alternative dispute deadlines. However, Shell Energy asserts that CAISO's commitment to re-examine the dispute deadlines should not preclude the Commission from granting the waiver sought in its complaint.

F. Griffith's Response

25. On November 3, 2015, Griffith submitted a response to CAISO's October 26 Response. Griffith reiterates that it is suffering financial harm from CAISO's failure to timely pay for the power it provided, and restates its request that the Commission require CAISO to timely pay the undisputed amount it owes Griffith for its power purchase.

III. Discussion

A. Procedural Matters

²³ *Id.* at 6 (citing CAISO September 25 Answer at 10-11).

²⁴ CAISO October 26 Response at 4.

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motions to intervene serve to make the parties that filed them parties to this proceeding.

27. 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 unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they provided us with information that assisted us in our decision-making process.

B. Commission Determination

28. While we deny Shell Energy's complaint, as discussed below, we find that Shell Energy has demonstrated that under the specific facts and circumstances presented here, it should be granted a waiver of the CAISO tariff. Specifically, we grant waiver of section 11.29.8.4.6 of the CAISO tariff, and direct CAISO to refund the \$307,500 in erroneous unavailability charges included on the T+35M statement, plus interest.

29. The Commission has previously granted one-time waivers of tariff provisions where: (1) the waiver was of limited scope; (2) the underlying error was made in good faith; (3) a concrete problem needed to be remedied; and (4) the waiver did not have undesirable consequences, such as harming third parties.²⁵ We find that Shell Energy meets all of these criteria.

30. First, Shell Energy's waiver request is limited in scope because the charge to be corrected is the result of a one-time technical error affecting one customer that CAISO was to have resolved months before. Second, we find that Shell Energy's identification of the billing error two days after the dispute deadline was an error made in good faith because Shell Energy reasonably relied on CAISO to issue an accurate settlement statement in light of having already corrected this error two years earlier. Third, we find that granting waiver will remedy a concrete problem by requiring CAISO to refund the improper unavailability charge, which Shell Energy should not have been charged in the first place. Fourth, we find that granting waiver under the circumstances presented here

²⁵ See, e.g., *Cal. Indep. Sys. Operator Corp.*, 147 FERC ¶ 61,132, at P 15 (2014); *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,058, at P 16 (2014); *Cal. Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,004, at P 10 (2010); *ISO New England Inc.*, 117 FERC ¶ 61,171, at P 21 (2006) (granting limited and temporary change to tariff to correct an error); *Great Lakes Gas Transmission LP.*, 102 FERC ¶ 61,331, at P 16 (2003) (granting emergency waiver involving *force majeure* event for good cause shown); and *TransColorado Gas Transmission Co.*, 102 FERC ¶ 61,330, at P 5 (2003) (granting waiver for good cause shown to address the inclusion of certain data in the variance adjustment calculation).

will not result in undesirable consequences, such as harming third parties, as the billing error at issue only affects Shell Energy.

31. In addition to the foregoing, the Commission has previously found that situations addressing errors in invoice and settlement statements are “unusual” and thus has granted waiver where the “untimely action by the market participants was not due to failure on their part to act once the errors were discovered, but rather by the unusual nature and timing of the errors.”²⁶ Here, the error was not introduced until the very end of the billing process, causing Shell Energy difficulty in meeting the tariff deadline. The Commission has granted waivers of billing statement tariff provisions on the basis that “significant injustice would result absent Commission action.”²⁷ We find that, in the specific circumstances at hand, it is appropriate to direct CAISO to adjust the invoices for the T+35M statement for the August 2010 trade month to correct for the effects of the erroneous data on which those invoices were computed. To refrain from doing so would yield an unjust and unreasonable result by requiring a market participant to pay unavailability charges assessed in error for energy purchases over the relevant period, particularly where, as here, CAISO purported to have fixed an identified technical error that it later repeated. While we recognize CAISO’s argument that the purpose of dispute deadlines are to promote finality, it is also necessary to balance this goal against the need for invoices to be correct in the first place and completed in accordance with the filed rate.

32. We disagree with CAISO’s assertion that identifying the error would have been a “simple matter.” The erroneous charge on Shell Energy’s T+35M statement was just one element of a 9,405 page document. Moreover, it is undisputed that the error had been previously identified and resolved two years earlier. We agree with Shell Energy that it would have been reasonable to assume that, because the error had been flagged and resolved, subsequent invoices for the next two years would not reflect the same the error.

33. While we find that Shell Energy has demonstrated that the CAISO tariff should be waived with respect to the instant billing dispute, we decline to find that section 11.29.8.4.6 of the CAISO tariff is unjust and unreasonable and therefore deny the complaint. Although some Intervenors support Shell Energy’s position that the dispute process or deadline is too restrictive, their general concerns do not support a finding that the tariff is unjust and unreasonable. Indeed, the circumstances here, involving an error

²⁶ *Niagara Mohawk Power Corp.*, 123 FERC ¶ 61,314, at P 24 (2008) (“This is an unusual situation in which untimely action by the market participants was not due to failure on their part to act once the errors were discovered, but rather by the unusual nature and timing of the errors.”).

²⁷ *Id.* P 25.

on CAISO's part that had been already addressed once, are unusual, a point Shell Energy essentially concedes is the case.²⁸ However, in light of CAISO's October 26 response, which explains that CAISO will be initiating a stakeholder process to address billing issues, we encourage Shell Energy and interested parties to raise their concerns regarding the dispute deadline at subsequent CAISO stakeholder meetings.

34. For the reasons discussed above, the Commission grants Shell Energy's request for waiver and directs CAISO to reopen and correct the invoices at issue, resettle billings to Shell Energy, and provide appropriate refunds with interest in accordance with section 35.19a of the Commission's regulations, as requested.

34. Finally, we dismiss Griffith's claims of not having been compensated for electricity sold as being outside the scope of this proceeding. This proceeding is a complaint initiated by Shell Energy.

The Commission orders:

(A) The complaint is hereby denied, as discussed in the body of this order.

(B) Shell Energy's request for waiver is hereby granted, as discussed in the body of this order.

(C) CAISO is hereby directed to reopen and resettle Shell Energy's T+35M Statement for August 31, 2013, and to refund the \$307,500 in erroneous unavailability charges from the August 2010 trade month, with interest, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁸ See Shell Energy Complaint at 13 ("The facts of this case are unique and uncommon...it will be only the unusual and exceptional circumstance where invoice and settlement corrections are required because of unilateral technical errors by CAISO late in the billing period.").